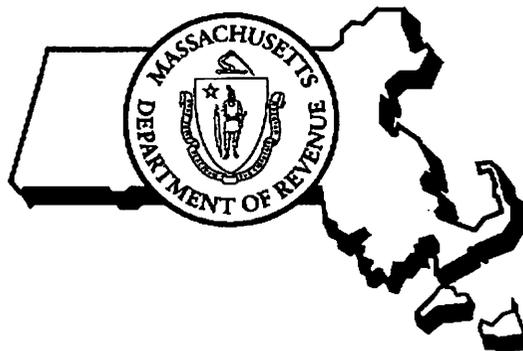

**Massachusetts Department of Revenue
Division of Local Services**

**Current Developments
in
Municipal Law**



2013

Massachusetts and Federal Court Cases

Book 2

**Amy A. Pitter, Commissioner
Robert G. Nunes, Deputy Commissioner**

www.mass.gov/dls

MASSACHUSETTS AND FEDERAL COURT CASES

Book 2

Table of Contents

Massachusetts and Federal Appellate Court Cases

	<u>Page</u>
<u>Barrows v. Wareham Fire District</u> , 82 Mass. App. Ct. 623 (October 12, 2012) - <i>Tort Claims Act-Defamation-Intentional Conduct-Governmental Immunity</i>	1
<u>Boston Gas Co. v. Board of Assessors of Boston</u> , 82 Mass. App. Ct. 517 (October 3, 2012) – <i>Valuing Utility Personal Property-Actual Tax-Income Capitalization- Substantial Evidence</i>	6
<u>Boston v. Boston Police Superior Officers Federation, Supreme Judicial Court</u> , 466 Mass. 210 (August 9, 2013) – <i>Police, Assignment of Duties-Collective Bargaining-Public Employment-Civil Service-Contract</i>	13
<u>Dixon v. Malden</u> , 464 Mass. 446 (March 4, 2013) – <i>Massachusetts Wage Act-Contract-Employment-Termination of Employment Contract-Public Employment</i>	17
<u>Durkin v. Boston Retirement Board</u> , 83 Mass. App. Ct. 116 (January 18, 2013) - <i>Police-Public Employment-Criminal Conduct-Forfeiture of Pension</i>	22
<u>Herrick v. Essex Regional Retirement Board</u> , 465 Mass. 801 (July 15, 2013) - <i>Public Employment-Retirement Benefits- Reinstatement of Benefits-Calculation of Interest-Damages</i>	24
<u>Kearns v. State Board of Retirement</u> , 82 Mass. App. Ct. 682 (October 19, 2012) - <i>Contributory Retirement Appeal Board-Public Employment-Accidental Disability Retirement-Police-Words, "Regular Compensation"</i>	29
<u>Koontz v. St. Johns River Water Management District</u> , 133 S. Ct. 2586 (United States Supreme Court June 25, 2013) – <i>Land-use Permitting-Unconstitutional Conditions Doctrine-5th Amendment-Monetary Exaction-Nexus and Rough Proportionality Test</i>	32

<u>Leder v. Superintendent of Schools of Concord</u> , 465 Mass. 305 (May 31, 2013) - <i>School and School Committee-Superintendent of Schools-Regional School District-Bidding for Contract-State Ethics Commission-Conflict of Interest</i>	51
<u>Lopez v. Commonwealth</u> , 463 Mass. 696 (November 9, 2012) – <i>Racial Discrimination-Police- Promotional Examination-Disparate Impact</i>	57
<u>Mahajan v. Department of Environmental Protection</u> , 464 Mass. 604 (March 15, 2013) – <i>Article 97-Urban Renewal-Department of Environmental Protection-Waterways License-Urban Renewal</i>	70
<u>Massachusetts Community College Council v. Massachusetts Board of Higher Education</u> , 465 Mass. 791 (July 12, 2013) – <i>Arbitration-Public Employment-Collective Bargaining-Denial of Tenure</i>	82
<u>Massachusetts Nurses Association v. Cambridge Public Health Commission</u> , 82 Mass. App. Ct. 909 (October 12, 2012) – <i>Cambridge Public Health Commission-Retiree Health Insurance Premiums</i>	87
<u>Moore v. Billerica</u> , 83 Mass. App. Ct. 729 (June 7, 2013) - <i>Tort Claims Act-Recreational Use Statute-Governmental Immunity-Failure to Prevent Harm</i>	90
<u>Noonan v. Board of Assessors of Springfield</u> , 83 Mass. App. Ct. 1125, Rule 1.28 Unpublished Decision (April 17, 2013) – <i>Abatement-Untimely Appeal-Jurisdiction-Deadline-Declaration of Emergency</i>	94
<u>O’Brien v. New England Police Benevolent Association, Local 911</u> , 83 Mass. App. 376 (March 1, 2013) – <i>Arbitration-Authority of Arbitrator-Police-Discharge-Public Policy</i>	95
<u>O’Neill v. School Committee of North Brookfield</u> , 464 Mass. 374 (February 8, 2013) – <i>School and School Committee-Superintendent of Schools-Retirement Benefits-Contract-Employment</i>	100
<u>Retirement Board of Maynard v. Tyler</u> , 83 Mass. App. Ct. 109 (January 18, 2013) – <i>Fire Fighter-Public Employment-Criminal Conduct- Forfeiture of Pension</i>	105
<u>Rotondi v. Contributory Retirement Appeal Board</u> , 463 Mass. 644 (October 29, 2012) – <i>Contributory Retirement Appeal Board-Public Employment-Retirement-Words, "Regular Compensation"</i>	109

<u>Serrazina v. Springfield Public Schools</u> , 464 Mass. 1011 (February 15, 2013) – <i>School and School Committee- Arbitration-Suspension-Termination-Confirmation of Award-Damages-Back Pay</i>	115
<u>Sheriff of Suffolk County v. Jail Officers and Employees of Suffolk County</u> , 465 Mass. 584 (June 14, 2013) - <i>Public Employment-Termination-Mitigation of Damages-Post-judgment Interest-Governmental Immunity</i>	116
<u>W.A. Wilde Company, Inc. v. Board of Assessors of Holliston</u> , 84 Mass. App. Ct. 102 (August 8, 2013) - <i>ATB Procedure-Statutory Interpretation-Burden of Proof</i>	124

Massachusetts Superior, Land and District Court Cases

<u>Globe Newspaper Company v. Executive Office of Administration and Finance, et al</u> , Suffolk Superior Court Civil Action No. 2011-01184A (June 14, 2013) – <i>Public Records-Separation Agreements-Exempt Personnel Information</i>	127
<u>Lynnfield v. Commissioner of Division of Unemployment Assistance</u> , Peabody District Court, C.A. No. 1286 CV 0502 (February 5, 2013) – <i>Unemployment Assistance-Police-Words, “Available for Work”</i>	170
<u>Salisbury v. Tomaselli</u> , Land Court, Tax Lien Case No. 06 TL 133120 (January 14, 2013) - <i>Tax Title and Liens-Right of Redemption-Sewer Betterment Assessments-Sewer User Fees-Land Court-Jurisdiction to Grant Abatements</i>	173
<u>Valianti v. Marshfield</u> , Plymouth Superior Court, Civil Docket #: PLCV2010-1029-B (August 6, 2013) – <i>Community Preservation Act-Legislative Body Vote-Community Preservation Committee Recommendation-Judicial Review of Moderator’s Ruling</i>	182

KEVIN BARROWS vs. WAREHAM FIRE DISTRICT & others.¹

¹ Members of the board of water commissioners of the Wareham fire district and Michael Martin, individually and as superintendent of the water department of the Wareham fire district.

No. 11-P-288.

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 623; 976 N.E.2d 830; 2012 Mass. App. LEXIS 264

November 4, 2011, Argued
October 12, 2012, Decided

PRIOR HISTORY: [***1]

Plymouth. Civil action commenced in the Superior Court Department on April 7, 2008. The case was heard by Richard J. Chin, J., on a motion for summary judgment.

DISPOSITION: Judgment affirmed.

HEADNOTES

Massachusetts Tort Claims Act. Libel and Slander. Municipal Corporations, Liability for tort, Governmental immunity. Intentional Conduct. Governmental Immunity.

COUNSEL: Frank J. McGee for the plaintiff.

Michael J. McGlone for the defendants.

JUDGES: Present: Trainor, Milkey, & Agnes, JJ.

OPINION BY: TRAINOR

OPINION

[*623] [**833] TRAINOR, J. The plaintiff, Kevin Barrows, appeals from a summary judgment entered by a judge of the Superior Court on his [*624] claims of defamation and slander against the municipal defendants, the Wareham fire district and the board of water commissioners of Wareham (collectively, town) (counts I and II of the complaint); and Michael Martin, individually and as the superintendent of the water department of the Wareham fire district (count III of the complaint). Barrows argues on appeal that it was error for the judge to rule (1) that the town was exempt from liability pursuant to *G. L. c. 258, § 10(c)*; and

(2) that Martin was exempt from liability based on a conditional privilege to make the allegedly defamatory statements.

Ultimately, the appeal poses two questions: (1) whether a claim of defamation based on allegations of reckless conduct by a municipal employee is an intentional tort for the purposes [***2] of a *G. L. c. 258, § 10(c)*, exemption from the liability imposed by the Massachusetts Tort Claims Act (Act), and (2) whether that same alleged misconduct is exempt from individual liability because of the privilege granted to a public official in the exercise of his official duties. We conclude that (1) under the Act, a municipality is exempt from liability for a reckless defamation claim against a municipal employee based on the specific inclusion [**834] of both forms of defamation, slander and libel, in the list of torts enumerated in *G. L. c. 258, § 10(c)*; and (2) Martin did not act with a level of misconduct necessary to forfeit his conditional privilege as a public official. For these reasons and others discussed below we affirm the summary judgment.

Facts. The summary judgment record provides us with the following undisputed facts. Barrows was employed by the water department of the Wareham fire district (water department) as a foreman. On July 18, 2005, Martin, the superintendent of the water department, met with both Barrows and Andrew Cunningham, Barrows's direct supervisor, and delivered to Barrows a written list of thirteen separate allegations of gross misconduct. Barrows was ordered [***3] to appear before Martin the next morning, July 19, 2005. At the July 19 meeting, Barrows was accompanied by Nancy Caldeira and Robert Silvia, his union representatives. He refused to answer any

of the allegations at the meeting, as he wanted to seek legal advice before proceeding. Later on July 19, Martin delivered to Barrows a letter terminating his employment based on some of the allegations.

[*625] The allegations of misconduct were based on actions taken by Barrows in 2004. The allegations claimed, and Barrows has conceded, that he took dirt and sand dug from graves in the town cemetery and stockpiled it behind the water department building in an area subject to regulation under the Wetlands Protection Act. Barrows also allowed two local construction companies to store significant amounts of their own construction by-products in the same location.

As evidence that he was being targeted by Martin, Barrows submitted an affidavit of Cynthia Parola, a former Wareham selectman, in which she stated that Martin told her in the summer of 2002, "I'm going to make it my mission to get rid of Kevin Barrows."

Barrows appealed his termination to the prudential committee, a body authorized to review termination [***4] appeals. After a public hearing, which Barrows had requested, the prudential committee determined that Barrows did not commit any violations and that his firing was not justified. Barrows was immediately reinstated to his position with full back pay for any lost wages and benefits. The Wareham conservation commission later found that some of the material that Barrows had placed or had authorized to be placed behind the water department building had been deposited into an area subject to regulation under the Wetlands Protection Act. It cost the town approximately \$150,000 to remediate the problem.

Discussion. 1. Summary judgment. Summary judgment shall be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983). See *Community Natl. Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976); *Mass.R.Civ.P. 56(c)*, 365 Mass. 824 (1974). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.*, 404 Mass. 14, 17, 532 N.E.2d 1211 (1989).

The town argues that the grant of summary judgment on counts I and II was proper as a matter of law pursuant [***5] to *G. L. c. 258, § 10(c)*.

The town and Martin further argue that summary judgment was also appropriate on count III pursuant to the privilege applicable to statements made by public officials in the performance of their official duties.

[*626] [**835] 2. Claims against the town. "[T]he primary purpose of the Act was to replace the common-law doctrine of governmental immunity, and its myriad judicially created exceptions, with a comprehensive statutory scheme governing the tort liability of public employers." *Morrissey v. New England Deaconess Assn. -- Abundant Life Communities, Inc.*, 458 Mass. 580, 590, 940 N.E.2d 391 (2010). The Act "created a cause of action against public employers for the negligent or wrongful acts or omissions of their employees acting within the scope of their employment." *Nelson v. Salem State College*, 446 Mass. 525, 537, 845 N.E.2d 338 (2006). See *G. L. c. 258, § 2*. The Act expressly exempts intentional torts from its provisions, and therefore a public employer cannot be sued for the intentionally tortious conduct of its employee. See *G. L. c. 258, § 10(c)*.² While § 10(c) lists a number of intentional torts, its use of the word "including" indicates that the enumerated list is representative, not all-inclusive, [***6] and that any intentional tort is covered by § 10(c). See *Connerty v. Metropolitan Dist. Commn.*, 398 Mass. 140, 149, 495 N.E.2d 840 (1986); *Molinaro v. Northbridge*, 419 Mass. 278, 279, 643 N.E.2d 1043 (1995).

2 *General Laws c. 258, § 10(c)*, inserted by St. 1978, c. 512, § 15, excludes from the Act "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations."

Barrows argues that since his complaint alleges reckless misconduct in the defamation claim, the town is not exempt from suit under the provisions of § 10(c). Barrows's argument is based largely on *Forbush v. Lynn*, 35 Mass. App. Ct. 696, 699, 625 N.E.2d 1370 (1994), in which we determined that the alleged wilful, wanton, and reckless conduct of municipal employees "should not be equated with the intentional torts which § 10(c) exempts from the coverage of the Massachusetts Tort Claims Act." Contrast *Commonwealth v.*

Welansky, 316 Mass. 383, 399, 401, 55 N.E.2d 902 (1944) ("The essence of wanton or reckless conduct is intentional [***7] conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another. . . . Wanton or reckless conduct is the legal equivalent of intentional conduct"). The municipality in *Forbush* was not immune from [*627] tort liability under the Act when a child was seriously injured while playing on a public playground as a result of the municipality's wilful, wanton, and reckless conduct. *Forbush v. Lynn*, *supra* at 699.³

3 In *Forbush*, we emphasized "the difference between the intention to commit an act which involves a high degree of likelihood that substantial harm may result to another (reckless misconduct) and the intention to cause that harm (intentional misconduct)." 35 Mass. App. Ct. at 700, citing *Restatement (Second) of Torts § 500 comment f* (1964). We relied on this distinction when we determined that the reckless conduct alleged in that case was not exempt from suit under § 10(c). *Id.* at 701-704. There are, however, very significant exceptions to the rule announced in *comment f of the Restatement (Second) of Torts § 500* and highlighted in *Forbush*, *supra*. For example, we have recognized [***8] that reckless misconduct is sufficient to prove the tort of intentional emotional distress since the tort was first recognized in *George v. Jordan Marsh Co.*, 359 Mass. 244, 255, 268 N.E.2d 915 (1971). In that context, "reckless" or "wanton" conduct is the essence of the intentional conduct required for the commission of the tort of intentional emotional distress. See *Tilton v. Franklin*, 24 Mass. App. Ct. 110, 112, 506 N.E.2d 897 (1987). The Legislature specifically listed intentional mental distress (which we view as the same as intentional emotional distress, see *ibid.*), as an intentional tort in § 10(c), despite the fact that it can be proved by reckless misconduct.

[**836] Relying on *Forbush*, Barrows argues that the town defamed him wantonly and recklessly, and that therefore his complaint should not have been dismissed pursuant to *G. L. c. 258, § 10(c)*.⁴ He argues that the Legislature did not in-

tend wanton and reckless defamation to be exempted under § 10(c) as an intentional tort.

4 Specifically, Barrows's amended complaint alleged that "the [town's] allegations . . . were false and reckless in disregard of the truth, wilful, and wanton, and taken without investigation of the allegations."

We do not agree with Barrows's [***9] argument and are not persuaded by his attempt to apply the *Forbush* analysis to the tort of defamation. First, the tort at issue in *Forbush* was a claim for personal injury based on reckless or wanton conduct, a tort that is not specifically exempted from liability under the Act by § 10(c).⁵

5 In contrast, the species of personal injury that results from an intentional act is properly considered to be a battery, a tort that is specifically enumerated in § 10(c).

Additionally, as we will discuss in more detail, the gravamen of the tort of defamation does not lie in the nature or degree of the misconduct but in its outcome, i.e., the injury to the reputation of the plaintiff. Barrows misconstrues (1) the nature of the [*628] tort of defamation and (2) the significance of its specific inclusion as an intentional tort in § 10(c).

"Defamation is the publication of material by one without a privilege to do so which ridicules or treats the plaintiff with contempt." *Draghetti v. Chmielewski*, 416 Mass. 808, 812, 626 N.E.2d 862 (1994), quoting from *Correllas v. Viveiros*, 410 Mass. 314, 319, 572 N.E.2d 7 (1991). Defamation is essentially spoken or written words or expressions that injure reputation.⁶ See *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 853, 330 N.E.2d 161 (1975). [***10] While jurisdictions differ as to the extent to which a statement must be capable of injuring the plaintiff's reputation for it to be defamatory, in Massachusetts the false statement must be one that "discredits the plaintiff 'in the minds of any considerable and respectable segment in the community.'" *Draghetti v. Chmielewski*, *supra* at 811, quoting from *Tropeano v. Atlantic Monthly Co.*, 379 Mass. 745, 751, 400 N.E.2d 847 (1980).

6 In most cases the statement must be false. See *Bander v. Metropolitan Life Ins. Co.*, 313 Mass. 337, 342, 47 N.E.2d 595 (1943). Massachusetts, by statute, allows a

plaintiff to recover for a truthful defamatory statement if it was published in writing (or its equivalent) and with actual malice. See *G. L. c. 231, § 92*.

Although defamation is explicitly enumerated in § 10(c), it is unique among the listed intentional torts in that it does not require any intentional misconduct.^{7 8} Assuming the other elements of [**837] defamation are present, the publication of a false statement [**629] about a private party is equally tortious whether it is made intentionally, recklessly, or negligently. See, e.g., *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 390, 372 N.E.2d 1281 (1978) (defamation verdict reinstated where jury could have determined [***11] that defendant during public hearing "knowingly [i]ed] or knowingly accus[ed] the plaintiff of theft"); *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 395 Mass. 471, 476-477, 480 N.E.2d 1005 (1985), quoting from *Stone v. Essex County Newspapers, Inc.*, *supra* at 855 ("private persons . . . may recover compensation on proof of negligent publication of a defamatory falsehood").

7 An exception to this rule exists when the plaintiff in a defamation suit is a public figure; in such a case the plaintiff must prove the defendant acted with malice. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Howell v. Enterprise Publishing Co., LLC*, 455 Mass. 641, 664, 920 N.E.2d 1 (2010). In this case, *Sullivan* does not apply because Barrows only alleges defamation as a private party.

8 Torts with clear specific intent requirements include assault, *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 523-524, 649 N.E.2d 784 (1995), S.C., 421 Mass. 610, 659 N.E.2d 284 (1996); battery, *Waters v. Blackshear*, 412 Mass. 589, 590, 591 N.E.2d 184 (1992); false imprisonment, *Ortiz v. Hampden County*, 16 Mass. App. Ct. 138, 139-140, 449 N.E.2d 1227 (1983); false arrest, *Gutierrez v. Massachusetts Bay Transp. Authy.*, 437 Mass. 396, 405-406, 772 N.E.2d 552 (2002); malicious prosecution, [***12] *Beecy v. Pucciarelli*, 387 Mass. 589, 594-595, 441 N.E.2d 1035 (1982); abuse of process, *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760,

775-776, 489 N.E.2d 185 (1986); invasion of privacy, *Martinez v. New England Med. Center Hosps., Inc.*, 307 F. Supp. 2d 257, 267 (D. Mass. 2004); interference with advantageous relations, *Blackstone v. Cashman*, 448 Mass. 255, 260, 860 N.E.2d 7 (2007); and interference with contractual relations, *Swanset Dev. Corp. v. Taunton*, 423 Mass. 390, 397, 668 N.E.2d 333 (1996). Intentional mental distress requires intentional or reckless misconduct, however, and the Supreme Judicial Court has held that a claim for intentional mental distress based on reckless misconduct is covered by the exemption in § 10(c). See *Tilton v. Franklin*, *supra*. Fraudulent misrepresentation and deceit appear to be similar to intentional mental distress in that they can be committed by either intentional or reckless misconduct. See *Graphic Arts Finishers, Inc. v. Boston Redev. Authy.*, 357 Mass. 40, 44, 255 N.E.2d 793 (1970); *Hogan v. Riemer*, 35 Mass. App. Ct. 360, 365, 619 N.E.2d 984 (1993). Negligent misrepresentation would not be exempt, as it is a separate and distinct nonintentional tort that is not enumerated in § 10(c), much the same way battery is enumerated [***13] while negligent or reckless personal injury are not.

Courts determined early on that the nature of the wrong in a defamation of a private party is unrelated to the defendant's intentions or his degree of malice: "[I]t is said that neither the intention with which a tortfeasor acted, nor the state of his feelings toward the person injured . . . , can make him less responsible for the injury actually caused by his wrongful act. Carelessly to utter defamatory statements entails the same responsibility for the injurious consequences as negligently to cast about firebrands, or shoot off a gun: since the defendant has in fact done the wrongful act he must be taken to have intended the consequences which naturally resulted." Note, *Libel Without Intent*, 23 Harv. L. Rev. 218-219 (1910), citing *Curtis v. Mussey*, 72 Mass. 261, 6 Gray 261 (1856); *Hill v. Winsor*, 118 Mass. 251 (1875); *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N.E. 462 (1893); *Ellis v. Brockton Publishing Co.*, 198 Mass. 538, 84 N.E. 1018 (1908).

For private persons, intent is not essential to the tort of defamation. Intent is presumed, or, at a minimum, responsibility and liability is imputed as

if intent was manifest, even when publication is negligently or carelessly [***14] effectuated. See *In re Pereira*, 44 B.R. 248, 252 (Bankr. D. Mass. 1984). The Legislature appears to have acknowledged and perpetuated this unique characteristic of the tort of defamation, by specifically including it in § 10(c).

[*630] The discussion in *Restatement (Second) of Torts* § 500 comment f (1964) of the distinction between intentional misconduct and reckless misconduct, applicable to the tort of personal injury and relied on in the Forbush decision, is specifically not applicable to the tort of defamation. We recognize no such distinction, because, as stated above, the gravamen of the tort is not determined by the nature of the misconduct but by its outcome, i.e., the injury to the reputation of the plaintiff.

[**838] Since our case law has determined that any degree of misconduct -- intentional, reckless, or simply negligent -- is sufficient to prove a claim for defamation of a private party, it follows that it should make no difference which level of fault is pleaded for the purposes of a § 10(c) exemption. A statement about a private party that is negligently published, with intentional or reckless disregard for its truth, can be just as defamatory as a statement that is intentionally published, [***15] with negligent disregard for its truth. See *New England Tractor-Trailer Training of Conn., Inc., supra*; *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 630, 782 N.E.2d 508 (2003). Ultimately, and appropriately, the Legislature has determined that both species of defamation, libel and slander, are intentional torts for the purposes of § 10(c).⁹ Summary judgment was properly granted in favor of the town on counts I & II.

9 The Act is modeled closely on the Federal Tort Claims Act (FTCA), and a comparison of the two statutes supports our conclusion that the Act intended to exempt all forms of defamation. See 28 U.S.C. § 2680 (2006); *Vining v. Commonwealth*, 63 Mass. App. Ct. 690, 693, 828 N.E.2d 576 (2005). In the comparable provision to § 10(c) in the FTCA, Congress exempts the Federal government from liability for a similar list of tort claims, including slander and libel, but does not refer to the listed torts collectively as "intentional tort[s]." 28 U.S.C. § 2680(h). The FTCA, therefore,

plainly exempts all varieties of slander and libel from suit, as well as all varieties of the other listed torts.

3. Claim against Martin. Martin argues that summary judgment was appropriate as to count III because an absolute privilege [***16] or, in the alternative, a conditional or qualified privilege applies to statements made by public officials in the performance of their official duties.¹⁰ "Statements made by public officials while performing their official duties are conditionally [*631] privileged. . . . The threat of defamation suits may deter public officials from complying with their official duties when those duties include the need to make statements on important public issues." *Mulgrew v. Taunton*, 410 Mass. 631, 635, 574 N.E.2d 389 (1991). We recognize that, on certain occasions and for certain purposes, the importance of free communication outweighs the interest in protecting reputation. See *Restatement (Second) of Torts* ch. 25, topic 3 scope note, at 258. Martin's statements were made in his official capacity as superintendent of the water department, and the public clearly had an interest in both the issues being investigated and the content of the allegations made by Martin.

10 The Supreme Judicial Court has not directly addressed whether public officials in Massachusetts are entitled to an absolute privilege in the performance of their official duties. Thus far the court has determined it unnecessary to consider the application [***17] of an absolute privilege because the conduct it has considered has been well within the limits of a conditional privilege. See *Vigoda v. Barton*, 348 Mass. 478, 484, 204 N.E.2d 441 (1965). See also *Restatement (Second) of Torts* § 591.

However, a qualified or conditional privilege, unlike an absolute privilege, can be abused and lost in a number of different ways. *Bratt v. International Bus. Machs. Corp.*, 392 Mass. 508, 514, 467 N.E.2d 126 (1984). "One manner of such abuse is publication with knowledge of falsity or with reckless disregard of the truth." *Tosti v. Ayik*, 386 Mass. 721, 726, 437 N.E.2d 1062 (1982). Our case law and the *Restatement (Second) of Torts* agree that recklessness is the minimum degree of misconduct required to forfeit a conditional privilege. *Bratt v. International Bus. Machs. Corp., supra*. The abuse and loss of the defendant's conditional

privilege in a defamation action can also be based on [**839] "unnecessary, unreasonable or excessive publication," provided the plaintiff proves that the defendant acted "recklessly." *Id. at 515-516*. Therefore, the privilege is abused when the communication is made in such a way as to unnecessarily, unreasonably, or excessively "publish it to others, as to whom the occasion is not [***18] privileged." *Galvin v. New York, N.H. & H.R.R., 341 Mass. 293, 297, 168 N.E.2d 262 (1960)* (quotation omitted). Finally, a conditional privilege is abused and lost when it is determined that the defendant has acted with actual malice. See *ibid.*; *Tosti v. Ayik, supra*.

A conditional privilege may thus be recklessly abused and lost whether the fault lies in the misconduct of determining the truth of the material published or in the misconduct of unnecessarily, unreasonably, or excessively publishing the material.

[*632] Here, the record shows that Martin had conducted an investigation between April and July of 2005 that included interviews with town employees and contractors connected to the events prior to confronting Barrows in July of that year. This did not amount to a reckless disregard of the truth.¹¹ When Martin first confronted Barrows with the allegations, Barrows's immediate supervisor was present. At Barrows's request, the next meeting included his union representatives. Later, Barrows requested that the hearing before the prudential committee be open to the public because he "wanted the public in on it to witness what had

happened." This did not amount to an "unnecessary or unreasonable or excessive [***19] publication." Finally, Parola's affidavit, which stated that in the summer of 2002 Martin told her, "I am going to make it my mission to get rid of Kevin Barrows," does not establish that Martin was acting in bad faith and with malice three years after allegedly making the statement, nor does it indicate that he inadequately investigated Barrows's conduct.¹² The motion for summary judgment was properly allowed on count III.

11 The judge specifically stated in his memorandum of decision that "Barrows has conceded that he and two other employees under his direction drove to the cemetery, and he loaded and brought back material to deposit behind the Water Department building. Barrows believes that some of the material may have been dumped in a wetlands buffer zone behind the building. Also, [two local contractors] recount that in 2004, Barrows . . . allowed them to dump material at the Water Department building. In the end, it cost approximately \$150,000 to remove the material." Barrows does not dispute the judge's statement.

12 Additionally, there was no evidence of any statements or actions by Martin indicating animus against Barrows in the years since the statement to Parola was allegedly [***20] made.

Judgment affirmed.

BOSTON GAS COMPANY vs. BOARD OF ASSESSORS OF BOSTON.

No. 11-P-1100.

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 517; 976 N.E.2d 176; 2012 Mass. App. LEXIS 256

**February 1, 2012, Argued
October 3, 2012, Decided**

PRIOR HISTORY: [*1]**

Suffolk. Appeal from a decision of the Appellate Tax Board.

Boston Gas Co. v. Bd. of Assessors of Boston, 458 Mass. 715, 941 N.E.2d 595, 2011 Mass. LEXIS 10 (2011)

DISPOSITION: Reinstated decision of Appellate Tax Board affirmed.

HEADNOTES

Taxation, Gas company; Personal property tax: public utility, abatement, value; Appellate Tax Board: appeal to Appeals Court, findings. Administrative Law, Substantial evidence, Judicial review. Public Utilities, Value. Gas Company.

COUNSEL: Stephen W. DeCoursey (John M. Lynch with him) for the taxpayer.

David L. Klebanoff for Board of Assessors of Boston.

JUDGES: Present: Graham, Grainger, & Hanlon, JJ.

OPINION BY: HANLON

OPINION

[**179] [*517] HANLON, J. The plaintiff, Boston Gas Company (company or utility), doing business as Keyspan Energy Delivery New England, appeals from a reinstated decision of the Appellate Tax Board (board), upholding the fiscal year 2004 assessment by the board of assessors of Boston (assessors), for the company's [*518] rate-regulated utility property. The reinstated decision followed a partial remand by the Supreme Judicial Court in *Boston Gas Co. v. Assessors of Boston*, 458 Mass. 715, 941 N.E.2d 595 (2011) (Boston Gas I), ordering the board to consider further certain aspects of its analysis in valuing the company's personal property.¹ In this appeal, the company argues that the board's findings of fact and report on remand were not supported by substantial evidence and were erroneous under applicable law.

¹ The Supreme Judicial Court affirmed the board's decision as to the valuation of the company's real property. *Boston Gas I*, 458 Mass. at 740.

For [***2] background and the issues on remand, we refer to the Supreme Judicial Court's opinion in *Boston Gas I, supra*. Briefly, the board had reached an estimate of the fair cash value of the company's personal property by according equal weight to the net book value of the property and the property's reproduction cost new less depreciation

(RCNLD), a methodology upheld in this case by the Supreme Judicial Court. See *Boston Gas I, supra* at 729 ("In sum, we conclude that the board relied on sufficient evidence in determining that special circumstances warranted the use of a valuation method other than net book value"). As part of the RCNLD determination, the board relied on the income capitalization approach as a market reference, in order to estimate the economic obsolescence associated with the property, particularly the effect of governmental regulation on value. It was within the board's discretion to utilize the income capitalization approach for that limited purpose. See, e.g., *Boston Edison Co. v. Assessors of Boston*, 402 Mass. 1, 17, 520 N.E.2d 483 (1988).

The problem that concerned the court, however, was that, because the property's RCNLD exceeded the value reached through the income capitalization [***3] approach, the board's methodology called for the RCNLD amount to be reduced to the income capitalization value. Thus, in estimating economic obsolescence by reference to the income capitalization approach, the board essentially adopted that value as the property's RCNLD. "Given the importance of the income capitalization approach to the board's final valuation, we conclude that the income approach must itself be sound." *Boston Gas I*, 458 Mass. at 731.

The court identified three aspects of the income capitalization approach used by the board that required further consideration. [*519] First, the court remanded to the board for clarification of its decision not to use a tax factor in the income capitalization approach. *Id.* at 734, 740. Second, with respect to the board's analysis of the property's earnings before interest, taxes, depreciation, and amortization (EBITDA), the court sought clarification of the board's exclusion of calendar year 2001 from the sample used to determine the property's average EBITDA. *Id.* at 732, 740. Last, the court also sought clarification regarding the board's calculation of the EBITDA multiplier. *Id.* at 733-734, 740. [**180] We are persuaded that, as to each of those issues, [***4] the board's findings of fact in its reinstated decision were supported by substantial evidence. Accordingly, we affirm.

1. Tax factor. The board arrived at a valuation of the property from the income capitalization approach by averaging the revenues of the company for five years between 1997 and 2003.² In so doing, the board subtracted the property's operat-

ing expenses from the revenues for each of the five years to arrive at the annual EBITDA figure. Included in the operating expenses were the property taxes actually incurred by the company. Noting the board's preference in prior decisions for the use of a tax factor, rather than the amount of property taxes actually paid -- based, as they are, on the disputed assessment -- the court remanded, for further consideration, the board's decision not to use a tax factor in its calculation under the income capitalization approach. See *Boston Gas I*, 458 Mass. at 734-735 ("We have recognized that, in using a tax factor rather than the tax expense actually incurred, one avoids including the very tax assessment in dispute in the valuation of the property for the purpose of resolving that dispute").³

2 The board excluded 2000 and 2001 from the average, [***5] which we discuss, *infra*.

3 "The purpose of a tax factor, in a formula for capitalizing earnings, is to reflect the tax [that] will be payable on the assessed valuation produced by the formula." *Boston Gas I*, 458 Mass. at 734, quoting from *Assessors of Lynn v. Shop-Lease Co.*, 364 Mass. 569, 573, 307 N.E.2d 310 (1974). The tax factor would be the relevant year's tax rate, added to the capitalization rate or, in this case, the earnings multiplier, and then applied to the property's annual income to determine the property's value to investors. *Boston Gas I*, *supra* at 734 n.27. See generally *Taunton Redev. Assocs. v. Assessors of Taunton*, 393 Mass. 293, 294-296, 471 N.E.2d 75 (1984); *Assessors of Brookline v. Buehler*, 396 Mass. 520, 522-523, 487 N.E.2d 493 (1986).

[*520] "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. 456, 466, 420 N.E.2d 298 (1981). We are satisfied that the board, on remand, adequately explained and supported its decision not to use a tax factor [***6] in its income capitalization approach.

Among its stated reasons on remand, the board specifically found that, as a rate-regulated utility,

the company was entitled to charge rates that included reimbursement of its property taxes. See *Boston Gas I*, 458 Mass. at 718 ("The DPU allows a utility to recover, through the rates charged to consumers, its reasonable operating expenses, taxes, depreciation and amortization, and other costs"), citing *Boston Gas Co. v. Department of Telecommunications & Energy*, 436 Mass. 233, 234, 763 N.E.2d 1045 (2002).⁴ That finding was supported in the record, as the evidence plainly established that the rates were set by the Department of Public Utilities (DPU) to allow for the company's operating expenses, including property taxes, to be recovered from the rate payers. The board also referred to the fact, also supported in the record, that the utility's earnings were highly regulated, [**181] and the evidence showed that rates were set by the DPU to permit the utility owner to earn a reasonable return on investment. Taken together, we read those findings as explaining the board's decision to deduct the property taxes actually paid by the company as an expense in the board's income [***7] capitalization approach, as those amounts were recovered from the rate payers rather than from the utility owner's profits.

4 The company's own expert, Dr. Susan F. Tierney, explained that "[t]he economic value of these particular tangible assets for their owner flows from the authority and action of rate regulators to establish the rates designed to recover the costs associated with these assets."

It was appropriate for the board, in valuing the property of the company, a rate-regulated utility, to consider evidence of the regulatory features of the property in deciding to use the actual property taxes as an expense, rather than a tax factor.⁵ As the record made clear, a significant regulatory feature in valuing the [*521] company property was rate setting as a means of recovering expenses and ensuring a reasonable rate of return on investment. "[G]overnmental restrictions on the financial returns of a utility company are . . . relevant to the price which a willing buyer would pay to a willing seller for utility property." *Montaup Elec. Co. v. Assessors of Whitman*, 390 Mass. 847, 850-851, 460 N.E.2d 583 (1984). If property is subject to "a governmentally-imposed restriction affecting its value or its earning [***8] power, that fact should be considered in any determination of its fair cash value." *Boston Edison Co. v. Assessors of Water-*

town, 387 Mass. 298, 304, 439 N.E.2d 763 (1982), S.C., 393 Mass. 511 (1984).

5 In its brief, the company takes issue with the board's description of property taxes as "reimburse[d]," in the board's explanation that the amounts actually paid in property taxes by a regulated utility are reimbursed through the rates the utility is entitled to charge -- and are therefore recovered, in the rate-setting process. The board's choice of words adequately conveyed that property taxes were a recovered expense. Dr. Tierney reiterated, in her testimony and her report, that property taxes are recovered as an expense by a rate-regulated utility company as part of the rate-setting process. See, e.g., *Boston Edison Co. v. Assessors of Watertown*, 387 Mass. 298, 307, 439 N.E.2d 763 (1982) ("If Edison pays more in local property taxes, that amount is reflected in Edison's rate to its customers").

Mindful of the effect of governmental regulation on the property's capacity to generate income, the board properly treated the property taxes actually incurred by the company as an operating expense, based on substantial evidence [***9] that recovery of those amounts was provided through the rates set by the DPU. "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. at 466. Here, the evidence adequately supported the board's finding that, unlike the typical commercial property, the company's property taxes were among the expenses recovered from the rate payers, and therefore did not affect the rate of return on the owner's investment.⁶ See, e.g., *Boston Edison Co. v. Assessors of Watertown*, 387 Mass. at 304 (a potential buyer of a public utility [*522] would be influenced by the rate of return specified by [**182] the DPU and its effect on the buyer's investment).

6 As Dr. Tierney succinctly put it: "While the revenue requirement is designed to cover the utility's expenses for operating and maintaining its system (e.g., labor costs, property taxes, regulatory expenses, depre-

ciation expenses, and amortization expenses of regulatory assets), the return is calculated only [***10] on the rate base and not on expenses" (emphasis omitted).

The board's expertise in this regard is entitled to "some deference," *Koch v. Commissioner of Rev.*, 416 Mass. 540, 555, 624 N.E.2d 91 (1993), which we extend to "the board's judgment concerning the feasibility and fairness of alternate proposed methods of valuation." *Massachusetts Inst. of Technology v. Assessors of Cambridge*, 422 Mass. 447, 452, 663 N.E.2d 567 (1996). The board determined that the usual dilemma of estimating a commercial property's income utilizing the property taxes actually incurred, which are based on the very assessment in dispute, was not present here. We conclude the board adequately clarified its decision to utilize the property taxes actually paid, rather than a tax factor, to account for the effect of rate regulation on the property's ability to generate income when estimating the property's value to a potential purchaser.

Contrary to the company's assertion, the cases upon which it relies do not mandate that the board use a tax factor in valuing all manner of commercial property.⁷ Those cases, in which the use of a tax factor was favored in the income capitalization approach, involved private income-producing properties rather than [***11] rate-regulated utility properties. See, e.g., *Assessors of Lynnfield v. New England Oyster House, Inc.*, 362 Mass. 696, 700 n.2, 290 N.E.2d 520 (1972), citing *New Brunswick v. New Jersey Div. of Tax Appeals*, 39 N.J. 537, 546, 189 A.2d 702 (1963); *Assessors of Lynn v. Shop-Lease Co.*, 364 Mass. 569, 573, 307 N.E.2d 310 (1974). Indeed, "the value of property for rate-making purposes, related, as it is, to assuring provision for an adequate return on a utility's investment, may have little to do with what the property would sell for on a free and open market." *Boston Edison Co. v. Assessors of Watertown*, 387 Mass. at 303.⁸

7 Nor did the Supreme Judicial Court in any way suggest that a tax factor must be used here. The court merely sought clarification, acknowledging the board's preference for the use of a tax factor and the appropriateness of its use in other cases. See *Boston Gas I*, 458 Mass. at 735 ("While we have never held that a tax factor is required in income capitalization analyses -- and we

do not so hold today -- we have noted the board's preference for the use of a tax factor in accounting for local real estate taxes").

8 The company's insistence that a rate-regulated utility property and a private commercial property are similarly [***12] situated with respect to how their owners recover income to pay property taxes is belied by the record. The company's expert, Dr. Tierney, explained that, in the case of a private commercial property, rates are set by the market, while in the case of rate-regulated utility property, rates are set by the regulators. The company provided no record support for its assertion that the owner of a private commercial property is assured recovery of property taxes from the market, simply by raising its rents, to the same extent that the owner of a rate-regulated utility property is assured recovery of property taxes through rate setting.

The assessors' analogy to valuation of net lease properties is [*523] apt. See, e.g., *General Elec. Co. v. Assessors of Lynn*, 393 Mass. 591, 609-610, 472 N.E.2d 1329 (1984) (tax factor not necessary where the tenant pays the property taxes and the landlord's income is not reduced thereby); *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 453, 491 N.E.2d 1071 (1986) (affirming board's decision not to use a tax factor where tenant was responsible for the payment of all taxes). In the net lease situation, the property taxes are paid by the tenant, while in the case of regulated utilities [***13] such as the company, property taxes are recovered from the rate payers through rate setting. In both instances, use of the amount of the actual property taxes, rather than a tax factor, is [**183] appropriate in the income capitalization approach because the actual amount of the taxes incurred does not affect the owner's rate of return on investment.

On appeal, the company also attempts to undercut the board's finding that the utility's property taxes were a recovered expense by focusing on the lapse of time between rate setting proceedings, claiming that a significant increase in property taxes in the interim would not be factored into the rates. According to that argument, the increased property taxes would not be recovered from the rate payers, but instead would be borne by the company, thereby diminishing its profits. On that

basis, the company maintains that the use of a tax factor was necessary to estimate the effect of such increases on the property's income-generating capacity.

The assessors counter that an increase in property taxes between rate setting proceedings likely would be covered by the annual inflation increase included in the rates.⁹ See generally *Boston Gas Co. v. Department of Telecommunications & Energy*, [*524] 436 Mass. at 235. [***14] The assessors also point out that a significant or unanticipated increase in property taxes between rate setting proceedings would entitle the company to seek recovery under the procedure available for exogenous costs.¹⁰ On this record, the company has failed to persuade us that property tax increases between rate setting proceedings would not be recovered from the rate payers pursuant to those safeguards.

9 Dr. Tierney reported that the company's rates were adjusted each year to account for inflation as well as for certain external events outside the utility's control. The company argues that the inflation adjustment included in the rates offers no assurance that significant increases in property taxes would be recovered from rate payers. In so doing, however, the company posits potential tax increases that, in our view, are too speculative to undercut the board's finding that property taxes are a recovered expense. See, e.g., *Costello v. Commissioner of Rev.*, 391 Mass. 567, 570-571, 462 N.E.2d 322 (1984) (taxpayers had the burden of proving facts necessary to support a new theory raised in reply brief before the board).

10 Exogenous costs were broadly defined in the rate setting proceeding as including, [***15] but not limited to, changes in tax laws, as well as regulatory, judicial, or legislative changes unique to the gas industry, and in excess of \$800,000 per event. The company questions whether recovery for exogenous costs would be available for a property tax increase, complaining that the record is lacking on that score. That burden, however, fell to the company. See *General Elec. Co. v. Assessors of Lynn*, 393 Mass. at 599 ("taxpayer bears the burden of persuasion of every material fact necessary to

prove that its property has been overvalued").

Based on the foregoing, we conclude that the board's findings of fact on remand concerning the company's recovery of its property taxes through the rates set by the DPU were supported by substantial evidence, and thus justified the use of the property taxes actually incurred, rather than a tax factor in the board's income capitalization approach.

The company conceded at oral argument that, unless it prevailed on the tax factor issue, resolution of the remaining issues in its favor would not result in a valuation below the property's 2004 assessed value, and so we touch on them only briefly.

2. Exclusion of 2001 EBITDA. The board excluded the 2000 [***16] and 2001 revenues from the seven-year sample of the company's annual EBITDA figures, which were used to arrive at an estimate of the annual EBITDA attributable to the property for purposes of selecting the EBITDA multiplier. The exclusion of the 2000 EBITDA figure was not disputed. However, the Supreme Judicial Court sought [**184] clarification for the board's decision to exclude the 2001 EBITDA figure from the seven-year sample. The board's original rationale, that 2001 was eliminated on account [*525] of abnormal amounts of deferred income tax and amortization expenses taken that year, was deemed insufficient by the court, as those expenses would not be a factor in EBITDA. The court also rejected the rationale that a Federal tax issue discussed by the assessors' expert provided a basis for excluding the 2001 EBITDA. See *Boston Gas I, supra at 731-732*.

On remand, the board explained that the anomalies it cited in its original decision were indicative of other concerns that rendered the 2001 EBITDA unreliable for inclusion in the sample. "In particular, the Board was influenced by 2001's atypical expense ratio, its substantially negative sum relating to income taxes, and perhaps most significantly, [***17] the fact that the average EBITDA as a percentage of total operating revenue for the years presented was more than 50% higher than the percentage for 2001." The board found that the atypical figures appeared to be connected with Keyspan's acquisition of Eastern Enterprises in 2000. On that point, the assessors' expert, George Sansoucy, testified that the purchase was

reflected in the company's 2001 EBITDA, specifically, the calculation of earnings as shown in the records of the company and Keyspan for 2001.¹¹

11 Sansoucy testified that the deferred income taxes and amortization figures for 2001, cited by the board as concerns in its original decision, followed the purchase of Eastern Enterprises by Keyspan in 2000. According to Sansoucy, the purchase was reflected in income and expenses for the company that rendered 2001 not typical of other years, and not in line with the rates set and the reimbursements allowed for that year through the rate-setting process. Sansoucy observed that the significant reduction shown in earnings, compared to expenses incurred and rates charged, was consistent with the purchase of Eastern Enterprises and, while proper, was not indicative of the utility's [***18] income and expenses for purposes of providing an average that was useful for valuation.

The company maintains that the link between the anomalies in the 2001 EBITDA and the acquisition of Eastern Enterprises was not supported in the record. We view Sansoucy's testimony as sufficient to support a reasonable inference connecting the two. In so doing, we defer to the board to decide Sansoucy's credibility, the weight to be given his testimony, and inferences to be drawn therefrom. See generally *Boston Gas I, supra at 738*, citing *Fisher Sch. v. Assessors of Boston*, 325 Mass. 529, 534, 91 N.E.2d 657 (1950). According to the board our usual deference, we are satisfied that the board's findings of fact regarding the 2001 [*526] EBITDA were based on substantial evidence and adequately accounted for the elimination of 2001 from the sample.

3. EBITDA multiplier. In its original report, the board adopted Sansoucy's EBITDA multiplier of 11.7 for use in its income capitalization approach. The EBITDA multiplier was reached by looking at six comparable sales of regulated utility property, and calculating the ratio of sales price to annual EBITDA for each. The Supreme Judicial Court described the board's selection of the EBITDA [***19] multiplier as "the approximate average" of the ratio of sales price to annual EBITDA for those properties. *Boston Gas I, 458 Mass. at 731*.

One of the six sales relied upon was Keyspan's acquisition of Eastern Enterprises in 2000. At the time of the acquisition, Colonial Gas was a subsidiary of Eastern Enterprises, having become a subsidiary in August, 1999. As described in Boston Gas I, the company maintained [**185] in its first appeal that the board erred in "calculating the sales price to EBITDA ratio for that sale by using a sale price from 2000, which included the amount paid for Colonial Gas, while using an EBITDA from the end of 1998, which did not include Colonial Gas's contribution to EBITDA." *Id.* at 733. The court remanded the issue for the board's further consideration.

On remand, the board agreed that Sansoucy's chosen EBITDA multiplier failed to account for the contribution to earnings of Colonial Gas. To that end, based on the corrected ratio of Eastern Enterprise's sale price to annual EBITDA, the board took the average of the six ratios to derive a corrected EBITDA multiplier, thus reducing the EBITDA multiplier from 11.7 to 11.57.¹²

12 The calculation resulted in a revised value [***20] of \$333,117,655 under the income capitalization approach, instead of the original value of \$336,860,550. The board's final valuation of the property, affording equal weight to the net book value and the RCNLD approach, was \$246,127,000. That revised figure still exceeded the assessed value of \$223,200,000 for fiscal year 2004.

On appeal, the company now objects that the new EBITDA multiplier of 11.57 was not reached by the same method used by the board in selecting the original multiplier and that, pursuant to the remand order, the board was required to use the same method. According to the company, the

board reached the original multiplier of 11.7, not by averaging the six ratios, but by selecting [*527] the figure at roughly the midpoint between the Eastern Enterprises and Colonial Gas multipliers.¹³ As noted, however, the Supreme Judicial Court described the board's selection of the original EBITDA multiplier as the approximate average of the ratio of sale price to EBITDA in the six sales, and found no fault with the method itself. Because the board selected the revised EBITDA multiplier using the method implicitly approved by the court, we see no need for further remand.¹⁴

13 The board, [***21] in its initial findings, did not identify the precise method by which it selected the EBITDA multiplier, but observed that "the mean and median multipliers were 11.78 and 11.68, respectively" and that "Mr. Sansoucy chose 11.7 as an appropriate multiplier," which the board adopted. Sansoucy described his selection of the multiplier as "reconciled" from the comparable sales transactions.

14 In addition to addressing the issues identified by the Supreme Judicial Court on remand, the board added the observation that its original valuation, which weighed the property's net book value with the RCNLD, resulted in factoring economic obsolescence twice. Removing the duplication would result in a somewhat higher valuation. As we affirm the reinstated decision based on the board's treatment of the issues on remand, we do not reach this alternative basis cited by the board in support of its decision to uphold the 2004 assessment.

Reinstated decision of Appellate Tax Board affirmed.

CITY OF BOSTON vs. BOSTON POLICE SUPERIOR OFFICERS
FEDERATION.

SJC-11238

SUPREME JUDICIAL COURT OF MASSACHUSETTS

466 Mass. 210; 2013 Mass. LEXIS 688

April 2, 2013, Argued
August 9, 2013, Decided

PRIOR HISTORY: [**1]

Suffolk. Civil action commenced in the Superior Court Department on August 18, 2009. The case was heard by Bonnie H. MacLeod, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

BOSTON POLICE SUPERIOR OFFICERS FEDN. v. JORDAN, 1984 U.S. Dist. LEXIS 19036 (D. Mass., Feb. 29, 1984)

HEADNOTES

Boston. Police, Assignment of duties, Collective bargaining. Public Employment, Police, Transfer, Collective bargaining. Municipal Corporations, Police, Collective bargaining. Labor, Police, Collective bargaining. Civil Service, Police, Collective bargaining. Arbitration, Collective bargaining, Confirmation of award, Authority of arbitrator. Contract, Collective bargaining contract.

COUNSEL: David M. Connelly (Robert J. Boyle, Jr., with him) for the plaintiff.

Alfred Gordon for the defendant.

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

OPINION BY: DUFFLY

OPINION

[*210] DUFFLY, J. After the city of Boston (city) transferred a Boston police sergeant who served as a union representative, the Boston Police Superior Officers Federation (union) sought to enforce a provision of its collective bargaining agreement with the city, prohibiting the involuntary transfer of certain union representatives be-

tween stations or assignments. Following binding arbitration mandated under the collective bargaining agreement, an [*211] arbitrator found that the city had violated the collective bargaining agreement and awarded the officer damages and reinstatement to his original position. The city filed a motion in the Superior Court, pursuant to *G. L. c. 150C, § 11*, to vacate the award. A Superior Court judge denied the city's motion and allowed the union's cross motion to confirm [**2] the award. The city appealed, and we transferred the case to this Court on our own motion.

The city argues, and we agree, that assignment and transfer of officers within the Boston police department (department) are nondelegable statutory powers of the Boston police commissioner (commissioner), see St. 1906, c. 291, § 10, as appearing in St. 1962, c. 322, § 1, and, accordingly, that the grievance arbitrator exceeded his authority in reversing the officer's transfer.

Background and prior proceedings. In 1989, the city and the union underwent interest arbitration¹ as part of a collective bargaining process. The city had proposed a provision that would have prohibited the involuntary transfer of union representatives, but the parties were unable to reach agreement on how many officers would be covered by that provision. The proposal followed several years of litigation over what the union alleged was the city's practice of antiunion transfers. In 1985, the city settled a Federal case involving allegations that the police commissioner used transfers to retaliate against certain superior officers for their union activities. That settlement agreement, as well as a 1987 agreement in a related [**3] case, stipulated that the city would not transfer current or former union representatives without their consent.² Following adoption of that settlement

agreement, several disputes arose concerning whether the city had violated the agreement.

1 "'Interest' arbitration characterizes the arbitration of labor disputes that 'involve the question of what shall be the basic terms and conditions of employment.'" *School Comm. of Hanover v. Hanover Teachers Ass'n*, 435 Mass. 736, 738 n.2, 761 N.E.2d 918 (2002), quoting F. Elkouri & E. Elkouri, *How Arbitration Works* 128 (5th ed. 1997). See *School Comm. of Boston v. Boston Teachers Union, Local 66, Am. Fed'n of Teachers (AFL-CIO)*, 372 Mass. 605, 606 n.4, 363 N.E.2d 485 (1977).

2 Following the 1985 settlement agreement in the United States District Court for the District of Massachusetts, the Boston Police Superior Officers Federation (union) sought a judgment of contempt against the city of Boston (city) for violation of that agreement. The parties reached an agreement resolving the contempt action and, in 1987, signed a separate letter of agreement.

[*212] In a written opinion and award in which this history was discussed, the interest arbitrator ordered that the transfer provision at issue [**4] here, art. XVI, § 6A, be inserted in the collective bargaining agreement.³ That provision, covering a specified number of union officers and area representatives, has remained unchanged in several successor contracts.

3 Article XVI, § 6A, of the collective bargaining agreement provides:

"Federation officers and area representatives (not to exceed a total of 25 officers) shall not be transferred out of their unit, district, division or bureau, and shall not be reassigned nor detailed permanently from one platoon to another except upon their own request or in normal 42-day rotation of night men. No Federation member shall be transferred in retaliation for the exercise of the rights specific in Section 1 of this Article or the purpose of

interfering with the structure of institutional life of the Federation. Specific reasons, in writing, for any transfer, detail or reassignment shall be given by the Police Commissioner or his delegate to an employee upon request within three (3) days of such request. Any dispute hereunder shall be subject to the Grievance and Arbitration Procedure."

The grievance that gave rise to this appeal was filed in 2008. Pursuant to *G. L. c. 150C, § 2 (b)*,⁴ the city [**5] sought to stay arbitration of the grievance, on the ground that the transfer provision was invalid and thus could not be arbitrated. A Superior Court judge declined to issue a stay. In 2009, an arbitrator heard the grievance and determined that the issue was arbitrable.

4 *General Laws c. 150C, § 2 (b)*, provides:

"Upon application, the [S]uperior [C]ourt may stay an arbitration proceeding commenced or threatened if it finds (1) that there is no agreement to arbitrate, or (2) that the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration and disputes concerning the interpretation or application of the arbitration provision are not themselves made subject to arbitration. . . ."

See *Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Ass'n*, 372 Mass. 116, 119, 360 N.E.2d 883 (1977) ("we regard an agreement to arbitrate a dispute which lawfully cannot be the subject of arbitration as equivalent to the absence of a controversy covered by the provision for arbitration").

We summarize the facts relevant to the grievance, based on the arbitrator's findings. See *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). Sergeant Ralph Caulfield [**6] is a Boston police officer who served as an area representative of the union at the D-14 police station in the [*213] Brighton sec-

tion of Boston. In January, 2007, Caulfield and another sergeant were involved in a physical fight in the duty supervisor room, during which Caulfield punched the other officer in the face. The station captain suspended the other officer, but did not suspend or otherwise discipline Caulfield. Although the two men did not work on the same shift, as supervisors they were required to interact and to exchange information during shift changes. The other officer said that an underlying tension remained between the two. The station captain and the chief of field services for the department agreed that Caulfield's effectiveness as a supervisor had been compromised, and discussed transferring him. A transfer order was issued in June, 2007, but was quickly rescinded, and Caulfield was placed on medical leave until September 14, 2007, when he returned to the D-14 station. In February, 2008, he was transferred due to what the city said were ongoing concerns about his supervisory authority. The union then filed a grievance on his behalf.

The arbitrator issued an award invalidating [**7] the transfer and granting Caulfield damages and the opportunity to return to his original station assignment. The city filed a motion in the Superior Court to vacate the arbitrator's award, and the union filed a cross motion to confirm the award. A second Superior Court judge denied the city's motion to vacate the award, and granted the union's motion confirming the award. The judge concluded that the so-called "police commissioner's statute," St. 1906, c. 291, §§ 10 & 11, as appearing in St. 1962, c. 322, § 1, was silent on the issue of transfer, and thus that the Legislature did not intend to create a nondelegable authority in the police commissioner to transfer personnel.

Discussion. When an arbitrator makes a binding award pursuant to a collective bargaining agreement, a Superior Court judge may vacate or alter the award if, inter alia, it was procured by "corruption, fraud or other undue means," the arbitrator was evidently corrupt or partial, or where "the arbitrator[] exceeded [his or her] powers." *G. L. c. 150C, § 11*. The city argues that the transfer provision at issue impermissibly delegates the commissioner's statutory power to assign and organize officers, and thus that [**8] the award was outside the arbitrator's authority. The union contends that the transfer provision is valid, and arbitrable, [*214] because the city consented to its inclusion in the collective bargaining agreement.

We conclude that the city is correct and that the award must be vacated.

a. Nondelegable powers of commissioner. The commissioner's powers are statutorily defined. The commissioner has "authority to appoint, establish and organize the [Boston] police" department, St. 1906, c. 291, § 10, as appearing in St. 1962, c. 322, § 1, and has "cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police." St. 1906, c. 291, § 11, as appearing in St. 1962, c. 322, § 1.

As an initial matter, we must determine whether these statutory provisions confer on the commissioner an exclusive, nondelegable authority to assign and transfer police officers. See generally *Department of State Police v. Massachusetts Org. of State Eng'rs & Scientists*, 456 Mass. 450, 455, 924 N.E.2d 248 (2010).⁵ Analysis of whether a legislative grant of "general management powers" [**9] to a public official or body creates a nondelegable authority "has been directed towards defining the boundary between subjects that by statute, by tradition, or by common sense must be reserved to the sole discretion of the public employer so as to preserve the intended role of the governmental agency and its accountability in the political process."⁶ *Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 178, 681 N.E.2d 1234 (1997). See *Chief Justice for Admin. & Mgt. of the Trial Court v. Commonwealth Employment Relations Bd.*, 79 Mass. App. Ct. 374, 381, 946 N.E.2d 704 (2011), citing *School Comm. of Boston v. Boston Teachers Union, Local [*215]* 66, *Am. Fed'n of Teachers (AFL-CIO)*, 378 Mass. 65, 71, 389 N.E.2d 970 & n.13 (1979) ("One purpose of the principle is the retention of public policy making in the hands of governmental employers accountable directly or indirectly through 'the normal political process,' and the prevention of the devolution of policy making to the narrower perspective and accountability of interest group bargaining").

5 "[W]hile an underlying decision may be reserved to the exclusive prerogative of the public employer . . . , the public employer may be required to arbitrate with respect to ancillary matters, such [**10] as procedures that the employer has agreed to follow

prior to making the decision." *Somerville v. Somerville Mun. Employees Ass'n*, 451 Mass. 493, 499, 887 N.E.2d 1033 (2008), quoting *Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 179, 681 N.E.2d 1234 (1997). The transfer provision at issue here does not concern such ancillary matters but, rather, the commissioner's authority to transfer officers.

6 Characterizing a decision as suitable for collective bargaining "can be difficult because many decisions of the public employer include both a managerial function and an effect upon the terms and conditions of the employees' work." *Chief Justice for Admin. & Mgt. of the Trial Court v. Commonwealth Employment Relations Bd.*, 79 Mass. App. Ct. 374, 381, 946 N.E.2d 704 (2011).

Although the statutory language does not contain the word "transfer," the statutory provision defining the commissioner's authority, by its plain language, confers nondelegable authority over the assignment and organization of the officers within the department. Pursuant to St. 1906, c. 291, §§ 10 and 11, as appearing in St. 1962, c. 322, § 1, "[t]he commissioner's authority . . . has been recognized to be broad." *Boston v. Boston Police Patrolmen's Ass'n*, 403 Mass. 680, 684, 532 N.E.2d 640 (1989). **[**11]** See *Boston v. Boston Police Superior Officers Fed'n*, 29 Mass. App. Ct. 907, 908, 556 N.E.2d 1053 (1990), and cases cited (St. 1906, c. 291, §§ 10, 11, and 14, as appearing in St. 1962, c. 322, § 1, confers "broad administrative control and discretion of the police commissioner of Boston").

"[C]onsiderations of public safety and a disciplined police force require managerial control over matters such as staffing levels, assignments, uniforms, weapons, definition of duties, and deployment of personnel. . . . [T]he deployment of officer personnel to meet the tasks and responsibilities of the department is a fundamental and customary prerogative of municipal management which falls squarely within [St. 1906, c. 291, § 11] . . ."

Boston v. Boston Police Patrolmen's Ass'n, 41 Mass. App. Ct. 269, 272, 669 N.E.2d 466 (1996). See, e.g., *Boston v. Boston Police Patrolmen's Ass'n*, 403 Mass. at 684 (assignment of one patrol

officer to marked patrol vehicle instead of two officers per vehicle was made pursuant to non-delegable authority); *Boston v. Boston Police Superior Officers Fed'n*, 52 Mass. App. Ct. 296, 299, 753 N.E.2d 154 (2001) (assignment of officer to temporary duties is nondelegable authority).

There is therefore no basis to conclude that **[**12]** a "transfer" of an officer falls outside the scope of the commissioner's power to "appoint, establish and organize." An assignment or deployment **[*216]** cannot be irrevocable, or managers would have no ability to react to changing conditions in arranging the police force into the necessary bureaus, units and divisions.⁷

7 The union does not claim that the transfer at issue here constituted improper retaliation for protected union activity, nor does it argue that it would have had no other avenue by which to seek redress had the transfer been retaliatory. See, e.g., *G. L. c. 150E, § 10* (prohibited practice for public employer to "[d]iscriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization"); *29 U.S.C. § 158(a)(3)* (2006) (making it an unfair labor practice under Federal law to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

b. City's consent to provision. The union argues that, even if art. XVI, § 6A, purports to delegate the commissioner's nondelegable managerial authority, it should nevertheless **[**13]** be binding on the city because the city consented to the provision. Furthermore, the union maintains, the city has not sought to excise the provision from several successor contracts. Regardless whether the city's consent to art. XVI, § 6A, may be gleaned from the fraught history between the parties, a nondelegable authority may not be delegated to an arbitrator, even with the parties' consent. See, e.g., *Department of State Police v. Massachusetts Org. of State Eng'rs & Scientists*, *supra* at 457 (holding dispute under collective bargaining agreement not arbitrable as delegation of nondelegable authority, without reference to whether provision was consented to by parties). Cf. *Boston v. Boston Police Patrolmen's Ass'n*, 41 Mass. App. Ct. at 270 n.3

("The fact that the city agreed to arbitrate the grievance is of no legal consequence if the issue is beyond the authority of the arbitrator").⁸

8 Consent could have been relevant to the question whether the interest arbitrator exceeded his statutory authority when he inserted art. XVI, § 6A, into the collective bargaining agreement. See St. 1973, c. 1078, § 4A (1) (a) (i) & 2 (a), as appearing in St. 1987, c. 589, § 1 (creating joint labor-management [****14**] committee to oversee collective bargaining processes for municipal police and firefighters). Pursuant to that statute, parties may be ordered to undertake arbitration to resolve outstanding issues; the scope of such arbitration, which is binding, "shall be limited to wages, hours, and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint,

promote, assign, and transfer employees" St. 1973, c. 1078, § 4A (3) (a), as appearing in St. 1987, c. 589, § 1. The city argues that art. XVI, § 6A, is invalid because the interest arbitrator exceeded this scope. However, it appears from the record that the provision in question was in substance agreed to by the parties, with the only controversy for the interest arbitrator involving the number of union officers to be covered by the provision.

Conclusion. Because the grievance arbitrator exceeded his [***217**] authority in invalidating the officer's transfer, the arbitration award cannot stand. The judgment affirming the grant of the arbitration award is vacated and set aside. The matter is remanded to the Superior Court, where judgment shall enter for the city on its motion to vacate [****15**] the award.

So ordered.

GARY DIXON vs. CITY OF MALDEN.

SJC-11137

SUPREME JUDICIAL COURT OF MASSACHUSETTS

464 Mass. 446; 984 N.E.2d 261; 2013 Mass. LEXIS 35

**November 6, 2012, Argued
March 4, 2013, Decided**

PRIOR HISTORY: [***1**]**

Middlesex. Civil action commenced in the Superior Court Department on November 1, 2007. The case was heard by Thomas P. Billings, J., and a motion for reconsideration was considered by him. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

Massachusetts Wage Act. Contract, Employment. Damages, Termination of employment contract. Employment, Termination. Municipal Corporations. Public Employment, Vacation pay.

COUNSEL: Alfred Gordon for the plaintiff.

Kathryn M. Fallon for the defendant.

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

OPINION BY: IRELAND

OPINION

[****261**] [***446**] IRELAND, C.J. We transferred this case from the Appeals Court on our own motion to consider whether undifferentiated [***447**] gratuitous weekly payments made by the city of Malden (city) to the plaintiff, Gary Dixon, after he was discharged covered his claim for unpaid vacation days under *G. L. c. 149, §§ 148 and 150* (Wage Act). The plaintiff appeals from a judgment of the Superior Court dismissing his claim against the city. He asserts that a Superior Court judge erred in dismissing his claim under the Wage Act

for vacation pay, costs, attorney's fees, and treble damages on the ground that, although the manner of the [**262] payments violated the express language of the Wage Act, the city nevertheless compensated the plaintiff. Because we conclude that the city could not cast [***2] those payments as vacation pay after the fact and that the plaintiff is entitled to recover his vacation pay in addition to costs and attorney's fees, we remand the case to the Superior Court for entry of a judgment consistent with our opinion.

Facts and procedure. We present the essential facts found by the judge after a jury-waived trial.

In 1983, the city appointed the plaintiff as a director of a city-owned nursing home, where the plaintiff worked until March, 2007. Although a city ordinance provided for successive two-year terms of appointment, the city did not formally reappoint the plaintiff to his position after 1996. He continued working in a "holdover capacity," apparently under a provision in a city ordinance providing that appointed officials hold office "until a successor shall be chosen and qualified." As a city employee, the plaintiff was entitled to a certain number of vacation days each year, based on years of service.

In December, 2006, the plaintiff was notified that his position at the nursing home was going to be discussed at a meeting of the city's board of health, the appointing authority for the plaintiff's position. The plaintiff and his counsel attended. Although [***3] the board unanimously approved a motion not to reappoint the plaintiff, at the request of his counsel, it agreed to negotiate with the plaintiff over retirement and severance issues. No settlement agreement was in place before the plaintiff was informed that a successor, who was to begin March 20, 2007, had been appointed. In a letter dated March 21, 2007, the plaintiff was instructed that he was relieved of all responsibilities and should turn in his keys, leave the facility immediately, and [*448] contact the human resources department for an exit interview and details concerning benefits.

At the time of his departure, the plaintiff had accrued fifty days of unused vacation time, amounting to \$13,615.54. The plaintiff was not paid for these vacation days on the day of his termination. Although the city asserted that it terminated the plaintiff for cause,¹ the mayor authorized a continuation of the plaintiff's salary and benefits until June 29, 2007. The mayor did not communi-

cate to the plaintiff that the continuing salary payments were vacation pay. The plaintiff received weekly payments, which included standard deductions for income tax, retirement, insurance, and the like, through the [***4] regular payroll system. His final paystub from this period shows fifty days of accrued vacation time.

1 According to city ordinance § 8.9(5), the city of Malden (city) will not pay vacation pay equivalent to employees who are terminated for fault: "[a]ny employee who is eligible for earned vacation leave under this Section whose service is terminated by lay-offs, resignations, [or] dismissal through no fault or delinquency of their own . . . shall be paid vacation pay equivalent to any unused earned vacation leave available as of the termination date. No vacation pay equivalent shall be granted to any employee whose services are terminated for reasons other than as stated in this paragraph."

The plaintiff filed an action in the Superior Court alleging, insofar as relevant here, that the city violated the Wage Act when it failed to pay him for his accrued vacation days on March 20, 2007, the day he was terminated.²

2 The plaintiff pursued his private action claim by attaining the Attorney General's assent in writing pursuant to *G. L. c. 149, § 150*. See *Melia v. Zenhire, Inc.*, 462 Mass. 164, 171 n.7, 967 N.E.2d 580 (2012) (Wage Act allows public and private enforcement).

[**263] In his written findings of fact, conclusions [***5] of law, and order of judgment, the judge found, and the parties do not dispute, that the parties' employment agreement included the benefit of vacation time. The judge noted that the plaintiff was terminated prior to our decision in *Electronic Data Sys. Corp. v. Attorney Gen.*, 454 Mass. 63, 71, 907 N.E.2d 635 (2009) (*Electronic Data Sys. Corp.* [No. 2]), and made no finding whether the plaintiff was terminated for fault. The judge found that, by failing to pay the plaintiff for his vacation time on the day he was terminated, the city did not act in compliance with the Wage Act. However, the judge determined that, when the city paid a "salary continuation" [*449] after the plaintiff was terminated, the plaintiff "came away with more from the City than was owed; therefore he was not damaged by the city's treatment of him

at termination."³ The judge also stated that, because the city acted in good faith and its actions were not outrageous, the plaintiff was not entitled to treble damages.

3 The mayor testified at trial that the plaintiff was paid after his termination in "an attempt to settle [his] claims." The judge interpreted this statement to mean "he hoped [the plaintiff] would consider himself fairly treated [***6] and would abandon any claims he had." There was no written settlement agreement between the parties concerning the plaintiff's termination.

The plaintiff moved to reconsider. In his memorandum and order on the plaintiff's motion, the judge stated, among other things, that the plaintiff's salary continuation "more than mitigated [his] damages for unpaid vacation"; that the "any damages incurred" clause in *G. L. c. 149, § 150*, did not allow the plaintiff to be awarded damages in these circumstances; and that the plaintiff was not entitled to attorney's fees.

Discussion. 1. Statutory framework. We begin by setting forth the relevant statutes. *General Laws c. 149, § 148*, provides, in relevant part,

"[A]ny employee discharged from . . . employment shall be paid in full on the day of his discharge The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement No person shall by a special contract with an employee or by any other means exempt himself from this section." (Emphases added.)

The version of *G. L. c. 149, § 150*, applicable to this case⁴ states, in relevant part,

"An employee claiming to be aggrieved by a violation of [***7] section 148 . . . may . . . institute and prosecute in his own name . . . a civil action for injunctive relief and any damages incurred, including treble damages for any loss [*450] of wages and other benefits. An employee so aggrieved and who prevails in such an action shall be entitled to

an award of the costs of litigation and reasonable attorney fees." (Emphasis added).

4 Subsequent to the filing of the complaint in this case, *G. L. c. 149, § 150*, was amended to mandate treble damages when an employer violates *G. L. c. 149, § 148*. St. 2008, c. 80, § 5. See *Melia v. Zenhire, Inc.*, *supra* at 171, n.8. This amendment does not apply retroactively. *Rosnov v. Molloy*, 460 Mass. 474, 483, 952 N.E.2d 901 (2011).

We interpreted the language of the Wage Act in *Electronic Data Sys. Corp. (No. 2)*, *supra*. In that case, we concluded that the Wage Act plainly states that wages "shall include any holiday or vacation [**264] payments due an employee under an oral or written agreement," *id.* at 67, and that employers must pay unused, earned vacation time to employees who have been involuntarily discharged. *Id.* at 71. See *Electronic Data Sys. Corp. v. Attorney Gen.*, 440 Mass. 1020, 1021, 798 N.E.2d 273 (2003) (*Electronic Data Sys. Corp. [No. 1]*) (where [***8] terminated plaintiff was "owed vacation time under the employment agreement, payment for that unused vacation time is a form of 'wages' that must be paid pursuant to § 148").

In reaching our conclusion in *Electronic Data Sys. Corp. (No. 2)*, *supra* at 71, we deferred to the guidance of the Attorney General, who has exclusive authority to enforce this statute.⁵ The Attorney General's Advisory 99/1 states, and our conclusion concurs, that "[u]pon separation from employment, employees must be compensated by their employers for vacation time earned [A]n employer may not enter into an agreement with an employee under which the employee forfeits earned wages, including vacation payments." *Electronic Data Sys. Corp. (No. 2)*, *supra* at 68, 71.

5 The city argues that *Electronic Data Sys. Corp. v. Attorney Gen.*, 454 Mass. 63, 907 N.E.2d 635 (2009) (*Electronic Data Sys. Corp. [No. 2]*), offers an invitation to argue for another interpretation of the Wage Act. However, the city misinterprets the court's statement that "[t]he Attorney General's interpretation is not the only meaning that could be attached to the phrase 'vacation payments due . . . under an [employment] agreement.'" *Id.* at 71. The city con-

tends [***9] that this sentence means there may be other interpretations of the statute depending on the particular city ordinance that granted benefits. Our discussion in that case was a statement of fact, not a suggestion that we were departing from our long-standing principle that we defer to the guidance of administrative agencies where their guidance is reasonable. See, e.g., *Rosing v. Teachers' Retirement Sys.*, 458 Mass. 283, 290, 936 N.E.2d 875 (2010) (where agency's determination reasonable, court does not substitute its own judgment); *Smith v. Winter Place LLC*, 447 Mass. 363, 367-368, 851 N.E.2d 417 (2006).

2. Weekly payments as substitute for vacation pay. The city's [*451] primary argument is that the statute allows for mitigation of unpaid vacation payments by later payments. It asserts that it fully compensated the plaintiff for his vacation pay because it paid him, after his termination, salary payments totaling approximately \$19,700, which is more than the amount of his vacation pay of approximately \$13,615. The city also contends that, because it paid other benefits such as retirement and health insurance to the plaintiff after his termination, the plaintiff was paid more than the equivalent of his vacation pay.⁶

6 In its [***10] brief, the city maintains that sections of the city ordinance granting benefits such as vacation time, sick leave, and retirement benefits, as well as the ordinance section requiring an involuntarily terminated employee to forfeit accrued vacation pay, act "in tandem" with *G. L. c. 149, § 148*. At oral argument, however, the city conceded that the forfeiture clause was in contravention of the Wage Act. We note that city ordinances, like employment policies, if found to violate State laws, may be struck down. See, e.g., *Electronic Data Sys. Corp. (No. 2)* at 64. Here, city ordinance § 8.9(5) withholding accrued vacation pay appears similar to the invalid policy that took away an employee's accrued vacation time in *Electronic Data Sys. Corp. v. Attorney Gen.*, *supra* at 66-67. The trial judge correctly found this ordinance invalid. Because the ordinance is invalid, we need not determine whether the judge erred by not permitting the city to submit evidence at

trial that the plaintiff was terminated for fault.

The city's payment of salary and benefits after the plaintiff's termination, however, does not provide a substitute for payment for accrued vacation time. The city did not characterize [***11] the continued salary [**265] payments as payment for vacation accrual, and the city did not communicate in any way that the salary continuation was payment for accrued vacation time. In fact, the plaintiff's final pay stub from the city reflects a balance of fifty hours of vacation accrual, a balance which was "still tallied" and "carried on" by the city's payroll system through the pay period ending on June 29, 2007. The vacation balance on the pay stubs was not decreased when the city paid the salary continuation. Rather, the city continued to make salary payments in "an attempt to settle [the plaintiff's] claims."⁷ Gratuitous salary [*452] payments, and the benefits associated with salary payments, do not constitute payment for earned and accrued vacation time.⁸

7 The city also argues that when coupled with payment for vacation pay, the plaintiff's salary continuation would create a windfall for the plaintiff. We have discussed "windfall" in the context of *G. L. c. 149, § 148B*, and have noted that "[t]he 'windfall' the Legislature appeared most concerned with is the 'windfall' that employers enjoy from the misclassification of employees as independent contractors [such as] the avoidance of holiday, [***12] vacation, and overtime pay" (emphasis added). *Somers v. Converged Access, Inc.*, 454 Mass. 582, 592, 911 N.E.2d 739 (2009).

8 We note that had the city paid the plaintiff payments labeled as vacation pay, and merely been late in those payments, the city would not have been foreclosed from offsetting those payments from what was owed.

Moreover, the Wage Act requires employers to pay discharged employees earned wages "on the day of [their] discharge." *G. L. c. 149, § 148*. Here, the city paid the plaintiff on a continuing basis after his last day in the city's employ. The plaintiff's receipt of salary and benefits after his termination does not diminish the fact that the plaintiff was not paid for his accrued vacation time on the day of his discharge. No provision of the statute allows an

employer, after terminating an employee with or without cause, to claim that later payments, in the form of salary and other benefits, compensate for earned and unused vacation time. *G. L. c. 149, § 148*. See *Electronic Data Sys. Corp. (No. 2)*, *supra* at 70-71 (legislative history of Wage Act does not show intent to "allow employers free rein to deny or condition earned 'vacation payments' in any way they choose").

We conclude [***13] that the failure to pay unpaid wages, as defined by *G. L. c. 149, § 148*, cannot be mitigated by gratuitous, after-the-fact payments, and that employees who have not received payment for unused vacation time to which they are entitled may seek relief pursuant to *G. L. c. 149, § 150*. See *Electronic Data Sys. Corp. (No. 2)*, *supra* at 71.

3. Failure of proof of damages. The city asserts that the judge properly concluded that *G. L. c. 149, § 150*, requires a plaintiff to show he suffered actual damages. The city relies on several cases that do not have precedential value to support its argument that damages incurred can be mitigated by payments made after an employee's termination and that the plaintiff must affirmatively show actual damages to succeed in a Wage Act claim. These cases are distinguishable on their facts.

Contrary to the city's assertion, a violation of the Wage Act results in damages. It is settled law that the Wage Act "impose[s] strict liability on employers." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 592, 911 N.E.2d 739 (2009). Employers must "suffer the consequences" of violating the statute regardless of intent. *Id.* at 591. In these circumstances, the plaintiff has incurred damages [***14] [*453] under the terms of the statute because the city did not pay his earned, [**266] unused vacation time, a definitive amount of \$13,615.54, when he was terminated from the city's employment. See *Electronic Data Sys. Corp. (No. 2)*, *supra* at 71; *Wiedmann v. The*

Bradford Group, Inc., 444 Mass. 698, 708, 831 N.E.2d 304 (2005).

4. Litigation costs, attorney's fees, and treble damages.

The Wage Act provides that an employee aggrieved by a violation of *G. L. c. 149, § 148*, who prevails in a civil action for any damages incurred is entitled to an award of the costs of the litigation and reasonable attorney's fees. *G. L. c. 149, § 150*. See *Electronic Data Sys. Corp. (No. 1)*, *supra* at 1021 ("Where [the plaintiff is] owed vacation time under the employment agreement, payment for that unused vacation time is a form of 'wages' that must be paid pursuant to § 148"). Because it did not pay the plaintiff his wages in contravention of the Wage Act, the city must pay the plaintiff litigation costs and reasonable attorney's fees.

The Wage Act, as it existed when this action commenced, gave the judge discretion to award treble damages. See *Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165, 178-179, 732 N.E.2d 289 (2000), quoting *Dartt v. Browing-Ferris Indus., Inc.*, 427 Mass. 1, 17 [***15] (1998) (treble damages appropriate where conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others"). The plaintiff asserts that the city has acted with reckless indifference to his and other city employees' rights by adhering to an unlawful ordinance requiring terminated employees to forfeit accrued vacation pay. However, we conclude that, on these facts, the judge did not abuse his discretion when he determined that, because the city's conduct was "not outrageous," the plaintiff was not entitled to treble damages. See *Wiedmann v. The Bradford Group, Inc.*, *supra* at 709-710.

Conclusion. For the reasons set forth above, we reverse judgment and remand the case to the Superior Court to award the plaintiff vacation pay, litigation costs, and reasonable attorney's fees.

So ordered.

PAUL J. DURKIN vs. BOSTON RETIREMENT BOARD.

No. 12-P-741.

APPEALS COURT OF MASSACHUSETTS

83 Mass. App. Ct. 116; 981 N.E.2d 763; 2013 Mass. App. LEXIS 9

December 4, 2012, Argued

January 18, 2013, Decided

SUBSEQUENT HISTORY: Appeal denied by *Durkin v. Boston Ret. Bd.*, 464 Mass. 1107, 984 N.E.2d 296, 2013 Mass. LEXIS 186 (2013)

PRIOR HISTORY: [***1]

Bristol. Civil action commenced in the Taunton Division of the District Court Department on October 13, 2011. The case was heard by Francis J. Marini, J. After the filing of an action in the nature of certiorari in the Supreme Judicial Court for the county of Suffolk, the case was transferred to the Appeals Court.

DISPOSITION: Judgment affirmed.

HEADNOTES

Police, Retirement. Pension. Public Employment, Forfeiture of pension, Police. Municipal Corporations, Pensions, Police.

COUNSEL: Joseph G. Sandulli for the plaintiff.

Timothy J. Smyth for the defendant.

JUDGES: Present: Kantrowitz, Katzmann, & Hanlon, JJ.

OPINION BY: KANTROWITZ

OPINION

[*116] [**763] KANTROWITZ, J. In this pension forfeiture matter, we hold that the criminal actions of Paul J. Durkin were directly linked to his position as a police officer. As such, we affirm the decision of a judge of the District Court that determined that the Boston retirement board (board) correctly decided that Durkin's pension was forfeited.

Facts. Durkin was a Boston police officer. On June 21, 2006, after finishing his afternoon shift,

he went to an evening cookout at the Dorchester Yacht Club. He attended the cookout in civilian clothes and carried his department-issued firearm in his off-duty holster on his hip, as was permitted. Sometime after midnight, after consuming alcohol at the cookout, Durkin left [*117] and drove to a lounge in the Dorchester [***2] area of Boston, where he continued to drink.

As Durkin was leaving the lounge, a fellow police officer, Joseph Behnke, believing Durkin too intoxicated to drive, suggested that Durkin sleep at Behnke's house in the West Roxbury section of Boston. Durkin agreed. Upon their arrival at Behnke's house, Durkin, who had fallen asleep during the drive, woke up, left the car, and started walking "in a highly intoxicated state" in a direction away from Behnke's house. Behnke followed Durkin [**764] on foot, asking him to come back to the house. In response, Durkin, from a distance of five to six feet, pulled out his weapon and fired one shot at Behnke, striking him near his hip. In response, Behnke shouted, "I've been shot, Paul, you shot me!" Durkin walked away, and while leaving the scene called a friend on his cellular telephone and asked to be picked up and driven away.

On April 23, 2007, Durkin pleaded guilty to assault and battery by means of a dangerous weapon.¹ On March 31, 2009, he applied to the board for deferred superannuation retirement. Upon receiving no response, he requested a hearing. At the subsequent July 15, 2011, board hearing, Durkin acknowledged, among other things, that "the most [***3] important duty of a police officer is to protect life." On September 22, 2011, the board voted, pursuant to *G. L. c. 32, § 15(4)*, to deprive Durkin of his pension.

1 Durkin was sentenced to three years of probation, a sentence with which Behnke agreed.

Durkin appealed to the District Court, and the judge affirmed the decision of the board, finding that "laws prohibit[ing] . . . assault and battery by means of [a] dangerous weapon [were] certainly applicable to police officers who routinely carry such weapons on and off duty, who are trained extensively in their use and who have specific rules and regulations regulating their use."²

2 Durkin appealed to the Supreme Judicial Court, which remanded the matter to this court. Whether Durkin should have first proceeded to the Superior Court as in *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 131, 680 N.E.2d 45 (1997), and *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 538-539, 954 N.E.2d 541 (2011), rather than the Supreme Judicial Court (as is permitted under an action for certiorari), is a procedural issue neither raised by the parties nor addressed further by us.

[*118] Discussion. The applicable standards are set out in *Retirement Bd. of Maynard v. Tyler*, ante, 83 Mass. App. Ct. 109, 981 N.E.2d 740 (2013), [***4] and need not be reiterated here. Nor do we need to dwell at length on the special position that police officers hold. As the Supreme Judicial Court wrote in *Attorney Gen. v. McHatton*, 428 Mass. 790, 793-794, 705 N.E.2d 252 (1999), quoting from *Police Commr. of Boston v. Civil Service Commn.*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27 (1986):

"Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness

to perform their official responsibilities." (Emphasis in original).

See *Falmouth v. Civil Serv. Commn.*, 61 Mass. App. Ct. 796, 801-802, 814 N.E.2d 735 (2004) ("[p]olice officers must . . . behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. This applies to off-duty as well as on-duty officers" [citations [***5] omitted]).³

3 We recognize the different standards between job termination or disqualification and pension forfeiture.

In *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 179, 843 N.E.2d 603 (2006), the Supreme Judicial Court, in upholding the forfeiture of the member's pension, discussed off-duty conduct:

[**765] "At the heart of a clerk-magistrate's role is the unwavering obligation to tell the truth, to ensure that others do the same through the giving of oaths to complainants, and to promote the administration of justice. When [the member] committed the crimes of perjury and obstruction of justice, he violated the fundamental tenets of the code and of his oath of office, notwithstanding his contention that such misconduct occurred in the context of what was arguably a personal matter."

It cannot be gainsaid that police officers, who are extensively [*119] trained in the use of firearms, and who carry their service revolvers with them while off-duty, have a high degree of responsibility⁴ to which the public deserves and demands adherence. Simply, an officer who consumes an excess amount of alcohol and uses his service revolver to shoot, without any justification whatsoever, a fellow officer from a distance of a few [***6] feet has sadly breached that trust.

4 See Boston Police Department Rules and Procedures on Use of Deadly Force, Rule 303, § 5 (Pointing Firearms) and § 6 (Discharge of Firearms) (April 11, 2003).

The nexus required by *G. L. c. 32, § 15(4)*, is not that the crime was committed while the mem-

ber was working, or in a place of work, but only that the criminal behavior be connected with the member's position. "The nature of [the member's] particular crimes cannot be separated from the nature of his particular office when what is at stake is the integrity of [the] system." *Id. at 180*. Here, Durkin engaged in the very type of criminal behavior he was required by law to prevent. This violation was directly related to his position as a police officer as it demonstrated a violation of the public's trust as well as a repudiation of his official duties. Clearly, at the heart of a police officer's role is the unwavering obligation to protect life, which Durkin himself recognized at his hearing. His extreme actions violated the integrity of the system which he was sworn to uphold. The board and the District Court judge acted properly in concluding that Durkin's pension is forfeited.⁵

5 In *Retirement Bd. of Maynard v. Tyler, supra* [***7] at, a pension was ordered reinstated as, however reprehensible the actions of the member (a firefighter), they were not directly linked to his official duties. Notwithstanding the high standards placed on firefighters and police officers, not every off-duty illegal act qualifies as a "violation of the laws applicable to his office or position." *Bulger, 446 Mass. at 179*, quoting from *G. L. c. 32, § 15(4)*. As both Tyler and this matter demonstrate, every case must be decided by examining its own set of unique facts and circumstances. *Bulger, supra at 175*.

Judgment affirmed.

ROBERT D. HERRICK vs. ESSEX REGIONAL RETIREMENT BOARD & another.¹

1 Contributory Retirement Appeal Board.

SJC-11239

SUPREME JUDICIAL COURT OF MASSACHUSETTS

465 Mass. 801; 2013 Mass. LEXIS 578

March 5, 2013, Argued

July 15, 2013, Decided

PRIOR HISTORY: [1]**

Essex. Civil action commenced in the Superior Court Department on March 24, 2005. Following review by the Appeals Court, *77 Mass. App. Ct. 645, 933 N.E.2d 666 (2010)*, a motion for assessment of damages was heard by Howard J. Whitehead, J., and corrected judgment was entered by him. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court. *Herrick v. Essex Reg'l Ret. Bd., 77 Mass. App. Ct. 645, 933 N.E.2d 666, 2010 Mass. App. LEXIS 1205 (2010)*

HEADNOTES

Public Employment, Retirement benefits, Forfeiture of pension. Judgment, Interest. Practice,

Civil, Interest. Municipal Corporations, Pensions. County, Retirement board. Contract, Damages.

COUNSEL: Michael Sacco for Essex Regional Retirement Board.

H. Ernest Stone for the plaintiff.

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

OPINION BY: GANTS

OPINION

[*802] GANTS, J. The questions on appeal are whether plaintiff Robert Herrick, a member of a public employee contributory retirement system

governed by *G. L. c. 32, §§ 1-28*, inclusive, is entitled to prejudgment interest on a retroactive award of superannuation retirement benefits and, if so, at what rate of interest. We hold that the plaintiff is not entitled to interest at a rate of twelve per cent per annum pursuant to *G. L. c. 231, § 6C*, because his suit was not an action "based on contractual obligations." We further hold that the plaintiff is not entitled to twelve per cent annual interest pursuant to *G. L. c. 231, § 6H*, because interest in this case is "otherwise provided [**2] by law" under *G. L. c. 32, § 20 (5) (c) (2)*. We interpret *§ 20 (5) (c) (2)* to provide that, where, as here, a retirement board makes a legal error in denying retirement benefits that is corrected by a court, the plaintiff is entitled to a rate of interest determined by the board's actuary "so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid."

Background. The plaintiff worked for twenty-seven years as a custodian and maintenance mechanic for the Wenham Housing Authority and was a member of the Essex Regional Retirement System.² On May 1, 2003, he was charged with sexually assaulting his daughter and, that same day, resigned his position. On May 6, he submitted an application for voluntary superannuation retirement pursuant to *G. L. c. 32, § 5 (1) (a)*. [**3] On May 15, he pleaded guilty to two counts of indecent assault and battery on a child under fourteen years of age, and was sentenced to two and one-half years in a house of correction, eighteen months of which to serve. Although he met the age and service time requirements to be eligible for superannuation retirement benefits, the Essex Regional Retirement Board³ (board) on June 27, 2003, voted to deny his application pursuant to *G. L. c. 32, § 10 (1)*, [*803] based on a finding of forfeiture due to moral turpitude.⁴ On July 14, 2004, after a hearing, an administrative magistrate of the Division of Administrative Law Appeals issued an order affirming the board's denial of the plaintiff's application for superannuation retirement benefits. On February 18, 2005, the Contributory Retirement Appeal Board (CRAB) accepted the administrative magistrate's findings of fact and affirmed her decision.

2 Employees of towns with fewer than 10,000 inhabitants who are pension-eligible and not teachers become members of the

county retirement system. *G. L. c. 32, § 28 (3) (b)*.

3 "Each of the several retirement systems, State, county, city or town, is in general an independent unit, having its own separate assets [**4] and liabilities and is under the jurisdiction of its own separate board." *O'Connor v. Bristol County*, 329 Mass. 741, 746, 110 N.E.2d 492 (1953). See *G. L. c. 32, § 20*.

4 Prior to its amendment in 2009, see St. 2009, c. 21, §§ 9-11, *G. L. c. 32, § 10 (1)*, provided:

"Any member classified in Group 1, Group 2 or Group 4 who after completing twenty or more years of creditable service, resigns or voluntarily terminates his service, or 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 without moral turpitude on his part, or any member who, after having attained age fifty-five, resigns, or fails of nomination or re-election, or fails to become a candidate for nomination or re-election, or fails of reappointment or is removed or discharged from his office or position without moral turpitude on his part, or any such member whose office or position is abolished, shall, upon his written application on a prescribed form filed with the board, receive a superannuation retirement allowance . . ."

The plaintiff sought judicial review pursuant to *G. L. c. 30A, § 14*. In June, 2009, a Superior Court judge reversed [**5] CRAB's decision and entered judgment for the plaintiff, directing the board to grant plaintiff's application for superannuation retirement benefits, retroactive to the date of his resignation. The judge found that the board and CRAB made an error of law in their interpretation

of *G. L. c. 32, § 10 (1)*, concluding that a member of a retirement system forfeits his retirement benefits under § 10 (1) where the member is "removed or discharged from his office or position" because of the member's moral turpitude, not where, as here, the plaintiff voluntarily resigned his position. The judge determined that a member who resigns his position is entitled to superannuation retirement benefits for which he qualifies regardless whether his resignation was motivated by the member's moral turpitude or by the likelihood that his misconduct will lead to an involuntary discharge. The Appeals Court affirmed the judgment. See *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 655, 933 N.E.2d 666 (2010).

[*804] Subsequently, the board on March 31, 2011, issued a check to the plaintiff for \$191,165.76, which represented his superannuation retirement benefits retroactive to the date of his resignation, but did not [**6] include any interest thereon. The plaintiff then filed a motion in the Superior Court, claiming that he was entitled to interest on the retroactive payment pursuant to *G. L. c. 231, § 6C*, at the rate of twelve per cent per annum. A judge concluded that § 6C applied and ordered that "interest be awarded at the rate of [twelve per cent] on each amount of plaintiff's unpaid benefits commencing from the date that such amount became payable." The judge later clarified that he regarded each past failure of the board to pay the plaintiff his monthly retirement benefit as a breach of contract, so that the plaintiff was entitled to twelve per cent simple interest on each unpaid monthly payment from the date that payment was due. The board appealed the judge's award of interest, the case was entered in the Appeals Court, and we transferred it to this court on our own motion.

Discussion. *General Laws c. 30A, § 14*, which provides for judicial review of the final decisions of agencies in adjudicatory proceedings, is silent as to the question of interest where an agency decision denying the payment of money is reversed. *Section 14 (7)* provides only that the reviewing court "may set aside or modify [**7] the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced."

The plaintiff contends, and the judge ruled, that he is entitled to the award of interest under *G. L. c. 231, § 6C*, which provides, in part:

"In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve per cent per annum from the date of the breach or demand" (emphasis added).

By its terms, § 6C only applies to an action "based on contractual obligations." A contractual obligation may be created by an agreement or be imposed by statute, and § 6C applies to [*805] contracts derived from both sources. *Lexington v. Bedford*, 378 Mass. 562, 576, 393 N.E.2d 321 (1979). The plaintiff claims that he has a contractual right to his retirement benefits that is imposed by *G. L. c. 32, § 25 (5)*, which provides:

"Effect of Amendments or Repeal. -- The provisions of sections one to twenty-eight, inclusive, and of corresponding provisions of earlier laws shall be deemed [**8] to establish and to have established membership in the retirement system as a contractual relationship under which members who are or may be retired for superannuation are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits provided for thereunder, if such member or members have paid the stipulated contributions specified in said sections or corresponding provisions of earlier laws."

In *Opinion of the Justices*, 364 Mass. 847, 856-860, 303 N.E.2d 320 (1973), we declared that § 25 (5) was intended to reject the thesis suggested by a number of cases that contributory retirement plans were "State-granted gratuities" that did not establish contractual relationships with vested rights constitutionally protected against subsequent legislation reducing or eliminating retirement benefits. "The minimal meaning of this change is that the 'contract' is formed when a person becomes a member by entering the employment, and he is entitled to have the level of rights

and benefits then in force preserved in substance in his favor without modification downwards." *Id.* at 860. We [**9] added:

"Contract' . . . should be understood here in a special, somewhat relaxed sense. . . . It is not really feasible -- nor would it be desirable -- to fit so complex and dynamic a set of arrangements as a statutory retirement scheme into ordinary contract law which posits as its model a joining of the wills of mutually assenting individuals to form a specific bargain. As the commentators show, a retirement plan for public employees does not readily submit itself to analysis according to Professor Williston's canons. . . . When, therefore, the characterization 'contract' is used, it is best understood as meaning that the retirement scheme has [**806] generated material expectations on the part of employees and those expectations should in substance be respected."

Id. at 861. In contrast with a traditional contract, the contractual commitment provided in § 25 (5) "protects the member of a retirement plan in the core of his reasonable expectations, but not against subtractions which, although possibly exceeding the trivial, can claim certain practical justifications." *Id.* at 862. Therefore, § 25 (5) creates "something less than a full contractual relationship, but one that protects the 'core' [**10] of a member's 'reasonable expectations' of 'vested pension rights.'" *State Bd. of Retirement v. Woodward*, 446 Mass. 698, 706, 847 N.E.2d 298 (2006), quoting *Opinion of the Justices*, *supra* at 856-862.

In the *Woodward* case, we noted that, "[w]here the Legislature intended to give a retirement board . . . an 'action in contract' under *G. L. c. 32*, it did so explicitly." *Id.* at 705-706, and statutes cited. We held in that case that a pension forfeiture is not an action in contract and therefore concluded that the State Board of Retirement had the authority to forfeit the pension of a convicted public official after the expiration of the six-year statute of limitations for contract actions.⁵ *Id.* at 706. Where the forfeiture of a pension is not an action in contract, an action challenging the lawfulness of the forfeiture of a pension is also not an action in contract.

See *id.* Cf. *Robinson v. Teachers' Retirement Bd.*, 414 Mass. 340, 342, 607 N.E.2d 746 (1993) (nothing in *G. L. c. 32* suggests that claims for accidental death benefits are contractual). Therefore, we conclude that interest may not be awarded under *G. L. c. 231, § 6C*, because judicial review of the board's decision to forfeit the plaintiff's pension is based [**11] on "something less" than a contractual obligation.⁶

5 The pension forfeiture in *State Bd. of Retirement v. Woodward*, 446 Mass. 698, 700, 847 N.E.2d 298 (2006), was required by *G. L. c. 32, § 15 (4)*, which provides in pertinent 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"

6 The judge believed that he was bound to award interest under *G. L. c. 231, § 6C*, by what he understood to be the controlling authority in *Thibodeau v. Seekonk*, 52 Mass. App. Ct. 69, 750 N.E.2d 1037 (2001) (*Thibodeau II*). The plaintiff in that case had been demoted to a lieutenant from his position as captain in the Seekonk fire department, but the department failed to provide the local retirement board with the written notice then required under *G. L. c. 32, § 16 (2)*, as amended through St. 1982, c. 630, § 21, and repealed by St. 1996, c. 306, § 19, thereby rendering the demotion ineffective. *Thibodeau v. Seekonk*, 40 Mass. App. Ct. 367, 367-368, 664 N.E.2d 30 (1996) (*Thibodeau I*). After the Appeals Court determined in *Thibodeau I* that the plaintiff [**12] was entitled to restoration to his position as fire captain and the back pay he would have earned in that position, see *id.* at 372, the primary issue in *Thibodeau II* was whether he was entitled to twelve per cent interest on that award from the date of his demotion under § 6C or from the date of filing of his complaint under § 6H. *Thibodeau II*, *supra* at 72. The Appeals Court held that the plaintiff was entitled to an interest award under § 6C. *Id.* at 73-74. In contrast with the instant case, the damages at issue in *Thibodeau II* were back pay, not retirement benefits, and the statute at

issue included a remedy provision that expressly stated that a wronged employee should be restored to his former position "without loss of compensation." *Id.* at 72. Given these quite different circumstances, we conclude that the judge's ruling should not have been controlled by the holding in *Thibodeau II*. In any event, the holding is not controlling on this court.

[*807] The plaintiff on appeal contends, in the alternative, that he is entitled to an award of interest under *G. L. c. 231, § 6H*.⁷ Section 6H is a catch-all interest provision that applies to "any action in which damages are awarded, but in which [**13] interest on said damages is not otherwise provided by law," and provides for interest at twelve per cent per annum calculated from the commencement of the suit. *G. L. c. 231, § 6H*.⁸ See *G. L. c. 231, § 6B*. By its terms, therefore, § 6H does not apply if interest is "otherwise provided by law." We conclude that § 6H does not apply to this judgment because another rate of interest [*808] -- the interest rate that will yield the "actuarial equivalent," as defined in *G. L. c. 32, § 1*⁹ -- has been "otherwise provided by law" under *G. L. c. 32, § 20 (5) (c) (2)*, which applies when a retirement board makes an error regarding a benefit determination or calculation.¹⁰

7 The plaintiff did not argue in the Superior Court that he was entitled to an award of interest under *G. L. c. 231, § 6H*; nor did the judge address § 6H in his order awarding interest. Although we generally deem issues that are not argued below to be waived, see *Carey v. New England Organ Bank*, 446 *Mass. 270, 285, 843 N.E.2d 1070 (2006)*, we will address whether § 6H applies to this action because the issue is of importance to the thousands of members of the Commonwealth's various contributory retirement systems and was fully briefed by the parties. See [**14] *Cottam v. CVS Pharmacy*, 436 *Mass. 316, 323, 764 N.E.2d 814 (2002)*.

8 *General Laws c. 231, § 6H*, provides:

"In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by the clerk of court to the

amount of damages interest thereon at the rate provided by section six B to be determined from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law."

General Laws c. 231, § 6B, provides for a twelve per cent annual interest rate.

9 The "actuarial equivalent" is defined in *G. L. c. 32, § 1*, as "any benefit of equal value when computed upon the basis of a mortality table to be selected by the actuary and an interest rate determined by the actuary."

10 *General Laws c. 32, § 20 (5) (c) (2)*, provides, in pertinent part:

"When an error exists in the records maintained by the system or an error is made in computing a benefit and, as a result, a member or beneficiary receives from the system more or less than the member or beneficiary would have been entitled to receive had the records been correct or had the error not been made, the records or error [**15] shall be corrected . . . as far as practicable, and future payments shall be adjusted so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid."

By enacting § 20 (5) (c) (2), the Legislature "recognize[d] that, in a complicated system of this type, errors are bound to occur." *Boston Retirement Bd. v. McCormick*, 345 *Mass. 692, 698 n.5, 189 N.E.2d 204 (1963)*. While the statute speaks of errors in record-keeping and computation, its overriding purpose is to enable a retirement board to correct an honest error by putting members and beneficiaries in the same position they would have been had the error not been made. Cf. *Bianchi v. Retirement Bd. of Somerville*, 359 *Mass. 642, 650*,

270 N.E.2d 792 (1971) ("The error in the present case was that of the board, and that error can readily and fairly be corrected now without prejudice to the board, [the decedent's] estate or the widow"); *Boston Retirement Bd. v. McCormick*, supra at 698 ("We see nothing in the statute which prevents a member from receiving those benefits because of an honest error which can readily and fairly be corrected"). Under the plain meaning of the statute, where a retired public [**16] employee receives a lesser amount of retirement benefits because of a record-keeping or computational error made by a retirement board, the retiree, once the error is discovered, shall receive the actuarial equivalent of the pension to which he is correctly entitled. We see no reason why the Legislature would have intended the corrective action by the board to be any different where the retired public employee erroneously was deprived of all his retirement [*809] benefits and where the board's error was an error of law rather than of record-keeping or computation. Therefore, we interpret § 20 (5) (c) (2) to provide a remedy for all errors made by the board that affect the amount of benefits a member or beneficiary receives, allowing the error to be corrected so that members and beneficiaries receive the actuarial equivalent of the benefits they would have received had the board not erred. Because the board's actuary must determine an appropriate interest rate to yield the actuarial equiv-

alent, the interest rate must be determined by the board, not the court clerk, on remand from a reversal of a board's decision under *G. L. c. 30A*.¹¹

11 Although the interest rate that will yield an actuarial [**17] equivalent must be determined by the Essex Regional Retirement Board's actuary under *G. L. c. 32, § 1*, we note that § 1 provides that, after December 31, 1983, "actuarial assumed interest' shall be interest that would have been so credited using a rate equal to a system's actuarial assumed rate of return on investments, . . . rather than regular interest."

Conclusion. For these reasons, we reverse the judgment awarding twelve per cent simple interest under *G. L. c. 231, § 6C*, on the retroactive award of superannuation retirement benefits, and order that the case be remanded to the Superior Court for entry of a judgment directing the board forthwith to determine the rate of interest that will yield the "actuarial equivalent of the pension or benefit" to which the plaintiff was correctly entitled under *G. L. c. 32, § 20 (5) (c) (2)*, and to make a one-time, lump-sum payment to the plaintiff amounting to the difference between that actuarial equivalent and the \$191,165.76 that has already been paid.

So ordered.

HERBERT KEARNS vs. STATE BOARD OF RETIREMENT & another.¹

1 Contributory Retirement Appeal Board.

No. 12-P-174.

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 682; 977 N.E.2d 100; 2012 Mass. App. LEXIS 270

September 6, 2012, Argued

October 19, 2012, Decided

SUBSEQUENT HISTORY: Appeal denied by *Kearns v. State Bd. of Ret.*, 464 Mass. 1102, 979 N.E.2d 1111, 2012 Mass. LEXIS 1212 (Mass., Dec. 19, 2012)

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on March 25, 2010. The case was heard by D. Lloyd Macdonald, J., on a motion for judgment on the pleadings.

HEADNOTES

Contributory Retirement Appeal Board. State Police. Public Employment, Accidental disability retirement, Police. Administrative Law, Agency's interpretation of statute, Judicial review. Words, "Regular compensation."

COUNSEL: Crystal L. Matthews for State Board of Retirement.

Paul T. Hynes for the plaintiff.

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

OPINION BY: GRAHAM

OPINION

[**101] [*682] GRAHAM, J. The State Board of Retirement (board) appeals from a judgment on the pleadings entered in the Superior Court reversing a decision of the Contributory Retirement Appeal Board (CRAB). The CRAB decision denied the claimant, Herbert Kearns, a retired police officer, an increase in retirement benefits pursuant to *G. L. c. 32, § 90A*, to account for a bonus paid to active-duty police officers who pass a physical fitness [*683] test. On appeal, the board argues that the Superior Court judge erred in concluding that the claimant was entitled to an increase in his retirement benefits because the physical fitness bonus does not qualify as "regular compensation" as defined in *G. L. c. 32, § 1*. We agree and accordingly reverse.

1. Procedural and factual background. We recount the undisputed facts. The claimant, who was born in 1924, began service as a Metropolitan District Commission (MDC) police [***2] officer in 1951. In January, 1971, while performing his official duties, he suffered a serious injury to his back. On January 30, 1971, he began receiving accidental disability retirement benefits equal to seventy-two percent of his regular compensation at the time of the injury. Thereafter, in accord with *G. L. c. 32, § 90A*, the claimant's retirement benefits periodically were increased.²

2 Before 1991, these periodic increases were limited to an amount not exceeding one-half of the rate of regular compensation payable to an active-duty MDC police officer of the same grade or classification that

the claimant held upon retirement. In December, 1991, however, the Legislature consolidated the MDC police force and the Massachusetts State police. *St. 1991, c. 412, § 1*. Thereafter, MDC officers on accidental disability retirement were to have their retirement allowances periodically increased to an amount not exceeding one-half of the rate of regular compensation payable to a Massachusetts State police officer in a comparable grade or classification (as determined by the personnel administrator). *G. L. c. 32, § 90A*, as amended through *St. 1991, c. 412, § 41*.

[**102] By letter dated April 12, 2007, [***3] the claimant requested that the board increase his retirement benefits to reflect bonuses paid to active-duty State police officers who pass a physical fitness test. The board denied the claimant's request. On September 7, 2007, the claimant appealed the board's decision to CRAB. CRAB, in turn, referred the matter to a Division of Administrative Law Appeals magistrate for a hearing. In a decision dated December 4, 2009, the magistrate reversed the board's decision, concluding that the claimant's retirement benefits should be increased to reflect the two and one-half percent bonus paid to active-duty State police officers who pass the physical fitness test. On January 13, 2010, the board filed objections to the magistrate's decision with CRAB. After a hearing, in a decision dated February 24, 2010, CRAB reversed the magistrate's decision, affirmed the board's initial decision, and concluded that the claimant was [*684] not entitled to the increase in retirement benefits because the physical fitness bonus was not "regular compensation" as defined in *G. L. c. 32, § 1*.

On March 25, 2010, the claimant sought judicial review of CRAB's decision in the Superior Court pursuant to *G. L. c. 30A, § 14*, [***4] and thereafter moved for judgment on the pleadings on October 1, 2010. After a hearing, a judge of the Superior Court granted the claimant's motion for judgment on the pleadings, concluding, as the magistrate did, that the claimant's benefits should be increased to reflect the physical fitness bonus.

2. Discussion. The only dispute before us is one of statutory interpretation: whether the term "regular compensation," as defined by the Legislature in *G. L. c. 32, § 1*, encompasses the bonus paid to officers who pass a physical fitness test. See *Pelonzi v. Retirement Bd. of Beverly, 451 Mass.*

475, 478, 886 N.E.2d 707 (2008). In conducting our review in this case, we are mindful of the principle that "[w]here an agency's interpretation of a statute is reasonable, the court should not supplant it with its own judgment." *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 441 Mass. 78, 82, 803 N.E.2d 325 (2004). Further, in accord with the standards of *G. L. c. 30A, § 14(7)*, we "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *Brackett v. Civil Serv. Comm'n.*, 447 Mass. 233, 241-242, 850 N.E.2d 533 (2006), quoting from *Iodice v. Architectural Access Bd.*, 424 Mass. 370, 375-376, 676 N.E.2d 1130 (1997). [***5] At the same time, we exercise de novo review of legal questions, and if the agency's view of the statutory language "is inconsistent with governing law," we cannot uphold its decision. *Plymouth v. Civil Serv. Commn.*, 426 Mass. 1, 5, 686 N.E.2d 188 (1997).

We begin with the relevant statutory language. See *Leary v. Contributory Retirement Appeal Bd.*, 421 Mass. 344, 345-346, 657 N.E.2d 224 (1995), quoting from *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37, 364 N.E.2d 1215 (1977) ("[S]tatutory language itself is the principal source of insight into the legislative purpose"). *General Laws c. 32, § 90A*, as amended through St. 2000, c. 159, § 95, provides, in pertinent part, that the claimant, as a former MDC police officer entitled to accidental disability retirement benefits, "shall have his retirement allowance increased to an amount not exceeding [*685] one half the rate of regular compensation payable to state police officers holding similar positions . . . in the comparable grade or classification . . . occupied by [**103] such former officer at the time of his retirement." *General Laws c. 32, § 1*, as amended through St. 1979, c. 681, in turn, defines "regular compensation" as "the salary, wages or other compensation in whatever form, lawfully determined [***6] for the individual service of the employee by the employing authority, not including bonus, overtime, severance pay for any and all unused sick leave, early retirement incentives, or any other payments made as a result of giving notice of retirement."

This "straightforward and unambiguous" language "denotes ordinary, recurrent, or repeated payments not inflated by any 'extraordinary ad hoc' amounts such as bonuses or overtime pay." *Pelonzi*, 451 Mass. at 479, quoting from *Bulger v.*

Contributory Retirement Appeal Bd., 447 Mass. 651, 658, 856 N.E.2d 799 (2006). See *Bower v. Contributory Retirement Appeal Bd.*, 393 Mass. 427, 429, 471 N.E.2d 1296 (1984), quoting from *Boston Assn. of Sch. Administrators & Supervisors v. Boston Retirement Bd.*, 383 Mass. 336, 341, 419 N.E.2d 277 (1981) ("regular' as it modifies 'compensation,' imports the idea of ordinariness or normality as well as the idea of recurrence"). "In addition, the language 'salary, wages or other compensation in whatever form,' demonstrates 'a legislative intent to include the many distinct ways in which individuals are paid for their services.'" *Pelonzi*, *supra*, quoting from *Bulger*, *supra*. The Supreme Judicial Court has emphasized that the § 1 definition of "regular compensation" [***7] "refers to remuneration geared to work or services performed," and therefore operates as a "safeguard against the introduction into the computations [of retirement benefits] of adventitious payments to employees," which is needed especially where, as here, "the public entity that negotiates a collective agreement is not the one that will have to find the funds to pay the continuing retirement benefits." *Boston Assn. of Sch. Administrators & Supervisors*, 383 Mass. at 341.

Here, the pertinent collective bargaining agreement of the State Police Association of Massachusetts, in effect from January 1, 2007, to December 31, 2008, provides that officers who successfully pass a physical fitness test will receive a two and [*686] one-half percent increase in their base salary. It further provides that any officer who fails the test three times "will be subject to a [temporary duty] assignment" and that "[s]uch [temporary duty] assignment shall continue until the employee successfully passes the physical fitness test." Officers who do not pass the physical fitness test are not eligible to receive the increase to their base salary.

We conclude that CRAB's ruling that the physical fitness bonus should [***8] not be regarded as "regular compensation" as defined in *G. L. c. 32, § 1*, was reasonable. In *O'Brien v. Contributory Retirement Appeal Bd.*, 76 Mass. App. Ct. 901, 902, 923 N.E.2d 91 (2010), we found that a contract-based physical fitness bonus paid to a police officer before he retired due to accidental disability was not "regular compensation" as defined in *G. L. c. 32, § 1*. Although it is true, as the claimant argues, that here, unlike in *O'Brien*, the bonus becomes incorporated into the base salary of

its recipients, and that almost all active-duty officers eventually may pass the test, nevertheless the additional compensation is, ultimately, a bonus paid only upon successful passage of the test. We therefore agree with CRAB that the bonus operates as a contract-based incentive to successful passage of the physical fitness test, and thus does not form part of the "regular compensation" owed to each person who attains a particular grade or classification as compensation for his or her regular service as a police officer. See *ibid.* See also *Pelonzi*, 451 *Mass. at 480* (automobile provided to "on-call" emergency responder for use in his employment was not "regular compensation" because it "was not intended to compensate the plaintiff for his service"). As CRAB reasoned, the physical fitness bonus is, indeed, the sort of "ad-

ventitious" payment under a contract negotiated by "the public entity that . . . is not the one that will have to find the funds to pay the continuing retirement benefits" against which the § 1 definition of regular compensation acts as a safeguard. See *Boston Assn. of Sch. Administrators & Supervisors, supra*. CRAB's interpretation of the retirement statute was thus both reasonable and consistent with governing law.

3. Conclusion. The judgment of the Superior Court allowing the claimant's motion for judgment on the pleadings and reinstating the decision of the Division of Administrative Law Appeals magistrate is reversed, and a new judgment is to be entered affirming CRAB's decision.

So ordered.

COY A. KOONTZ, JR., PETITIONER v. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

No. 11-1447.

SUPREME COURT OF THE UNITED STATES

133 S. Ct. 2586; 186 L. Ed. 2d 697; 2013 U.S. LEXIS 4918; 81 U.S.L.W. 4606; 76 ERC (BNA) 1649; 43 ELR 20140; 24 Fla. L. Weekly Fed. S 435

**January 15, 2013, Argued
June 25, 2013, Decided**

NOTICE:

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

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA
St. Johns River Water Mgmt. Dist. v. Koontz, 77 *So. 3d 1220*, 2011 *Fla. LEXIS 2617* (Fla., 2011)

DISPOSITION: 77 *So. 3d 1220*, reversed and remanded.

SYLLABUS

[*2588] [**702] Coy Koontz, Sr., whose estate is represented here by petitioner, sought permits to develop a section of his property

[*2589] from respondent St. Johns River Water Management District (District), which, consistent with Florida law, requires permit applicants wishing to build on wetlands to offset the resulting environmental damage. Koontz offered to mitigate the environmental effects of his development proposal by deeding to the District a conservation easement on nearly three-quarters of his property. The District rejected Koontz's proposal and informed him that it would approve construction only if he (1) reduced the size of his development and, *inter alia*, deeded to the District a conservation easement on the resulting larger remainder of his property or (2) hired contractors to make improvements to District-owned wetlands several miles away. Believing the District's demands to be excessive in light of the environmental effects his proposal would have caused, Koontz filed suit under a state law that provides money damages for

agency action that is an "unreasonable exercise of the state's police power [***2] constituting a taking without just compensation."

The trial court found the District's actions unlawful because they failed the requirements of *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, and *Dolan v. City of Tigard*, 512 U. S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304. Those cases held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. The District Court of Appeal affirmed, but the State Supreme Court reversed on two grounds. First, it held that petitioner's claim failed because, unlike in *Nollan* or *Dolan*, the District *denied* the application. Second, the State Supreme Court held that a demand for money cannot give rise to a claim under *Nollan* and *Dolan*.

Held:

1. The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when it denies the permit. Pp. 6-14.

(a) The unconstitutional conditions doctrine vindicates the Constitution's enumerated rights by preventing the [**703] government from coercing people into giving them up, and *Nollan* and *Dolan* represent a special [***3] application of this doctrine that protects the *Fifth Amendment* right to just compensation for property the government takes when owners apply for land-use permits. The standard set out in *Nollan* and *Dolan* reflects the danger of governmental coercion in this context while accommodating the government's legitimate need to offset the public costs of development through land use exactions. *Dolan*, *supra*, at 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304; *Nollan*, *supra*, at 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677. Pp. 6-8.

(b) The principles that undergird *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. Recognizing such a distinction would enable the government to evade the *Nollan/Dolan* limitations simply by phrasing its demands for property as

conditions precedent to permit approval. This Court's unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See, e.g., *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U. S. 583, 592-593, 46 S. Ct. 605, 70 L. Ed. 1101. It makes no difference that no property was actually taken in this case. Extortionate demands [*2590] [***4] for property in the land-use permitting context run afoul of the *Takings Clause* not because they take property but because they impermissibly burden the right not to have property taken without just compensation. Nor does it matter that the District might have been able to deny Koontz's application outright without giving him the option of securing a permit by agreeing to spend money improving public lands. It is settled that the unconstitutional conditions doctrine applies even when the government threatens to withhold a gratuitous benefit. See e.g., *United States v. American Library Assn. Inc.*, 539 U. S. 194, 210, 123 S. Ct. 2297, 156 L. Ed. 2d 221. Pp. 8-11.

[*2591] (c) The District concedes that the denial of a permit could give rise to a valid *Nollan/Dolan* claim, but urges that this Court should not review this particular denial because Koontz sued in the wrong court, for the wrong remedy, and at the wrong time. Most of its arguments raise questions of state law. But to the extent that respondent alleges a federal obstacle to adjudication of petitioner's claim, the Florida courts can consider respondent's arguments in the first instance on remand. Finally, the District errs in arguing that because it gave Koontz another [***5] avenue to obtain permit approval, this Court need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan*. Had Koontz been offered at least one alternative that satisfied *Nollan* and *Dolan*, he would not have been subjected to an unconstitutional condition. But the District's offer to approve a less ambitious project does not obviate the need to apply *Nollan* and *Dolan* to the conditions it imposed on its approval of the project Koontz actually proposed. Pp. 12-14.

2. The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when its demand [**704] is for money. Pp. 14-22.

(a) Contrary to respondent's argument, *Eastern Enterprises v. Apfel*, 524 U. S. 498, 118 S. Ct.

2131, 141 L. Ed. 2d 451, where five Justices concluded that the *Takings Clause* does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest," *id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (KENNEDY, J., concurring in judgment and dissenting in part), does not control here, where the demand for money did burden the ownership of a specific parcel of land. Because of the direct link between the government's demand and a specific parcel of real property, this [***6] case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue. Pp. 15-18.

(b) The District argues that if monetary exactions are subject to *Nollan/Dolan* scrutiny, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. But the District exaggerates both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain. It is beyond dispute that "[t]axes and user fees . . . are not 'takings,'" *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 243, n. 2, 123 S. Ct. 1406, 155 L. Ed. 2d 376, yet this Court has repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained through taxation, *e.g.*, *id.*, at 232, 123 S. Ct. 1406, 155 L. Ed. 2d 376. Pp. 18-21.

(c) The Court's holding that monetary exactions are subject to scrutiny under *Nollan* and *Dolan* will not work a revolution in land [***7] use law or unduly limit the discretion of local authorities to implement sensible land use regulations. The rule that *Nollan* and *Dolan* apply to monetary exactions has been the settled law in some of our Nation's most populous States for many years, and the protections of those cases are often redundant with the requirements of state law. Pp. 21-22.

77 So. 3d 1220, reversed and remanded.

COUNSEL: Paul J. Beard, II argued the cause for petitioner.

Paul R. Q. Wolfson argued the cause for respondent.

Edwin S. Kneedler argued the cause for the United States as amicus curiae.

JUDGES: ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

OPINION BY: ALITO

OPINION

JUSTICE ALITO delivered the opinion of the Court.

Our decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of [**705] his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management [***8] District (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr.¹ The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

¹ For ease of reference, this opinion refers to both men as "petitioner."

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the [*2592] south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage [***9] power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The same year that petitioner purchased his property, Florida enacted the Water Resources Act, which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." [***10] 1972 Fla. Laws ch. 72-299, pt. IV, §1(5), pp. 1115, 1116 (codified as amended at *Fla. Stat. §373.403(5)* (2010)). Under the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." 1972 Fla. Laws §4(1), at 1118 (codified as amended at *Fla. Stat. §373.413(1)*).

In 1984, in an effort to protect the State's rapidly diminishing wetlands, [**706] the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management

(WRM) permit. 1984 Fla. Laws ch. 84-79, pt. VIII, §403.905(1), pp. 204-205. Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. See *Fla. Stat. §373.414(1)*. Consistent with the Henderson Act, the St. Johns River Water Management District, [***11] the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation [*2593] easement on that portion of his property.

The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District [***12] proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to Dis-

trict-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite [***13] project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent." App. 75.

Believing the District's demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, [**707] petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under *Fla. Stat. §373.617(2)*, which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

B

The Florida Circuit Court granted the District's motion to dismiss on the ground that petitioner had not adequately exhausted his state-administrative remedies, but the Florida District Court of Appeal for the Fifth Circuit reversed. On remand, the State Circuit Court held a 2-day bench trial. After considering testimony from several experts who examined petitioner's property, the trial court found that the property's northern section had already been "seriously degraded" by extensive construction on the surrounding parcels. [***14] App. to Pet. for Cert. D-3. In light of this finding and petitioner's offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. *Id.*, at D-11. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida District Court affirmed, *5 So. 3d 8 (2009)*, but the State Supreme Court reversed, *77 So. 3d 1220 (2011)*. A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the majority thought it significant that in this case, unlike *Nollan* or *Dolan*, the District did not

approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions. *77 So. 3d, at 1230*. [**2594] Second, the majority drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money. *77 So. 3d, at 1229-1230*. The majority acknowledged a division of authority over whether [***15] a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot. *77 So. 3d, at 1229-1230*. Compare, e.g., *McClung v. Sumner*, *548 F.3d 1219, 1228 (CA9 2008)*, with *Ehrlich v. Culver City*, *12 Cal. 4th 854, 876, 50 Cal. Rptr. 2d 242, 911 P. 2d 429, 444 (1996)*; *Flower Mound v. Stafford Estates Ltd. Partnership*, *135 S. W. 3d 620, 640-641 (Tex. 2004)*. Two justices concurred in the result, arguing that petitioner had failed to exhaust his administrative remedies as required by state law before bringing an inverse condemnation suit that challenges the propriety of an agency action. *77 So. 3d, at 1231-1232*; see *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, *427 So. 2d 153, 159 (Fla. 1982)*.

Recognizing that the majority opinion rested on a question of federal constitutional law on which the lower courts are divided, we granted the petition for a writ of certiorari, *568 U. S. ___, 133 S. Ct. 420, 184 L. Ed. 2d 251 (2012)*, and now reverse.

II

A

We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation* [**708] *of Wash.*, *461 U. S. 540, 545, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983)*. [***16] See also, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, *547 U. S. 47, 59-60, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)*; *Rutan v. Republican Party of Ill.*, *497 U. S. 62, 78, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990)*. In *Perry v. Sindermann*, *408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)*, for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration.

And in *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974), we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

Nollan and *Dolan* "involve a special application" of this doctrine that protects the *Fifth Amendment* right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U. S. A. Inc.*, 544 U. S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *Dolan*, 512 U. S., at 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (invoking "the well-settled doctrine [***17] of 'unconstitutional conditions'"). Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the *Fifth Amendment* would otherwise require just compensation. See *id.*, at 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304; *Nollan*, 483 U. S., at 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677. [*2595] So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the *Fifth Amendment* right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. [***18] Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at

issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 *Ohio Law Abs.* 816 (1926).

Nollan and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. *Dolan*, *supra*, at 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304; *Nollan*, 483 U. S., at 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677. Our precedents thus enable permitting authorities to insist that applicants bear the full costs [***19] of their proposals while still forbidding the government from engaging in "out-and-out . . . extortion" that would thwart the *Fifth Amendment* right to just compensation. *Ibid.* (internal quotation marks omitted). Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

B

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, e.g., *Perry*, 408 U. S., at 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests" (emphasis added)); *Memorial Hospital*, 415 U. S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (finding unconstitutional condition where government denied healthcare benefits). [***20] In so holding, we have recognized that regardless of whether the

government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, [*2596] a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U. S. 583, 592-593, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207, 13 S. Ct. 44, 36 L. Ed. 942 (1892) [***21] (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured [**710] to it by the Constitution"). See also *Flower Mound*, 135 S. W. 3d, at 639 ("The government cannot sidestep constitutional protections merely by rephrasing its decision from 'only if' to 'not unless'"). To do so here would effectively render *Nollan* and *Dolan* a dead letter.

The Florida Supreme Court puzzled over how the government's demand for property can violate the *Takings Clause* even though "no property of any kind was ever taken," 77 So. 3d, at 1225 (quoting 5 So. 3d, at 20 (Griffin, J., dissenting)); see also 77 So. 3d, at 1229-1230, but the unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the *Takings Clause* not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible

denial of a governmental [***22] benefit is a constitutionally cognizable injury.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. See *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. See, e.g., *Regan*, 461 U. S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (tax benefits); *Memorial Hospital*, 415 U. S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (healthcare); *Perry*, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (public employment); *United States v. Butler*, 297 U. S. 1, 71, 56 S. Ct. 312, 80 L. Ed. 477, 1936-1 C.B. 421 (1936) (crop payments); *Frost*, *supra* (business license). Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. E.g., *United States v. American Library Assn., Inc.*, 539 U. S. 194, 210, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" (emphasis added and internal quotation marks omitted)); [***23] *Wieman v. Updegraff*, 344 U. S. 183, 191, 73 S. Ct. 215, 97 L. Ed. 216 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. See *Nollan*, [*2597] 483 U. S., at 836-837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition").

That is not to say, however, that there is no relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. [**711] Where the permit is denied and the condition is never

imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the *Fifth Amendment* mandates a particular *remedy*--just compensation--only for takings. In [***24] cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action--whether state or federal--on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.

C

At oral argument, respondent conceded that the denial of a permit could give rise to a valid claim under *Nollan* and *Dolan*, Tr. of Oral Arg. 33-34, but it urged that we should not review the particular denial at issue here because petitioner sued in the wrong court, for the wrong remedy, and at the wrong time. Most of respondent's objections to the posture of this case raise questions of Florida procedure that are not ours to decide. See *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *Murdock v. Memphis*, 87 U.S. 590, 20 Wall. 590, 626, 22 L. Ed. 429 (1875). But to the extent that respondent suggests that the posture of this case creates some federal obstacle to adjudicating petitioner's unconstitutional conditions claim, we remand for the Florida courts to consider [***25] that argument in the first instance.

Respondent argues that we should affirm because, rather than suing for damages in the Florida trial court as authorized by *Fla. Stat.* §373.617, petitioner should have first sought judicial review of the denial of his permit in the Florida appellate court under the State's Administrative Procedure Act, see §§120.68(1), (2) (2010). The Florida Supreme Court has said that the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a . . . statute or rule in such a way that the aggrieved party's constitutional rights have been violated," *Key Haven Associated Enterprises*, 427 So. 2d, at 158, and respondent has argued throughout this litigation that petitioner brought his unconstitutional conditions claim in the wrong forum. Two members of the Florida Supreme Court credited respondent's argument, 77 So. 3d, at

1231-1232, but four others refused to address it. We decline respondent's invitation to second-guess a State Supreme Court's treatment of its own procedural law.

Respondent also contends that we should affirm because petitioner sued for damages but is at most entitled to an injunction ordering that his permit issue without [***26] any conditions. But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the *Takings Clause* because petitioner brought his claim under *state* law. Florida law allows property owners to sue for "damages" whenever a state agency's action is "an unreasonable exercise of the state's police power constituting a taking [*2598] without just compensation." *Fla. Stat. Ann.* §373.617. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law [**712] that the Florida Supreme Court did not address and on which we will not opine.

For similar reasons, we decline to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*. The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. It relied instead on the Florida District Court of Appeals' characterization of respondent's behavior as a demand for *Nollan/Dolan* purposes. See 77 So. 3d, at 1224 (quoting 5 So. 3d, at 10). Whether that characterization [***27] is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address. This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.

Finally, respondent argues that we need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan* because it gave petitioner another avenue for obtaining permit approval. Specifically, respondent said that it would have approved a revised permit application that reduced the footprint of petitioner's proposed construction site from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9 acres of petitioner's land. Respondent argues that regardless of whether its demands for offsite

mitigation satisfied *Nollan* and *Dolan*, we must separately consider each of petitioner's options, one of which did not require any of the offsite work the trial court found objectionable.

Respondent's argument is flawed because the option to which it points--developing only 1 acre of the site and granting a conservation easement on the rest--involves the [***28] same issue as the option to build on 3.7 acres and perform offsite mitigation. We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition. But respondent's suggestion that we should treat its offer to let petitioner build on 1 acre as an alternative to offsite mitigation misapprehends the governmental benefit that petitioner was denied. Petitioner sought to develop 3.7 acres, but respondent in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. Petitioner claims that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, respondent's offer to approve a less ambitious building project does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*.

III

We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land. A predicate for any unconstitutional conditions claim [***29] is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. See *Rumsfeld*, 547 U. S., at 59-60, 126 S. Ct. 1297, 164 L. Ed. 2d 156. For that reason, we began our analysis in both *Nollan* and *Dolan* by observing [**713] that if the government had directly [*2599] seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. See *Dolan*, 512 U. S., at 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304; *Nollan*, 483 U. S., at 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. 77 So. 3d, at 1230. Respondent and the dissent take the same position, citing the concurring and dissenting

opinions in *Eastern Enterprises v. Apfel*, 524 U. S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim. See *post*, at 5-8 (opinion of KAGAN, J.).

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant [***30] with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S. M. U. L. Rev. 177, 202-203 (2006), and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

A

In *Eastern Enterprises*, *supra*, the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the *Takings Clause*. *Id.*, at 529-537, 118 S. Ct. 2131, 141 L. Ed. 2d 451. Although JUSTICE KENNEDY concurred in the result on due process grounds, he joined four other Justices in dissent in [***31] arguing that the *Takings Clause* does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion concurring in judgment and dissenting in part); see *id.*, at 554-556, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (BREYER, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"). Relying on the concurrence and dissent in *Eastern Enterprises*, respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Respondent's argument rests on a mistaken premise. Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did "operate upon . . . an identified property interest" by directing the owner of a particular piece of property to make a monetary payment. *Id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.). In this case, [**714] unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien--a right to receive [***32] money that is secured by a particular piece of property. See *Armstrong v. United States*, 364 U. S. 40, 44-49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960); [*2600] *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 601-602, 55 S. Ct. 854, 79 L. Ed. 1593 (1935); *United States v. Security Industrial Bank*, 459 U. S. 70, 77-78, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982); see also *Palm Beach Cty. v. Cove Club Investors Ltd.*, 734 So. 2d 379, 383-384 (1999) (the right to receive income from land is an interest in real property under Florida law). The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property.² Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

2 Thus, because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land [***33] in order to constitute a taking. That is so even when the demand is considered "outside the permitting process." *Post*, at 8 (KAGAN, J., dissenting). The unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a reg-

ulatory taking by directing someone to spend money. As a result, we need not apply *Penn Central's* "essentially ad hoc, factual inquir[y]," 438 U. S., at 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. *Eastern Enterprises*, 524 U. S., at 542, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.). Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "per se [takings] approach" is the proper mode of analysis under the Court's precedent. *Brown v. Legal Foundation of Wash.*, 538 U. S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003).

Finally, it bears emphasis that [***34] petitioner's claim does not implicate "normative considerations about the wisdom of government decisions." *Eastern Enterprises*, 524 U. S., at 545, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.). We are not here concerned with whether it would be "arbitrary or unfair" for respondent to order a landowner to make improvements to public lands that are nearby. *Id.*, at 554, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (BREYER, J., dissenting). Whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien. Cf. *Dolan*, 512 [**715] U. S., at 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304; *Nollan*, 483 U. S., at 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677.

B

Respondent and the dissent argue that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. See *post*, at 9-10. We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" [*2601] *Brown, supra*, at 243, n. 2, 123 S. Ct. 1406, 155 L. Ed. 2d 376

[**35] (SCALIA, J., dissenting). We said as much in *County of Mobile v. Kimball*, 102 U. S. 691, 703, 26 L. Ed. 238 (1881), and our cases have been clear on that point ever since. *United States v. Sperry Corp.*, 493 U. S. 52, 62, n. 9, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989); see *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 44, 54 S. Ct. 599, 78 L. Ed. 1109 (1934); *Dane v. Jackson*, 256 U. S. 589, 599, 41 S. Ct. 566, 65 L. Ed. 1107 (1921); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614-615, 19 S. Ct. 553, 43 L. Ed. 823 (1899). This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

At the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown*, *supra*, at 232, 123 S. Ct. 1406, 155 L. Ed. 2d 376, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips v. Washington Legal Foundation*, 524 U. S. 156, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980), [**36] two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation. *Armstrong*, 364 U. S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554; *Louisville Joint Stock Land Bank*, 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593.

Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. *Brown* is illustrative. Similar to respondent in this case, the [**716] respondents in *Brown* argued that extending the protections of the *Takings Clause* to a bank account would open a Pandora's Box of constitutional challenges [**37] to taxes. Brief for Respondents Washington Legal Foundation et al. 32 and Brief for Respondent Justices of the Washington Supreme Court 22, in *Brown v. Legal Foundation of Wash.*, O. T. 2002, No. 01-1325. But also like respondent here, the *Brown* respondents never claimed that they were exercising their power to levy taxes when they took the petitioners' property. Any such argument would have been implausible under state law; in Washington, taxes are levied by the legislature, not the courts. See 538 U. S., at 242, n. 2, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (SCALIA, J., dissenting).

The same dynamic is at work in this case because Florida law greatly circumscribes respondent's power to tax. See *Fla. Stat. Ann.* §373.503 (authorizing respondent to impose ad valorem tax on properties within its jurisdiction); §373.109 (authorizing respondent to charge permit application fees but providing that such fees "shall not exceed the [*2602] cost . . . for processing, monitoring, and inspecting for compliance with the permit"). If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, respondent has maintained [**38] throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.³

3 Citing cases in which state courts have treated similar governmental demands for money differently, the dissent predicts that courts will "struggle to draw a coherent boundary" between taxes and excessive demands for money that violate *Nollan* and *Dolan*. *Post*, at 9-10. But the cases the dissent cites illustrate how the frequent need to decide whether a particular demand for money qualifies as a tax under state law, and the resulting state statutes and judicial precedents on point, greatly reduce the practical difficulty of resolving the same

issue in federal constitutional cases like this one.

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a "tax" becomes "so arbitrary . . . that it was not the exertion of taxation but a confiscation of property." *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 24-25, 36 S. Ct. 236, 60 L. Ed. 493, T.D. 2290 (1916). For present purposes, it suffices to say that despite having long recognized that "the power of taxation [***39] should not be confused with the power of eminent domain," *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 264, 36 S. Ct. 58, 60 L. Ed. 266 (1915), we have had little trouble distinguishing between the two.

C

Finally, we disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. *Post*, at 8. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. See, e.g., *Northern Ill. Home Builders Assn. v. County of Du Page*, 165 Ill. 2d 25, 31-32, 649 N. E. 2d 384, 388-389 [**717] (1995); *Home Builders Assn. v. Beavercreek*, 89 Ohio St. 3d 121, 128, 729 N. E. 2d 349, 356 (2000); *Flower Mound*, 135 S. W. 3d, at 640-641. Yet the "significant practical harm" the dissent predicts has not come to pass. *Post*, at 8. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land use permitting fees. *Post*, at 11.

The dissent criticizes the notion that the Federal Constitution places any [***40] meaningful limits on "whether one town is overcharging for sewage, or another is setting the price to sell liquor too high." *Post*, at 9. But only two pages later, it identifies three constraints on land use permitting fees that it says the Federal Constitution imposes and suggests that the additional protections of *Nollan* and *Dolan* are not needed. *Post*, at 11. In any event, the dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*. After all,

the *Due Process Clause* protected the Nollans from an unfair allocation of public burdens, and they too could have argued that the government's demand for property amounted to a taking under the *Penn Central* framework. See *Nollan*, 483 U. S., at 838, 107 S. Ct. 3141, 97 L. Ed. 2d 677. We have repeatedly rejected the dissent's contention that other constitutional doctrines [*2603] leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today.

We hold that the government's demand for property from a land-use permit applicant must satisfy [***41] the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENT BY: KAGAN

DISSENT

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

In the paradigmatic case triggering review under *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), the government approves a building permit on the condition that the landowner relinquish an interest in real property, like an easement. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply [***42] paying money? This case also raises other, more

fact-specific issues I will address: whether the government here [**718] imposed any condition at all, and whether petitioner Coy Koontz suffered any compensable injury.

I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. Still, the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan*, then the government has taken the property and must pay just compensation under the *Fifth Amendment*. But when the government denies a permit because an owner has refused [***43] to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property. So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over *Eastern Enterprises v. Apfel*, 524 U. S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), which held that the government may impose [*2604] ordinary financial obligations without triggering the *Takings Clause's* protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision.

I also would affirm for two independent reasons establishing that Koontz cannot get the money

[***44] damages he seeks. First, respondent St. Johns River Water Management District (District) never demanded *anything* (including money) in exchange for a permit; the *Nollan-Dolan* standard therefore does not come into play (even assuming that test applies to demands for money). Second, no taking occurred in this case because Koontz never acceded to a demand (even had there been one), and so no property changed hands; as just noted, Koontz therefore cannot claim just compensation under the *Fifth Amendment*. The majority does not take issue with my first conclusion, and affirmatively agrees with my second. But the majority thinks Koontz might still be entitled to money damages, and remands to the Florida Supreme Court on that question. I do not see how, and expect that court will so rule.

I

Claims that government regulations violate the *Takings Clause* by unduly restricting the use of property are generally "governed by the standards set forth in *Penn Central* [**719] *Transp. Co. v. New York City*, 438 U. S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)." *Lingle v. Chevron U. S. A. Inc.*, 544 U. S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Under *Penn Central*, courts examine a regulation's "character" and "economic impact," asking whether the action goes beyond "adjusting [***45] the benefits and burdens of economic life to promote the common good" and whether it "interfere[s] with distinct investment-backed expectations." *Penn Central*, 438 U. S., at 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631. That multi-factor test balances the government's manifest need to pass laws and regulations "adversely affect[ing]. . . economic values," *ibid.*, with our longstanding recognition that some regulation "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

Our decisions in *Nollan* and *Dolan* are different: They provide an independent layer of protection in "the special context of land-use exactions." *Lingle*, 544 U. S., at 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876. In that situation, the "government demands that a landowner dedicate an easement" or surrender a piece of real property "as a condition of obtaining a development permit." *Id.*, at 546, 125 S. Ct. 2074, 161 L. Ed. 2d 876. If the government appropriated such a property interest outside the permitting process, its action would constitute a taking, necessitating just compensation.

Id., at 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876. *Nollan* and *Dolan* prevent the government from exploiting the landowner's [***46] permit application to evade the constitutional obligation to pay for the property. They do so, as the majority explains, by subjecting the government's demand to heightened scrutiny: The government may condition a land-use permit on the relinquishment of real property only if it shows a "nexus" and "rough proportionality" between the demand made and "the impact of the proposed development." *Dolan*, 512 U. S., at 386, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304; see *ante*, at 8. *Nollan* and *Dolan* thus serve not to address excessive regulatory burdens on land use (the function of *Penn Central*), but instead to stop the government from imposing an "unconstitutional condition"--a requirement that a person give up his constitutional right to receive just compensation [*2605] "in exchange for a discretionary benefit" having "little or no relationship" to the property taken. *Lingle*, 544 U. S., at 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876.

Accordingly, the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for--or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking. That is why *Nollan* began by stating that "[h]ad California [***47] simply required the Nollans to make an easement across their beachfront available to the public . . . , rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking" requiring just compensation. 483 U. S., at 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677. And it is why *Dolan* started by maintaining that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to [d]evelop her property on such a dedication, a taking would have occurred." 512 U. S., at 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304. Even the [**720] majority acknowledges this basic point about *Nollan* and *Dolan*: It too notes that those cases rest on the premise that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Ante*, at 14-15. Only if that is true could the government's demand for the property force a landowner to relinquish his constitutional right to just compensation.

Here, Koontz claims that the District demanded that he spend money to improve public wetlands, not that he hand over a real property interest. I assume for now that the District made that demand [***48] (although I think it did not, see *infra*, at 12-16). The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan-Dolan* test apply.

But we have already answered that question no. *Eastern Enterprises v. Apfel*, 524 U. S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451, as the Court describes, involved a federal statute requiring a former mining company to pay a large sum of money for the health benefits of retired employees. Five Members of the Court determined that the law did not effect a taking, distinguishing between the appropriation of a specific property interest and the imposition of an order to pay money. JUSTICE KENNEDY acknowledged in his controlling opinion that the statute "impose[d] a staggering financial burden" (which influenced his conclusion that it violated due process). *Id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion concurring in judgment and dissenting in part). Still, JUSTICE KENNEDY explained, the law did not effect a taking because it did not "operate upon or alter" a "specific and identified propert[y] or property right[]." *Id.*, at 540-541, 118 S. Ct. 2131, 141 L. Ed. 2d 451. Instead, "[t]he [***49] law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent [**721] as to how the regulated entity elects to comply or the property it uses to do so." *Id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451. JUSTICE BREYER, writing for four more Justices, agreed. He stated that the *Takings Clause* applies only when the government appropriates a "specific interest in physical or intellectual property" or "a specific, separately identifiable fund of money"; by contrast, the Clause has no bearing when the government imposes "an ordinary liability to pay money." *Id.*, at 554-555, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (dissenting opinion).

[*2606] Thus, a requirement that a person pay money to repair public wetlands is not a taking. Such an order does not affect a "specific and identified propert[y] or property right[]"; it simply "imposes an obligation to perform an act" (the improvement of wetlands) that costs money. *Id.*, at

540-541, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.). To be sure, when a person spends money on the government's behalf, or pays money directly to the government, it "will reduce [his] net worth"--but that "can be said of any law which has an adverse economic effect" on someone. *Id.*, at 543, 118 S. Ct. 2131, 141 L. Ed. 2d 451. Because the government is merely imposing a "general [***50] liability" to pay money, *id.*, at 555, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (BREYER, J., dissenting)--and therefore is "indifferent as to how the regulated entity elects to comply or the property it uses to do so," *id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.)--the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking. And that means the order does not trigger the *Nollan-Dolan* test, because it does not force Koontz to relinquish a constitutional right.

The majority tries to distinguish *Apfel* by asserting that the District's demand here was "closely analogous" (and "bears resemblance") to the seizure of a lien on property or an income stream from a parcel of land. *Ante*, at 16, 19. The majority thus seeks support from decisions like *Armstrong v. United States*, 364 U. S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960), where this Court held that the government effected a taking when it extinguished a lien on several ships, and *Palm Beach Cty. v. Cove Club Investors Ltd.*, 734 So. 2d 379 (1999), where the Florida Supreme Court held that the government committed a taking when it terminated a covenant entitling the beneficiary to an income stream from a piece of land.

But the majority's citations succeed only in showing what this [***51] case is *not*. When the government dissolves a lien, or appropriates a determinate income stream from a piece of property--or, for that matter, seizes a particular "bank account or [the] accrued interest" on it--the government indeed takes a "specific" and "identified property interest." *Apfel*, 524 U. S., at 540-541, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.). But nothing like that occurred here. The District did not demand any particular lien, or bank account, or income stream from property. It just ordered Koontz to spend or pay money (again, assuming it ordered anything at all). Koontz's liability would have been the same whether his property produced income or not--*e.g.*, even if all he wanted to build was a family home. And similarly, Koontz could meet that obligation from

whatever source he chose--a checking account, shares of stock, a wealthy uncle; the District was "indifferent as to how [he] elect[ed] to [pay] or the property [he] use[d] to do so." *Id.*, at 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451. No more than in *Apfel*, then, was the (supposed) demand here for a "specific and identified" piece of property, which the government could not take without paying for it. *Id.*, at 541, 118 S. Ct. 2131, 141 L. Ed. 2d 451.

The majority thus falls back on the sole way the District's [***52] alleged demand related to a property interest: The demand arose out of the permitting process for Koontz's land. See *ante*, at 16-17. But under the analytic framework that *Nollan* and *Dolan* established, that connection alone is insufficient to trigger heightened scrutiny. As I have described, the heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants; rather, it is "a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right--here the right to receive [*2607] just compensation when property is taken"--in exchange for a land-use permit. *Lingle*, 544 U. S., at 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (internal quotation marks omitted); see *supra*, at 3-5. As such, *Nollan* and *Dolan* apply only if the demand at issue would have violated [**722] the Constitution independent of that proposed exchange. Or put otherwise, those cases apply only if the demand would have constituted a taking when executed *outside* the permitting process. And here, under *Apfel*, it would not.¹

1 The majority's sole response is that "the unconstitutional conditions analysis requires us to set aside petitioner's *permit* [***53] *application*, not his ownership of a particular parcel of real property." *Ante*, at 17, n. 1. That mysterious sentence fails to make the majority's opinion cohere with the unconstitutional conditions doctrine, as anyone has ever known it. That doctrine applies only if imposing a condition directly--*i.e.*, independent of an exchange for a government benefit--would violate the Constitution. Here, *Apfel* makes clear that the District's condition would not do so: The government may (separate and apart from permitting) require a person--whether Koontz or anyone else--to pay or spend

money without effecting a taking. The majority offers no theory to the contrary: It does not explain, as it must, why the District's condition was "unconstitutional."

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments--with no express limitation except as to taxes--the majority extends the *Takings Clause*, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. 524 U. S., at 541, 118 S. Ct. 2131, 141 L. Ed. 2d 451. Cities and towns across the nation impose many kinds [***54] of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution--or destruction of wetlands. See, e.g., *Olympia v. Drebeck*, 156 Wash. 2d 289, 305, 126 P. 3d 802, 809 (2006). Others cover the direct costs of providing services like sewage or water to the development. See, e.g., *Krupp v. Breckenridge Sanitation Dist.*, 19 P. 3d 687, 691 (Colo. 2001). Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. See, e.g., *Phillips v. Mobile*, 208 U. S. 472, 479, 28 S. Ct. 370, 52 L. Ed. 578 (1908); *BHA Investments, Inc. v. Idaho*, 138 Idaho 348, 63 P. 3d 474 (2003). All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.

That problem becomes still worse because the majority's distinction between monetary "exactions" and taxes is so hard to apply. *Ante*, at 18. The majority acknowledges, [***55] as it must, that taxes are not takings. See *ibid.* (This case "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners"). But once the majority decides that a simple demand to pay money--the sort of thing often viewed as a tax--can count as an impermissible "exaction," how is anyone to tell the two apart? The question, as JUSTICE BREYER's opinion in *Apfel* noted, "bristles with conceptual difficulties." 524 U. S., at 556, 118 S. Ct. 2131, 141

L. Ed. 2d 451. And practical ones, too: How to separate orders to pay money from . . . well, orders to pay money, so that a locality knows what it can (and cannot) do. State courts sometimes must [*2608] confront the same question, as they enforce restrictions on localities' taxing power. [**723] And their decisions--contrary to the majority's blithe assertion, see *ante*, at 20-21--struggle to draw a coherent boundary. Because "[t]here is no set rule" by which to determine "in which category a particular" action belongs, *Eastern Diversified Properties, Inc. v. Montgomery Cty.*, 319 Md. 45, 53, 570 A. 2d 850, 854 (1990), courts often reach opposite conclusions about classifying nearly identical [***56] fees. Compare, e.g., *Coulter v. Rawlins*, 662 P. 2d 888, 901-904 (Wyo. 1983) (holding that a fee to enhance parks, imposed as a permit condition, was a regulatory exaction), with *Home Builders Assn. v. West Des Moines*, 644 N. W. 2d 339, 350 (Iowa 2002) (rejecting *Coulter* and holding that a nearly identical fee was a tax).² Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

2 The majority argues that existing state-court precedent will "greatly reduce the practical difficulty" of developing a uniform standard for distinguishing taxes from monetary exactions in federal constitutional cases. *Ante*, at 20, n.2. But how are those decisions to perform that feat if they themselves are all over the map?

Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. See *ante*, at 8, 21. The majority might, for example, approve the rule, [***57] adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. See, e.g., *Ehrlich v. Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P. 2d 429 (1996). *Dolan* itself suggested that limitation by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative de-

termination[] classifying entire areas of the city." 512 U. S., at 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304. Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money. *Ante*, at 20.

At bottom, the majority's analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, "land-use permitting officials" could easily "evade the limitations" on exaction of real property interests that those decisions impose. *Ante*, at 15. But that is a prophylaxis in search of a problem. No one has [***58] presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs. See, e.g., *Krupp v. Breckenridge Sanitation Dist.*, 19 P. 3d, at 697; *Home Builders Assn. of Central Arizona v. Scottsdale*, 187 Ariz. 479, 486, 930 P. 2d 993, 1000 (1997); *McCarthy v. Leawood*, 257 Kan. 566, 579, 894 P. 2d 836, 845 (1995). And if officials were to impose a fee as a contrivance to take an easement (or other real property [**724] right), then a court could indeed apply *Nollan* and *Dolan*. See, e.g., *Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443 (1898) (preventing circumvention of the *Takings Clause* by prohibiting the government from imposing a special assessment for the full value of a [*2609] property in advance of condemning it). That situation does not call for a rule extending, as the majority's does, to *all* monetary exactions. Finally, a court can use the *Penn Central* framework, the *Due Process Clause*, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply "go[] too far." [***59] *Mahon*, 260 U. S., at 415, 43 S. Ct. 158, 67 L. Ed. 322; see *supra*, at 3.³

3 Our *Penn Central* test protects against regulations that unduly burden an owner's use of his property: Unlike the *Nollan-Dolan* standard, that framework fits to a T a complaint (like Koontz's) that a permitting condition makes it inordinately expensive to develop land. And the *Due Process Clause* provides an additional backstop

against excessive permitting fees by preventing a government from conditioning a land-use permit on a monetary requirement that is "basically arbitrary." *Eastern Enterprises v. Apfel*, 524 U. S. 498, 557-558, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (BREYER, J., dissenting). My point is not, as the majority suggests, that these constraints do the same thing as *Nollan* and *Dolan*, and so make those decisions unnecessary. See *ante*, at 21. To the contrary, *Nollan* and *Dolan* provide developers with enhanced protection (and localities with correspondingly reduced flexibility). See *supra*, at 8. The question here has to do not with "overruling" those cases, but with extending them. *Ante*, at 21. My argument is that our prior caselaw struck the right balance: heightened scrutiny when the government uses the permitting process to demand property that the *Takings Clause* [***60] protects, and lesser scrutiny, but a continuing safeguard against abuse, when the government's demand is for something falling outside that Clause's scope.

In sum, *Nollan* and *Dolan* restrain governments from using the permitting process to do what the *Takings Clause* would otherwise prevent--i.e., take a specific property interest without just compensation. Those cases have no application when governments impose a general financial obligation as part of the permitting process, because under *Apfel* such an action does not otherwise trigger the *Takings Clause's* protections. By extending *Nollan* and *Dolan's* heightened scrutiny to a simple payment demand, the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of "necessary predictability." *Apfel*, 524 U. S., at 542, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (opinion of KENNEDY, J.). That decision is unwarranted--and deeply unwise. I would keep *Nollan* and *Dolan* in their intended sphere and affirm the Florida Supreme Court.

II

I also would affirm the judgment below for two independent reasons, even assuming that a demand for money can trigger *Nollan* and *Dolan*. First, the District never demanded that Koontz [***61] give up anything (including money) as a condition for granting him a permit.⁴ And second,

because (as everyone agrees) no actual taking occurred, Koontz cannot claim just compensation even had the District made a demand. The majority nonetheless [**725] remands this case on the theory that Koontz might still be entitled to money damages. I cannot see how, and so would spare the Florida courts.

4 The Court declines to consider whether the District demanded anything from Koontz because the Florida Supreme Court did not reach the issue. See *ante*, at 13. But because the District raised this issue in its brief opposing certiorari, Brief in Opposition 14-18, both parties briefed and argued it on the merits, see Brief for Respondent 37-43; Reply Brief 7-8, Tr. of Oral Arg. 7-12, 27-28, 52-53, and it provides yet another ground to affirm the judgment below, I address the question.

A

Nollan and *Dolan* apply only when the government makes a "demand[]" that a [*2610] landowner turn over property in exchange for a permit. *Lingle*, 544 U. S., at 546, 125 S. Ct. 2074, 161 L. Ed. 2d 876. I understand the majority to agree with that proposition: After all, the entire unconstitutional conditions doctrine, as the majority notes, rests on the fear that the [***62] government may use its control over benefits (like permits) to "coerc[e]" a person into giving up a constitutional right. *Ante*, at 7; see *ante*, at 13. A *Nollan-Dolan* claim therefore depends on a showing of government coercion, not relevant in an ordinary challenge to a permit denial. See *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 703, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (*Nollan* and *Dolan* were "not designed to address, and [are] not readily applicable to," a claim based on the mere "denial of [a] development" permit). Before applying *Nollan* and *Dolan*, a court must find that the permit denial occurred because the government made a demand of the landowner, which he rebuffed.

And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country--to the detriment of both communities and property owners--that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed,

the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some [***63] local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage. See W. Fischel, *Regulatory Takings* 346 (1995). But that danger would rise exponentially if something less than a clear condition--if each idea or proposal offered in the back-and-forth of reconciling diverse interests--triggered *Nollan-Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer. Hence the need to reserve *Nollan* and *Dolan*, as we always have, for reviewing only what an official demands, not all he says in negotiations.

With that as backdrop, consider how this case arose. To arrest the loss of the State's rapidly diminishing wetlands, Florida law prevents landowners from filling or draining any such property without two permits. See *ante*, at 2-3. Koontz's property qualifies as a wetland, and he therefore needed the permits to embark on development. His applications, however, failed the District's preliminary review: The District found that they did not preserve wetlands or protect fish and wildlife to the extent Florida law required. See App. Exh. 19-20, 47. At that point, the District [***64] could simply have denied the applications; had it done so, the *Penn Central* test--not *Nollan* and *Dolan*--would have governed any takings claim Koontz might have brought. See *Del Monte Dunes*, 526 U. S., at 702-703, 119 S. Ct. 1624, 143 L. Ed. 2d 882.

Rather than reject the applications, [**726] however, the District suggested to Koontz ways he could modify them to meet legal requirements. The District proposed reducing the development's size or modifying its design to lessen the impact on wetlands. See App. Exh. 87-88, 91-92. Alternatively, the District raised several options for "off-site mitigation" that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause. *Id.*, at 90-91. The District never made any particular demand respecting an off-site project (or anything else); as Koontz testified at trial, that possibility was presented only in broad strokes, "[n]ot in any great detail." App. 103. And the District made clear that it welcomed additional proposals [*2611]

from Koontz to mitigate his project's damage to wetlands. See *id.*, at 75. Even at the final hearing on his applications, the District asked Koontz if he would "be willing to go back with the staff over the next month [***65] and renegotiate this thing and try to come up with" a solution. *Id.*, at 37. But Koontz refused, saying (through his lawyer) that the proposal he submitted was "as good as it can get." *Id.*, at 41. The District therefore denied the applications, consistent with its original view that they failed to satisfy Florida law.

In short, the District never made a demand or set a condition--not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government. Instead, the District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District's only hard-and-fast requirement was that Koontz do something--anything--to satisfy the relevant permitting criteria. Koontz's failure to obtain the permits therefore did not result from his refusal to accede to an allegedly extortionate demand or condition; rather, it arose from the legal deficiencies of his applications, combined with his unwillingness to correct them *by any means*. *Nollan* and *Dolan* were never meant to address such a run-of-the-mill denial of a land-use permit. As applications of the unconstitutional conditions doctrine, those [***66] decisions require a condition; and here, there was none.

Indeed, this case well illustrates the danger of extending *Nollan* and *Dolan* beyond their proper compass. Consider the matter from the standpoint of the District's lawyer. The District, she learns, has found that Koontz's permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice--even if he asks for guidance. As the Florida Supreme Court observed of this case: Were *Nollan* and *Dolan* to apply, the District would "opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation"; and property owners like Koontz then would "have no opportunity to amend their applications or discuss mitigation options." 77 So. 3d 1220, 1231 (2011). Nothing in the *Takings Clause* requires that folly. I

would therefore hold that the District did not impose an unconstitutional condition--because it did not impose a condition [***67] at all.

B

And finally, a third difficulty: Even [**727] if (1) money counted as "specific and identified propert[y]" under *Apfel* (though it doesn't), and (2) the District made a demand for it (though it didn't), (3) Koontz never paid a cent, so the District took nothing from him. As I have explained, that third point does not prevent Koontz from suing to invalidate the purported demand as an unconstitutional condition. See *supra*, at 1-2. But it does mean, as the majority agrees, that Koontz is not entitled to just compensation under the *Takings Clause*. See *ante*, at 11. He may obtain monetary relief under the Florida statute he invoked only if it authorizes damages *beyond* just compensation for a taking.

The majority remands that question to the Florida Supreme Court, and given how it disposes of the other issues here, I can understand why. As the majority indicates, a State could decide to create a damages remedy not only for a taking, but also for an unconstitutional conditions [*2612] claim predicated on the *Takings Clause*. And that question is one of state law, which we usually do well to leave to state courts.

But as I look to the Florida statute here, I cannot help but see yet another reason why the [***68] Florida Supreme Court got this case right. That statute authorizes damages only for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. §373.617 (2010); see *ante*, at 12. In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there *had* been a taking (although of exactly what neither was clear). See App. to Pet. for Cert. C-2; 5 So.3d 8, 8 (2009). So I would, once more, affirm the Florida Supreme Court, not make it say again what it has already said--that Koontz is not entitled to money damages.

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the *Takings Clause* would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not [***69] present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered sugges-

tions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. [**728] It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and [***70] local governments of the flexibility they need to enhance their communities--to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.

PAUL LEDER¹ vs. SUPERINTENDENT OF SCHOOLS OF CONCORD & CONCORD-CARLYLE REGIONAL SCHOOL DISTRICT & others.²

1 Doing business as Spencer Brook Strings.

2 John Flaherty, Matthew Wells, Robert Seely, Wade Hendricks, and Anna Anderson. The defendant John Flaherty is the deputy superintendent for finance and operations in the school district. The defendant Anna Anderson is an orchestra teacher in the school district. The defendant Matthew Wells is a business analyst for the school district. The defendants Wade Hendricks and Robert Seely are instrumental music teachers in the school district.

SJC-11224

SUPREME JUDICIAL COURT OF MASSACHUSETTS

465 Mass. 305; 988 N.E.2d 851; 2013 Mass. LEXIS 351

**February 7, 2013, Argued
May 31, 2013, Decided**

PRIOR HISTORY: [***1]

Middlesex. Civil action commenced in the Superior Court Department on August 15, 2011. A motion for preliminary injunctive relief was heard by Garry V. Inge, J. A petition for interlocutory review was heard in the Appeals Court by Elspeth

B. Cypher, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

School and School District. School and School Committee, Superintendent of schools, Regional school district. Municipal Corporations, Contracts. Contract, Bidding for contract, Regional school district. Injunction. Practice, Civil, Preliminary injunction. State Ethics Commission. Conflict of Interest.

COUNSEL: Kwabena B. Abboa-Offei for the plaintiff.

Adam Simms for the defendants.

Andrew P. Botti & David K. Moynihan, for David K. Moynihan & another, amici curiae, submitted a brief.

Martha Coakley, Attorney General, & Deirdre Roney, Special Assistant Attorney General, for State Ethics Commission, amicus curiae, submitted a brief.

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

OPINION BY: GANTS

OPINION

[*306] [**852] GANTS, J. The issue on appeal is whether, under *G. L. c. 268A, § 21 (a)*, as appearing in by St. 2009, c. 28, § 80, a party may obtain declaratory or injunctive relief rescinding an action taken by a municipal agency based on an alleged violation of *G. L. c. 268A, § 23*, where the State Ethics Commission (commission) has made no finding of a violation and where the municipal agency has not requested this relief. We conclude that a finding of a violation [***2] of § 23 by the commission after an adjudicatory proceeding and a request for rescission by the municipal agency are both prerequisites to the filing of a complaint seeking rescission under *G. L. c. 268A, § 21 (a)*. Because neither prerequisite has been met in this case, we affirm the denial of the plaintiff's motion for a preliminary injunction and remand the case to the Superior Court with instructions to dismiss the complaint.³

³ We acknowledge the amicus briefs submitted by the State Ethics Commission and by David K. Moynihan and Lia Zulilian-Moynihan.

Background. The facts are not materially in dispute. The plaintiff, Paul Leder, doing business as Spencer Brook Strings (SBS), operates a musical instrument sale and rental business that rents string instruments to students in various school districts throughout Massachusetts, including the Concord public schools and the Concord-Carlisle Regional School District (collectively, school district). Since 2003, [**853] SBS has rented string instruments to students who participated in the school district's music program. From 2003 to 2009, the school district held an "instrumental rental night" at the middle school where parents could choose among [***3] various vendors, including SBS, for rental instruments for their children. In the 2009-2010 school year, the school district did not hold an instrumental rental night but instead published on its Web site a list of the various musical instrument vendors and invited parents to contact the vendor from whom they wanted to rent.

In the spring of 2011, however, the school district invited vendors of string instruments to bid to rent instruments to the parents of children in the school district, and asked prospective vendors to provide with their bids, among other information, a detailed explanation of their rental program and their rental [*307] fees. SBS alleges that it submitted the lowest bid for rental fees. However, according to the school district, one of SBS's references reported that the quality of service provided by SBS was inconsistent and that there were customer service issues. The school district selected the next lowest bidder, Music and Arts (M&A), as the winning bid, after receiving positive reports from all of its references. As a result, the school district published on the Web sites of two schools a letter with M&A's logo that advised parents that M&A "is the music rental company [***4] for Concord Public Schools," assured parents that M&A "will provide quality rental instruments," gave step-by-step instructions on how to rent an instrument from M&A's Web site, and informed parents that "[s]hould you choose NOT to rent from [M&A] you are agreeing to take the instrument rental, maintenance, purchase of lesson book and supplies, and repair into your own hands."⁴

⁴ After the plaintiff filed this complaint, the Concord public schools and the Concord-Carlisle School District (collectively, school district) sent an electronic mail

message to parents advising them that "[f]amilies who have had a satisfactory instrument rental experience with another vendor, and feel comfortable assuming responsibility for arranging for maintenance, purchase of a lesson book and supplies, and repair of the instrument, may choose to continue that relationship."

In August, 2011, the plaintiff filed a verified complaint alleging that, by providing M&A with their "endorsement" and "fail[ing] to advertise SBS in the materials that [they] published for parents of children who participated in the music program in the same way that [they] advertised M&A," the defendants had used their official positions, [***5] see note 2, supra, to secure for M&A unwarranted privileges that are of substantial value and not available to similarly situated individuals, in violation of *G. L. c. 268A, § 23 (b) (2) (ii)*.^{5,6} The complaint sought declaratory and injunctive relief, and was accompanied by a motion for [*308] preliminary injunction that, among other relief, sought to enjoin the defendants from organizing any string rental nights without SBS's participation [***854] and publishing any letters or materials to parents that promote a competitor of SBS, and that sought an order requiring the defendants to remove any online materials that indorse or promote M&A as the official rental company of the school district.

5 The plaintiff's complaint also alleged that the defendants acted in a manner that would cause a reasonable person to conclude that they can be improperly influenced in the performance of their official duties, in violation of *G. L. c. 268A, § 23 (b) (3)*, but the plaintiff did not argue this ground in his motion for preliminary injunction, which is the motion before us on appeal.

6 *General Laws c. 268A, § 23 (b) (2) (ii)*, as appearing in St. 2009, c. 28, § 81, provides:

"No current officer or employee of a state, [***6] county or municipal agency shall knowingly, or with reason to know . . . use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions

which are of substantial value and which are not properly available to similarly situated individuals."

The judge denied the plaintiff's motion for a preliminary injunction. The judge declared that *G. L. c. 268A* was enacted "to prevent public officials from favoring one business over another," but concluded that the plaintiff lacked standing because, as a musical instrument rental company, it "is clearly not part of a regulated industry." The plaintiff appealed from the denial of preliminary injunctive relief pursuant to *G. L. c. 231, § 118*. After a single justice of the Appeals Court denied the petition for review, the case was entered in the Appeals Court; we transferred the plaintiff's appeal to this court on our own motion.⁷

7 The defendants filed a motion to dismiss the complaint, but the motion judge has yet to rule on this motion because he granted the parties' joint motion to stay the proceedings pending our decision.

Discussion. In 1962, the Legislature enacted *G. L. c. 268A, § 21*, [***7] as part of "comprehensive legislation . . . [to] strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain." See *Everett Town Taxi, Inc. v. Aldermen of Everett*, 366 *Mass. 534, 536, 320 N.E.2d 896 (1974)* (Everett Town Taxi), quoting Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, at 18. The original text of *§ 21 (a)*, inserted by St. 1962, c. 779, § 1, remained unchanged until 2009 and provided:

"In addition to any other remedies provided by law, any violation of section two, three, eight, or sections fifteen to twenty, inclusive, which has substantially influenced the action taken by any municipal agency in any particular matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third persons require."

[*309] When *§ 21 (a)* was enacted, there was no commission or other comparable entity to enforce the new ethics laws. Instead, the 1962 legislation

authorized a city or town to bring a civil action "against any person who has acted to his economic advantage in violation of said sections two, three, eight and fifteen to twenty, inclusive" and [***8] to "recover damages in the amount of such economic advantage or five hundred dollars, whichever is greater." *G. L. c. 268A, § 21 (b)*, inserted by St. 1962, c. 779, § 1.⁸

8 In 1978, the Legislature created the State Ethics Commission (commission) and in 1986 made it the "primary civil enforcement agency for violations of all sections of [G. L. c. 268A]." See *G. L. c. 268B, §§ 2 & 3 (i)*, inserted by St. 1978, c. 210, § 20, and as amended by St. 1986, c. 557, § 194. In 1982, the Legislature struck *G. L. c. 268A, § 21 (b)*, and replaced it with a provision that allowed "[t]he state ethics commission, the district attorney for that district, or the city or town or state" to bring a civil action "against any person who has acted to his economic advantage in violation of [*G. L. c. 268A, §§ 2,3, 8, and 15-20*], inclusive, and [to] recover damages for the city or town in the amount of such economic advantage or [\$500], whichever is greater." *G. L. c. 268A, § 21 (b)*, as appearing in St. 1982, c. 612, § 13. Where there has been no final judgment of conviction or acquittal of that violation, these same parties may recover additional damages for the city or town in an amount not to exceed twice the [***9] amount of the economic advantage, but a judgment for these additional damages would bar any criminal prosecution for the same violation. *Id.*

In 1974, we considered whether the Legislature intended § 21 (a) to include a private right of action and, if so, whether a [**855] taxicab company had standing to file a civil action under § 21 (a) against a city's public officials to challenge the issuance of licenses to a competitor to operate taxicabs and taxi stands in that city. *Everett Town Taxi, supra at 534-535*. We noted that the "language of § 21 (a) is neutral on the matter, simply setting out the remedy without describing those to whom it is available." *Id. at 535-536*. "At the least there is nothing in the language to preclude a private action; if anything, the specific reference to actions by the city or town for restitution in § 21 (b) leads to the inference that no such limitation is present in § 21 (a)." *Id. at 536*. We concluded that

we needed to construe § 21 (a) to permit a private right of action "to effectuate fully the statutory purpose" of attacking public corruption. *Id.* We stated:

"In light of these objectives it is apparent that, if a right of [*310] action is denied to all private parties, [***10] there would be a frustration of the statute. . . . Were we to construe § 21 (a) as providing an exclusively public remedy so that the sole parties eligible to move under § 21 (a) were municipal authorities, the result would be that in a municipality where those authorities were the principal parties in interest there would be no movement at all. Thus to deny a private right of action under the statute would in some cases be to deprive the public of the protection conferred on it by the Legislature."

Id.

We noted that the existence of a private right of action did not mean that every aggrieved business competitor had standing to bring such an action. *Id. at 538*. We recognized the general rule that "the mere fact that a plaintiff may suffer from business competition is not a sufficient injury to give him standing to sue." *Id.*, and cases cited. But we held that the aggrieved business competitor in that case had standing to sue because the general rule did not apply to competitors in a regulated industry, such as the taxicab industry, "who are attempting to challenge governmental action threatening their competitive position."⁹ *Id.*, and cases cited. Even where a plaintiff had standing to [***11] sue and even where there was a violation of one of the statutes enumerated in § 21 (a), we recognized that rescission of the governmental action may not always be appropriate. See *id. at 537* ("fact that the municipal authorities were aware of the conflict of interest, but chose to ratify the action may be entitled to some weight where the action cannot be rescinded without detriment to the municipality").

9 The judge relied on this general rule of standing to find that the plaintiff in this case had no standing to sue because the rental of musical instruments is not a regulated industry.

In 2009, as part of "An Act to improve the laws relating to campaign finance, ethics and lobbying" (act), the Legislature significantly revised various provisions of *G. L. c. 268A*, including *G. L. c. 268A, § 21*. The Legislature rewrote *§ 21 (a)* to add the italicized language:

"In addition to any other remedies provided by law, a [*311] finding by the [state ethics] commission pursuant to an adjudicatory proceeding that there has been any violation of *sections 2, 3, 8, 17 to 20, inclusive, or section 23*, which has substantially influenced the action taken by any municipal agency in any particular matter, shall [***12] be grounds for avoiding, rescinding or canceling the action of said municipal agency upon request by said municipal agency on such terms as the interests of the municipality and innocent [**856] third persons require" (emphasis added).

St. 2009, c. 28, § 80. This revision not only added § 23 to the list of violations that may justify rescission but also added two prerequisites to the filing of an action for rescission: a finding of a violation of one of the enumerated sections by the commission pursuant to an adjudicatory proceeding, and a request for rescission by the municipal agency that took the action that the suit seeks to rescind.

The act also made significant amendments to § 21 (b), which authorized the commission itself, on a finding after an adjudicatory hearing that a person acted to his economic advantage in violation of *G. L. c. 268A, §§ 2, 3, 8, 17-20, or 23*, to order rescission of a municipal action pursuant to § 21 (a), to order the violator to pay to the commission on behalf of the municipality damages in the amount of the economic advantage, not to exceed \$25,000, and to order restitution to an injured third party. *G. L. c. 268A, § 21 (b)*, as appearing in St. 2009, c. 28, § 80.¹⁰ [***13] A consequence of these amendments to § 21 (b) is that rescission of an action by a municipal agency may be accomplished [*312] by the commission, without the need to bring a civil action, after a finding of violation of at least one of the enumerated sections in an adjudicatory proceeding, but only on the request of that municipal agency, while other remedies are available without such request.

10 The full text of *G. L. c. 268A, § 21 (b)*, as appearing in St. 2009, c. 28, § 80, reads:

"In addition to the remedies set forth in subsection (a), the commission may, upon a finding pursuant to an adjudicatory proceeding that a person has acted to his economic advantage in violation of *sections 2, 3, 8, 17 to 20, inclusive, or section 23*, may issue an order (1) requiring the violator to pay the commission on behalf of the municipality damages in the amount of the economic advantage or \$500, whichever is greater; and (2) requiring the violator to make restitution to an injured third party. If there has been no final criminal judgment of conviction or acquittal of the same violation, upon receipt of the written approval of the district attorney, the commission may order payment of additional damages in [***14] an amount not exceeding twice the amount of the economic advantage or \$500, and payment of such additional damages shall bar any criminal prosecution for the same violation. The maximum damages that the commission may order a violator to pay under this section shall be \$25,000. If the commission determines that the damages authorized by this section exceed \$25,000, it may bring a civil action against the violator to recover such damages."

It is interesting to note that the Legislature did not impose the two prerequisites of an adjudicatory finding by the commission and the request of the governmental entity when it rewrote *G. L. c. 268A, § 9 (a)*, which provides for rescission of the actions of a State agency, and *G. L. c. 268A, § 15 (a)*, which provides for rescission of the actions of a county agency. See St. 2009, c. 28, §§ 70 & 75.¹¹

The only change to these statutes was to include [**857] § 23 among the sections whose violations could trigger rescission. See *id.* The legislative history sheds little light on the reasons for imposing these prerequisites on actions brought under § 21 (a) but not on actions brought under § 9 (a) or § 15 (a). But the commission's annual reports in 2007 and 2008 [***15] reflected that more than seventy per cent of the complaints alleging conflict of interest violations involved municipal employees, and more than sixty-one per cent of the complaints [*313] were dismissed by the commission, either because they were frivolous or otherwise did not justify continued investigation, or because they failed to allege a violation of G. L. c. 268A.¹² The Legislature reasonably could have decided that cash-strapped municipal agencies should not be burdened with the cost of defending civil actions seeking rescission of their actions where there has been no finding by the commission of a violation of one of the enumerated conflict of interest laws and where the municipal agency itself does not seek to rescind the action, especially where, with the amendments to § 21 (b), the commission may order restitution to an injured third party without the approval of the municipal agency.

11 *General Laws c. 268A, § 9 (a)*, as appearing in St. 2009, c. 28, § 70, provides:

"In addition to any other remedies provided by law, any violation of *sections 2 to 8*, inclusive, or *section 23* which has substantially influenced the action taken by any state agency in any particular matter, shall [***16] be grounds for avoiding, rescinding or canceling the action on such terms as the interests of the

commonwealth and innocent third persons shall require."

Similarly, *G. L. c. 268A, § 15 (a)*, as appearing in St. 2009, c. 28, § 75, provides:

"In addition to any other remedies provided by law, a violation of *section 2, 3, 8*, or *sections 11 to 14*, inclusive, or *section 23* which has substantially influenced the action taken by any county agency in any particular matter, shall be grounds for avoiding, rescinding, or canceling the action on such terms as the interests of the county and innocent third persons shall require."

12 See Massachusetts State Ethics Commission, Fiscal Year 2008 Annual Report, at 11 (2008); Massachusetts State Ethics Commission, Fiscal Year 2007 Annual Report, at 11 (2007).

Conclusion. Here, the plaintiff does not allege either that the commission has made a finding of a violation of § 23 or that the school district has requested rescission of its agreement with M&A. Without these prerequisites, the plaintiff cannot prevail in his motion seeking preliminary injunction and cannot continue to prosecute this action. Therefore, we not only affirm the denial of the plaintiff's [***17] motion for preliminary injunction, albeit on different grounds, but also remand the case to the Superior Court with instructions to dismiss the action.¹³

13 In light of this ruling, we need not decide whether, if these prerequisites were satisfied, the plaintiff had standing to bring a private right of action to seek rescission.

So ordered.

PEDRO LOPEZ & others¹ vs. COMMONWEALTH & another.²

- 1 Spencer Tatum, Gwendolyn Brown, and Louis Rosario, Jr.
2 Personnel administrator of the division of human resources.

SJC-11013

SUPREME JUDICIAL COURT OF MASSACHUSETTS

463 Mass. 696; 978 N.E.2d 67; 2012 Mass. LEXIS 1006; 116 Fair Empl. Prac. Cas. (BNA) 850

May 7, 2012, Argued
November 9, 2012, Decided

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on February 11, 2009. A motion to dismiss was heard by Thomas E. Conolly, J. The Supreme Judicial Court granted an application for direct appellate review. *Lopez v. Massachusetts*, 588 F.3d 69, 2009 U.S. App. LEXIS 26310 (1st Cir. Mass., 2009)

HEADNOTES

Police, Promotional examination. Civil Service, Police. Anti-Discrimination Law, Race. Employment, Discrimination. Governmental Immunity. Equal Rights Act. Public Employment, Police.

COUNSEL: Harold L. Lichten (Stephen S. Churchill with him) for the plaintiffs.

Sookyong Shin, Assistant Attorney General, for the defendants.

Catherine C. Ziehl & Beverly I. Ward for Massachusetts Commission Against Discrimination, amicus curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ. **CORDY, J.** (dissenting in part).

OPINION BY: DUFFLY

OPINION

[*697] [**71] DUFFLY, J. The named plaintiffs, African-American and Hispanic police officers employed by municipalities throughout the Commonwealth who are subject to the civil service

law, *G. L. c. 31*, brought suit in the Superior Court on behalf of themselves and a class of similarly situated individuals against the defendants, the Commonwealth and the division of human resources (division). The plaintiffs alleged that the division engaged in racial discrimination through the creation, design, and administration of a multiple-choice examination for candidates seeking promotion to the position of police sergeant. According [***2] to the complaint, the plaintiffs' employing municipalities (which are not named defendants in this action) relied on a ranked list of candidates who had passed this examination in making promotional decisions. The plaintiffs maintained that, because of the examination's adverse, discriminatory impact on African-American and Hispanic candidates, they were ranked lower on the list than their nonminority counterparts, despite being equally qualified. As a result of not being included at the top of the list from which promotions were made, they were denied promotional opportunities.

A Superior Court judge granted the defendants' motion to dismiss on the grounds that the Commonwealth had not waived [*698] its sovereign immunity from suit and, in the alternative, that the plaintiffs had failed to state any claim on which relief could be granted. We granted the plaintiffs' application for direct appellate review. We conclude that the plaintiffs' claim under *G. L. c. 151B*, § 4 (4A), should not have been dismissed because it alleges adequately that the defendants interfered with the plaintiffs' enjoyment of rights protected by *G. L. c. 151B*, specifically the plaintiffs' right to be free of racial discrimination [***3] in opportunities for promotion, but that the other claims were dismissed properly.

1. Background. a. Prior proceedings. In 2007, the plaintiffs sued the division and the plaintiffs' municipal employers in the United States District Court for the District of Massachusetts, alleging disparate impact race discrimination in violation of a provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (Title VII).³ *Lopez v. State*, 588 F.3d 69, 72-73 (1st Cir. 2009) (Lopez). The State defendants moved to dismiss on the ground of immunity from suit, arguing that Title VII abrogates immunity under the *Eleventh Amendment to the United States Constitution* only when a State functions as an employer, and that the division is not the plaintiffs' employer. *Id.* at 73. The District [**72] Court judge denied the motion, but the United States Court of Appeals for the First Circuit reversed, holding that the division is not the plaintiffs' employer within the meaning of Title VII. *Id.* at 89. On remand, the case proceeded to trial against the municipal employers. In 2009, the instant action was commenced in the Superior Court.

3 The plaintiffs also raised State law claims [**4] under *G. L. c. 151B*, but, according to their brief, they later assented to the dismissal of those claims without prejudice in order to pursue them in State court. The *Eleventh Amendment to the United States Constitution* bars State law claims against State officials in Federal court. See *Lopez v. State*, 588 F.3d 69, 73 n.1 (1st Cir. 2009) (Lopez), quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

b. Factual allegations. The plaintiffs filed the present suit in their individual capacities and as representatives of a class of similarly situated individuals, defined as "[a]ll Black and Hispanic police officers within the Commonwealth of Massachusetts who are employed in cities and towns covered by the [*699] [S]tate civil service law, [*G. L. c.*] 31, and who have taken the 2005, 2006, 2007 and 2008 police sergeant promotional examination administered by [the division] but have not been reached for promotion." We recite those facts alleged in the complaint⁴ that plausibly suggest entitlement to relief, taking them as true for purposes of our review of the judge's ruling on the motion to dismiss. See *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-636, 888 N.E.2d 879 (2008) (Iannacchino).

4 For [**5] convenience, we refer to the plaintiffs' second amended complaint as the complaint.

The division, an agency of the Commonwealth, creates, designs, and administers promotional examinations to candidates for promotion to police sergeant.⁵ The examinations are comprised of one hundred multiple choice questions taken from "law enforcement and related textbooks." To achieve a passing score, candidates must score at least seventy points; the maximum possible score is one hundred points. The examinations "have, over the last [twenty] years, been shown to have a significant adverse impact upon . . . (Black and Hispanic) test takers while not having been shown to be valid predictors of job performance for a police sergeant." Despite the fact that the division is aware of the test's flaws, assert the plaintiffs, it has "taken no action to design a less discriminatory and more job-related examination procedure."

5 See *G. L. c. 31, § 3* (providing for development of rules to regulate "recruitment, selection, training and employment of persons for civil service positions," including rules providing for "development of examination procedures").

Municipalities that opt to use the division's examination [**6] select candidates for promotion from those at the top of a list prepared by the division, on which passing candidates are ranked by the scores they achieved on the examination. Alternatively, municipalities may choose to conduct their own promotional examinations. However, in "virtually" all municipalities at issue in this action, the division's examination was used without modification in some or all of the four relevant years.

A majority of the plaintiffs passed the examination but did not receive scores high enough to be considered for promotion. According to the complaint, as a result of the use of the division's [*700] examination, African-American and Hispanic police officers have been ranked significantly lower than their nonminority counterparts, although they are otherwise equally qualified to be police sergeants, and "few, if any, minorities have been promoted to the position of sergeant . . . in civil service municipalities throughout the Commonwealth." As a result, there is a significant disparity between the number of African-American and Hispanic police sergeants in the Commonwealth

"and their corresponding numbers in entry-level police officer ranks."⁶

6 Although the plaintiffs [***7] also allege that, in the municipalities that employ them, "few, if any, minorities have been promoted to the position of sergeant," they do not specifically allege that there is a significant disparity within such municipalities between the percentage ratio of African-American and Hispanic police sergeants and their numbers in entry-level police officer ranks, on the one hand, and the corresponding percentage ratio of similarly situated nonminority police officers on the other. See *Commonwealth v. Arriaga*, 438 Mass. 556, 565-567, 781 N.E.2d 1253 & n.5 (2003) ("Consistent with the majority of jurisdictions, we apply the absolute disparity test to determine whether underrepresentation of a group is substantial"). Cf. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1000, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) (prima facie case of discriminatory promotion practices may fail where "relevant data base is too small to permit any meaningful statistical analysis").

[**73] The complaint asserts that the division engaged in discriminatory promotion practices in violation of *G. L. c. 151B*, § 4 (1), (4A), and (5) (hereinafter § 4 [1], § 4 [4A], and § 4 [5], respectively). The complaint also alleges that the division violated *G. L. c. 93*, § 102, which provides in relevant part that [***8] all persons shall have the same rights to make and enforce contracts as those enjoyed by "white male citizens." The defendants moved to dismiss the complaint for lack of jurisdiction, *Mass. R. Civ. P. 12 (b) (1)*, 365 Mass. 754 (1974), on the basis of sovereign immunity; or in the alternative, for failure to state a claim on which relief can be granted, *Mass. R. Civ. P. 12 (b) (6)*, 365 Mass. 754 (1974). By a margin indorsement, the judge allowed the motion to dismiss for the reasons stated in the division's memorandum.

2. Discussion. a. Standard of review. "We review the allowance of a motion to dismiss de novo," *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676, 940 N.E.2d 413 (2011), accepting as true "the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them." *Ginther v. Commissioner of*

Ins., 427 Mass. 319, 322, 693 N.E.2d 153 (1998). In determining [*701] whether the factual allegations are sufficient to survive a motion to dismiss under *rule 12 (b) (6)*, we consider whether the allegations "'plausibly suggest[] [and are] (not merely consistent with)' an entitlement to relief." *Iannacchino*, *supra* at 636, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) [***9] (*Twombly*). Although detailed factual allegations are not required, a complaint must set forth "more than labels and conclusions Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" *Iannacchino*, *supra*, quoting *Twombly*, *supra* at 555.

b. Sovereign immunity. Before addressing the plaintiffs' theories of liability under *G. L. c. 151B*, we evaluate whether, as asserted by the plaintiffs, the Commonwealth has waived its sovereign immunity under *G. L. c. 151B*. As a general matter, "the Commonwealth or any of its instrumentalities 'cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed [by] statute.'" *DeRoche v. Massachusetts Comm'n Against Discrimination*, 447 Mass. 1, 12, 848 N.E.2d 1197 (2006) (*DeRoche*), quoting *General Elec. Co. v. Commonwealth*, 329 Mass. 661, 664, 110 N.E.2d 101 (1953). See *Lopes v. Commonwealth*, 442 Mass. 170, 175, 811 N.E.2d 501 (2004) ("Sovereign immunity bars a private action against a State in its own courts absent consent by the Legislature . . . [***10] ."). Waiver of sovereign immunity will not be lightly inferred; "[c]onsent to suit must be expressed by the terms of a statute, or appear by necessary implication from them." *Woodbridge v. Worcester* [**74] *State Hosp.*, 384 Mass. 38, 42, 423 N.E.2d 782 (1981). In asserting that the Commonwealth has not consented to suit and therefore retains sovereign immunity, the division argues that express statutory waiver must authorize suit for each of the plaintiffs' particular claims under § 4 (1), (4A), and (5), in the manner and to the extent expressed in those subsections. We disagree.

General Laws c. 151B, § 9, permits "[a]ny person claiming to be aggrieved by a practice made unlawful under this chapter" to bring a civil action for damages or injunctive relief. *Section 4* then delineates various practices -- including alleged

practices [*702] that form the bases of the plaintiffs' claims -- that, when undertaken by "person[s]" or "employer[s]," are "unlawful." *Section 1 (1) and (5) of G. L. c. 151B*, respectively, define "person" and "employer" to include "the [C]ommonwealth and all political subdivisions," including boards, departments, and commissions. In previous cases considering waiver of sovereign immunity under *G. L. c. 151B*, [***11] we concluded that "[t]he Legislature has expressly waived sovereign immunity of the Commonwealth 'and all political subdivisions . . . thereof' by including them in the statutory definition of persons and employers subject to [*G. L. c. 151B*]." *DeRoche, supra at 12*. See *Bain v. Springfield*, 424 Mass. 758, 763, 678 N.E.2d 155 (1997) ("no doubt" that *G. L. c. 151B* waives sovereign immunity). Here, the Commonwealth has consented to suit under § 4 (4A) and (5) by including the Commonwealth and its instrumentalities in the statutory definition of "person," and under § 4 (1) by including the Commonwealth and its instrumentalities in the statutory definition of "employer." See *G. L. c. 151B*, §§ 1, 9. The division's arguments concerning whether it can be subject to liability under these particular subsections ultimately go to whether the plaintiffs have stated a claim on which relief can be granted under *rule 12 (b) (6)*, discussed *infra*, not whether the division, as an instrumentality of the Commonwealth, retains sovereign immunity. Moreover, the division has not identified any provision of *G. L. c. 151B* explicitly indicating that the Commonwealth and its instrumentalities may be sued only in a particular [***12] manner or to a particular extent. Consequently, we conclude that the Commonwealth -- and the division, as an instrumentality of the Commonwealth -- has consented to suit under *G. L. c. 151B*.

c. Theories under *G. L. c. 151B*. We now consider whether the plaintiffs have stated claims for which relief can be granted on their three theories of liability under § 4. We conclude that the plaintiffs may not proceed on their claims under § 4 (1) and (5), but that they may proceed with their claim under § 4 (4A).

i. *Section 4 (1)*. The plaintiffs allege that the division violated § 4 (1), which makes it unlawful for an employer "because of the race [or] color . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide [*703] occupational qualification."

Although they were not directly employed by the division,⁷ the plaintiffs argue that the division, as an "employer," may nevertheless be subject to liability on an indirect employment [**75] theory, and rely on Federal case law interpreting Title VII to support their claim.

7 The plaintiffs concede that they are not direct employees of the division under [***13] the traditional common-law test. See *Maniscalco v. Director of the Div. of Employment Sec.*, 327 Mass. 211, 212, 97 N.E.2d 639 (1951), quoting *Griswold v. Director of the Div. of Employment Sec.*, 315 Mass. 371, 372-373, 53 N.E.2d 108 (1944) (reiterating common-law employer-employee relationship).

The indirect employment theory was first endorsed in the context of Title VII⁸ in *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 160 U.S. App. D.C. 14 (D.C. Cir. 1973) (Sibley).⁹ The plaintiff in *Sibley* alleged that the defendant hospital violated Title VII, which proscribes employers from engaging in certain forms of discrimination based on sex. *Id. at 1339-1340*.¹⁰ Reasoning that Title VII was intended to prohibit employers "from exerting any power [they] may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him," the court concluded that the statute did not contemplate providing protections only in those situations where there was a direct employment relationship between the plaintiff and defendant, i.e., that of "an employee of an employer." *Id. at 1341*. The court held that, although the defendant was not the plaintiffs' "actual [or] potential direct employer[]," the complaint [***14] alleged sufficient facts to state a claim against one "who control[s] access to . . . employment and who den[ies] . . . access by reference to invidious criteria." *Id. at 1342*.

8 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (Title VII), addressed in *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 160 U.S. App. D.C. 14 (D.C. Cir. 1973) (Sibley), is the Federal analogue to *G. L. c. 151B*. See *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*, 400 Mass. 156, 163, 508 N.E.2d 587 (1987).

9 The indirect employment theory developed in *Sibley* is commonly referred to as an "interference theory" and is referred to as such by the plaintiffs. See, e.g., *Lopez, supra at 89*; *Association of Mexican-Am. Educators v. State, 231 F.3d 572, 580 (9th Cir. 2000)* (en banc) (AMAE).

10 In *Sibley, supra*, the matter came before the court on the defendant's appeal from the sua sponte entry of summary judgment in favor of the plaintiff. The court agreed that the plaintiff's complaint alleged facts sufficient to support a claim under Title VII, but concluded that "it was not the part of careful adjudication to enter summary judgment sua sponte," and reversed. *Id. at 1342-1344*.

[*704] Other circuit [***15] courts of the United States Court of Appeals have held similarly that a plaintiff bringing a claim under Title VII need not be in a direct employer-employee relationship with the defendant, so long as the defendant is an employer that "interferes with an individual's employment opportunities with another employer." *Association of Mexican-Am. Educators v. State, 231 F.3d 572, 580 (9th Cir. 2000)* (en banc) (AMAE), quoting *Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019, 1021 (9th Cir. 1983)*.¹¹ See *Zaklana v. Mt. Sinai Med. Ctr., 842 F.2d 291, 294 (11th Cir. 1988)*. But see *Lopez, supra at 89* (declining to adopt indirect employer interference theory for Title VII claims); *Gulino v. New York State Educ. Dep't, 460 F.3d 361, 373-376 (2d Cir. 2006)*, cert. denied, *554 U.S. 917, 128 S. Ct. 2986, 171 L. Ed. 2d 885 (2008)* (same).

11 In *AMAE, supra*, Latino, African-American, and Asian-American educators challenged a Statewide certification regime for California public school teachers, alleging that minority candidates disproportionately received failing scores on a test that was a prerequisite for prospective public school teachers and other public school personnel. *Id. at 578*. The defendants appealed from the grant of summary [***16] judgment in favor of the plaintiffs on the issue of the applicability of Titles VI and VII of the Civil Rights Act of 1964. *Id. at 579*. The court cited *Sibley, supra*, with approval in holding that California and its credentialing body interfered with the

plaintiffs' employment opportunities with local school districts. *AMAE, supra at 581*. The court concluded, in line with *Sibley*, that a "direct employment relationship is not a prerequisite to Title VII liability." *Id. at 580*.

[**76] No Massachusetts appellate decision has addressed squarely the issue whether a plaintiff can sustain a claim under § 4 (1) on an interference theory, see *Thomas O'Connor Constructors, Inc. v. Massachusetts Comm'n Against Discrimination, 72 Mass. App. Ct. 549, 555-556, 893 N.E.2d 80 (2008)*, and we need not do so here. Even if, as a general matter, we were to conclude that § 4 (1) provides a basis for liability on an indirect employment theory, such a theory is not supported by the facts pleaded in the plaintiffs' complaint. The plaintiffs have not alleged that the division exercised the type of direct control over access to employment opportunities that was present in other cases, see *Sibley, supra*, and *AMAE, supra*, where liability under [***17] Title VII has been predicated on an interference theory by an indirect employer. Thus, the plaintiffs have failed to state a claim under § 4 (1) on which relief may be granted.

[*705] In *Sibley, supra*, the plaintiff, a male private-duty nurse, alleged that the defendant hospital, through its supervisory nurses, prevented the plaintiff from reporting to female patients who had requested a private nurse. Although the patients, who would be paying for the private nursing services, could reject the nurse, the hospital controlled the premises on which those services were to be provided as well as the plaintiff's access to patients who would initiate employment, thereby directly denying the plaintiff access to employment opportunities because of his sex. *Id. at 1339-1342*. In *AMAE, supra*, California was deemed to be one of the employers of municipal school teachers for purposes of Title VII. In reaching this determination, the court noted the "peculiar degree of control that the State of California exercise[d] over local school districts," which affected "day-to-day operations." *Id. at 581*. "[B]y requiring, formulating, and administering the [mandatory credentialing examination]," California effectively [***18] "dictate[d] whom the districts may and may not hire." *Id. at 582*. Based on this pervasive and direct control over hiring,¹² the court concluded that California was liable under Title VII on an indirect employment theory. *Id.*

12 "Indeed, the [S]tate is so entangled with the operation of California's local school districts that individual districts are treated as '[S]tate agencies' for purposes of the *Eleventh Amendment*." *AMAE, supra* at 582.

The relationship between the division and the plaintiffs here is considerably more attenuated. Although the plaintiffs allege that the promotional examination, administered by the division and ultimately used by the municipalities, has "been shown to have a significant adverse [discriminatory] impact upon minority (Black and Hispanic) test takers," they concede that the employing municipalities had the option, under *G. L. c. 31, § 11*, to create and administer an alternative promotional examination, and to rest promotional decisions on factors other than the examination.¹³ Because the plaintiffs' factual allegations [*706] as to the degree of control the division exercised over the plaintiffs' employment opportunities do not assert the level of control that [***19] would be necessary to [**77] establish an indirect employment relationship under *Sibley, supra*, and *AMAE, supra*, even if we were to adopt such a doctrine, the § 4 (1) claim was properly dismissed.

13 See *Lopez, supra* at 77-78 (nothing in Massachusetts civil service law, *G. L. c. 31*, mandates that municipalities use results of division's promotional examination as sole criterion to evaluate merit-based promotions). See also *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 255, 850 N.E.2d 533 (2006), quoting *G. L. c. 31, § 3 (e)* (nothing in *G. L. c. 31* "mandates that promotions be made in strict rank order based only on examination results. Rather, the statute allows consideration of 'any combination of factors which fairly test the applicant's ability to perform the duties of the position as determined by the administrator [of the division]'").

ii. *Section 4 (4A)*. Unlike § 4 (1), which by its terms prohibits discrimination by employers, the division need not be an employer to be subject to an interference claim under § 4 (4A). Under § 4 (4A), it is unlawful for "any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by [*G. L. c. 151B*], [***20] or to coerce, intimidate, threaten or interfere with such other

person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by [*G. L. c. 151B*]." That provision "independently and explicitly provides for an interference claim, not merely against employers, but against all 'person[s].'" *Thomas O'Connor Constructors, Inc. v. Massachusetts Comm'n Against Discrimination, supra* at 564 (Rubin, J., concurring in the judgment and dissenting in part).

The complaint alleges that the division violated § 4 (4A) because it interfered with the plaintiffs' enjoyment of their right, pursuant to *G. L. c. 151B*, to be free from discrimination in the terms, conditions, and privileges of employment. The plaintiffs assert that the interference consisted of the division's repeated administration of a multiple-choice examination despite knowledge of its Statewide, adverse disparate impact on promotional opportunities for African-American and Hispanic candidates, and knowledge that the examination is not a valid predictor of job performance. The plaintiffs do not contend that the division created, designed, or administered the examination with the [***21] intent to interfere with their employment opportunities. Rather, they maintain that the division knowingly created, designed, and administered examinations on which African-American and Hispanic police officers performed disproportionately poorly compared to their nonminority counterparts in the pool of potential candidates Statewide, with the result that "few, if any minorities have been promoted" from police officer ranks [*707] to sergeant, and the division thereby unlawfully interfered with the promotional opportunities of minority officers.

The division argues that, even accepting all of the allegations in the plaintiffs' complaint as true, their claim under § 4 (4A) fails as a matter of law: first, because that subsection only prohibits retaliation against persons who exercise their rights under *G. L. c. 151B*, and the plaintiffs do not allege that the division has retaliated against them; and second, because the word "interfere" in § 4 (4A) must be defined to require conduct undertaken with the "intent to deprive someone of a protected right," which the plaintiffs do not allege.

We turn first to the assertion that § 4 (4A) only prohibits acts of retaliation. To assess this argument, we [***22] consider the plain language of the statute, mindful that *G. L. c. 151B* "shall be construed liberally for the accomplishment of its

purposes." *G. L. c. 151B, § 9*. "[W]e interpret the statutory language 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'" *Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779, 785, 971 N.E.2d 748 (2012), quoting *Boston Police Patrolmen's Ass'n v. Boston*, 435 Mass. 718, 719-720, 761 N.E.2d 479 (2002).

[**78] The language of the statute does not support the division's claim that § 4 (4A) provides protection only against retaliation. Section 4 (4A) has two clauses, only one of which (the second) provides protection against retaliation. The second clause provides that it is an unlawful practice "[f]or any person . . . to coerce, intimidate, threaten or interfere with [another] person for having aided or encouraged any other person in the exercise or enjoyment of any . . . right granted or protected by [c. [***23] 151B]." *G. L. c. 151B, § 4 (4A)*. The first clause of § 4 (4A) prohibits "interfere[nce] with . . . the exercise or enjoyment of any right granted or protected by this chapter." Among the rights protected by *G. L. c. 151B* is the right to be free from discrimination in the terms, conditions, and privileges of employment, which includes the right to equal opportunities for promotion without discrimination on the basis of race, color, or national origin. See [*708] *G. L. c. 151B, § 4 (1)*; *Haddad v. Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. 91, 108, 914 N.E.2d 59 (2009).

The cases on which the division relies, *Bain v. Springfield*, 424 Mass. 758, 765, 678 N.E.2d 155 (1997), and *King v. Boston*, 71 Mass. App. Ct. 460, 472-473, 883 N.E.2d 316 (2008), do not assist it. Those cases cite both *G. L. c. 151B, § 4 (4)* and (4A), in their discussion of "retaliation" claims because the plaintiffs therein alleged that the defendants interfered with their right to complain of discrimination through conduct that was also retaliatory. In those factual circumstances, the § 4 (4A) claims were described properly as retaliation claims. But, notwithstanding the fact that retaliation may also constitute interference under the second clause of § 4 (4A), retaliation [***24] is not required to establish a claim of interference under the first clause of § 4 (4A). See *Pontremoli v.*

Spaulding Rehabilitation Hosp., 51 Mass. App. Ct. 622, 624-625, 626 n.4, 747 N.E.2d 1261 (2001).¹⁴

14 We noted in *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 700, 774 N.E.2d 1085 (2002), that retaliation claims under *G. L. c. 151B, § 4 (4)*, provide a distinct cause of action from interference claims under *G. L. c. 151B, § 4 (4A)*, but we did not specifically address the distinction. The § 4 (4A) interference claim in that case was premised on alleged retaliation by the defendant that consisted of the filing of a lawsuit against the plaintiff. Balancing the constitutional right to petition government against the competing statutory right to be free from employment discrimination, we concluded that a lawsuit filed by an employer against an employee that has a legitimate basis in law "does not violate the provisions of either § 4 (4) or § 4 (4A), absent evidence that the employer's purpose is other than to stop conduct it reasonably believes violates the terms of [its] contract" with the employee. *Id.* at 705. Our reference to evidence of the employer's purpose in the *Sahli* case was specific to the circumstances [***25] as alleged in that case, namely the assertion of retaliation or interference based on the filing of a lawsuit.

We turn next to the division's argument that the term "interfere" in § 4 (4A) encompasses only acts specifically undertaken with the intent to deprive a person of a protected right. We agree that the word "interfere" in § 4 (4A) is appropriately considered with, and interpreted in light of, the words "coerce," "intimidate," and "threaten" that precede it, and that each implies some form of intentional conduct.¹⁵ [**79] However, it is not necessary that a plaintiff allege that such [*709] interference not only was intentional, but was undertaken with a specific intent to discriminate. As was recognized in *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination*, 377 Mass. 424, 429 n.10, 386 N.E.2d 1251 (1979) (Braintree), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (Griggs), *G. L. c. 151B, § 4*, like Title VII, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation".¹⁶

15 By contrast, the Massachusetts Civil Rights Act, *G. L. c. 12, § 11H*, makes it unlawful for any person to "interfere by threats, intimidation or coercion" [***26] with another's exercise of his civil rights. So structured, the word "interfere" is specifically defined by the words that follow it; its meaning, and thus the scope of recovery under the civil rights act, is significantly narrowed by the requirement that the interference must take the form of either threats, intimidation or coercion. See *Planned Parenthood League of Mass., Inc. v. Blake*, 417 Mass. 467, 473, 631 N.E.2d 985, cert. denied, 513 U.S. 868, 115 S. Ct. 188, 130 L. Ed. 2d 122 (1994). The word "interfere" in *G. L. c. 151B, § 4 (4A)*, however, is listed as a separate proscribed act, following threats, intimidation, and coercion.

16 As the Appeals Court correctly observed, "When the Supreme Judicial Court first recognized that one could base a c. 151B claim on a disparate impact theory, the court did not tether that conclusion to any particular language in the statute." *Porio v. Department of Revenue*, 80 Mass. App. Ct. 57, 68, 951 N.E.2d 714 (2011), citing *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination*, 377 Mass. 424, 428-429, 386 N.E.2d 1251 (1979). It is nonetheless apparent from its context that the claim that was the focus of our decision was based on *G. L. c. 151B, § 4 (1)*.

A violation of a plaintiff's right to be free from discrimination [***27] in opportunities for promotion may be established by proof of the disparate impact of an employment practice on promotional opportunities for employees of a particular race, color, or national origin. Discrimination that is based on proof of disparate impact "involve[s] employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another." *Braintree*, *supra* at 429.¹⁷ We recognized in the *Braintree* case that, unlike disparate treatment claims, "discriminatory motive is not a required element of proof" in disparate impact cases. *Id.* See *Griggs*, *supra* at 432 ("good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are [*710] unrelated to measuring job capability").¹⁸

This is because "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987-988, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) (extending application of disparate impact [***28] analysis to subjective and discretionary hiring and promotion decisions, which previously had been applied only to hiring and promotion decisions based on standardized tests).

17 Because there is relatively little case law on disparate impact claims in Massachusetts, we look to Title VII for guidance, mindful that Federal interpretations are not binding on this court when construing a State statute. See *Brown v. F.L. Roberts & Co.*, 452 Mass. 674, 680, 896 N.E.2d 1279 (2008). See also *Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination*, 450 Mass. 327, 337-338, 879 N.E.2d 36 (2008).

18 Two decades after the United States Supreme Court recognized the availability of a disparate impact theory under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (*Griggs*), Congress codified the elements required to establish discrimination based on a claim of disparate impact. See *Lewis v. Chicago*, 130 S. Ct. 2191, 2197, 176 L. Ed. 2d 967 (2010). Such a claim is established if the plaintiff "demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice [***29] is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[**80] In the context of Title VII claims, the principle that facially neutral employment practices may violate Title VII, even in the absence of demonstrated discriminatory intent, has frequently been applied where standardized employment tests or other standardized criteria have had an adverse impact on hiring and promotion of minority candidates. See *Watson v. Fort Worth Bank & Trust*, *supra* at 988, and cases cited. "Nothing in the Act precludes the use of testing or measuring proce-

dures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs, supra at 436*.¹⁹

19 Title VII permits "an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h) (2006). The United States Supreme Court has interpreted this language [***30] to mean that ability tests must be demonstrated to be a reasonable measure of job performance. *Griggs, supra at 433-436*. "[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975), quoting 29 C.F.R. § 1607.4(C). See Equal Employment Opportunity Commission regulations, 29 C.F.R. § 1607.5(B) (2012) ("Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance").

We decide today that, like a claim under § 4 (1), see note 16, [*711] *supra*, an interference claim under § 4 (4A) may be established by evidence of disparate impact. Because discrimination based on proof of disparate impact does not require proof of discriminatory intent, the element of intentionality is satisfied where it is shown that a defendant knowingly interfered [***31] with the plaintiffs' right to be free from discrimination in the terms, conditions, and privileges of employment on the basis of a protected category such as race, color, or national origin. Thus, to make out a prima facie claim under § 4 (4A) based on a disparate impact theory of liability, a plaintiff must allege facts that, if proved, would establish that (1) a defendant utilized specific employment practices or selection criteria knowing that the practices or

criteria were not reasonably related to job performance; and (2) a defendant knew that the practices or criteria had a significant disparate impact on a protected class or group.

Here, the facts alleged in the plaintiffs' complaint and reasonable inferences drawn therefrom would, if true, establish that the division knowingly created and administered an examination on which African-American and Hispanic police officers perform more poorly than their nonminority counterparts; was aware that the examination is not reasonably related to job performance; and knew that utilization of the promotional examination caused a significant disparity in the ratio of African-American and Hispanic police officers promoted to the rank of sergeant [***32] as compared to the ratio of nonminority police officers so promoted. The plaintiffs assert that African-American and Hispanic candidates who were "equally as qualified" as nonminority test takers regularly take the promotional examination; based on examination results, African-American and Hispanic candidates consistently score lower than nonminorities, and thus are placed [**81] too low on the ranked eligibility lists to be hired, despite their being as qualified as nonminorities (who are hired). Based on these allegations, the complaint sets forth a plausible claim that the division's examination has a disparate impact on [*712] African-American and Hispanic police officers. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (plausibility standard requires "context-specific" inquiry that asks court to "draw on its judicial experience and common sense"); *Twombly, supra at 554-556* ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement").²⁰

20 Statistical data, which generally are the source of evidence of disparate impact, [***33] will be required at later stages of the proceedings, see *Commonwealth v. Arriaga*, 438 Mass. 556, 565-567, 781 N.E.2d 1253 & n.5 (2003), but is not required at the pleading stage.

"Standard statistical analysis in discrimination cases generally takes the unprotected group and compares the treatment of that group to the treatment of the pro-

tected group to determine whether there is a statistically significant difference. . . . Differences, if any, can be measured in terms of absolute numbers, standard deviations or percentages." Tinkham, *The Uses and Misuses of Statistical Proof in Age Discrimination Claims*, 27 *Hofstra Lab. & Employment L.J.* 357, 358 (2010). See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-653, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989) ("if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite," selection mechanism "probably does not operate with a disparate impact on minorities"); *Griggs, supra* at 430-431 n.7 (use of standardized tests by defendant company "resulted in 58% of whites passing the tests, as compared with only 6% of the blacks").

It was not necessary that the plaintiffs allege that use of the division's examination [***34] led to a disparate impact on promotions in any particular, identified, employing municipality in order to state an interference claim under § 4 (4A). An allegation that a Statewide examination has been shown to disproportionately disadvantage African-American and Hispanic candidates, and is not a predictor of job performance, implies that use of the examination will have a disparate impact on the employment opportunities of at least some African-American and Hispanic police officers within the Commonwealth, by limiting the number of qualified African-American and Hispanic candidates among whom individual municipalities using the examination might seek to make promotions. Cf. *AMAE, supra* at 578, 582 (although there was no allegation that any individual school district had statistically significant racial disparities in hiring, Title VII applied to plaintiff teachers' claim against State of California where minority candidates disproportionately received failing [*713] scores on Statewide examination for public school teachers, and through use of examination, State "created a limited list of candidates from which local public school districts may hire").²¹

21 The division does not suggest that [***35] generalized Statewide statistics may not be used to establish a prima facie case of disparate impact. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977) (noting that

"application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory").

iii. *Section 4 (5)*. The plaintiffs contend also that the division violated § 4 (5), which makes it unlawful for "any person, whether an employer or an employee or not, to aid [or] abet . . . the [**82] doing of any of the acts forbidden under [*G. L. c. 151B*] or to attempt to do so." The division maintains that this claim was dismissed properly because the plaintiffs failed to allege that the division engaged in intentional discrimination, and because the plaintiffs did not name their municipal employers as defendants. We conclude that dismissal was appropriate, although not for the reasons advanced by the division.

In order to prevail on an aiding and abetting claim under § 4 (5), a plaintiff must show (1) that the defendant committed "a wholly individual and [***36] distinct wrong . . . separate and distinct from the claim in main"; (2) "that the aider or abetter shared an intent to discriminate not unlike that of the alleged principal offender"; and (3) that "the aider or abetter knew of his or her supporting role in an enterprise designed to deprive [the plaintiff] of a right guaranteed him or her under *G. L. c. 151B*." *Harmon v. Malden Hosp.*, 19 Mass. Discrimination L. Rep. 157, 158 (1997).

An aiding and abetting claim under § 4 (5), however, is also "entirely derivative of the discrimination claim." *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 122, 731 N.E.2d 1075 (2000). As a consequence, in addition to the "individual and distinct wrong" that the defendant must be alleged to have committed, the complaint must allege the commission of an underlying act of discrimination under *G. L. c. 151B*, (the "main claim") by the principal offender. See *Russell v. Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 458 n.7, 772 N.E.2d 1054 (2002).²² In this case, the plaintiffs' complaint fails to allege that any of the employing municipalities, [*714] as the proposed principal offenders, committed a distinct, underlying act of employment discrimination from which the aiding and [***37] abetting claim may be said to derive.

22 We reject the division's argument that under *Russell v. Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 772 N.E.2d 1054 (2002) (*Russell*), and *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 731 N.E.2d 1075 (2000) (*Abramian*), the plaintiffs' aiding and abetting claim under § 4 (5) necessarily fails because the municipalities are not named as defendants. In *Russell*, *supra* at 458 n.7, we held that the conclusion that the principal offender did not engage in employment discrimination under § 4 (16) necessarily resolved a corresponding aiding and abetting claim under § 4 (5) against its director of human resources and employee health. Similarly, in *Abramian*, *supra* at 122, we concluded that, because an aiding and abetting claim is necessarily derivative of the underlying discrimination claim, where a new trial was ordered for the discrimination claim, a new trial was also required for the aiding and abetting claim brought against separate defendants. Although in those cases both the alleged principal offender and the alleged aider and abettor were parties to the actions, the cases do not stand for the proposition that a claim of aiding and abetting under § 4 (5) necessarily [***38] fails where the principal offender is not named as a defendant.

In particular, the plaintiffs have not alleged that, because of the use of the division's examination, there is a significant disparity in the ratio of African-American and Hispanic police sergeants and their corresponding numbers in entry-level police officer ranks, compared to the ratio of nonminority police sergeants and the corresponding number of nonminority entry-level officers within the police division of any particular municipality.²³ Because the [**83] plaintiffs have not alleged that a specific practice or act was undertaken by one or more particular municipalities that could form the basis of a derivative aiding and abetting claim, they have not met the first of the three elements of a claim under *G. L. c. 151B, § 4 (5)*, and the claim properly was dismissed on this basis.²⁴

23 An interference claim under § 4 (4A) does not require such a specific allegation against a particular employer because a defendant (who is not the plaintiff's direct

employer) may independently commit an act of discrimination by "interfering" with the plaintiff's employment opportunities with that employer, based on statistical data supporting [***39] the disparate impact of the defendant's conduct on all employers within that category of employers. By contrast, an aiding and abetting claim under § 4 (5) requires the defendant to act in concert with one or more specific employers to "aid" or "abet" a primary and independent act of discrimination by those employers.

24 Allegations that the division "assisted with, and knowingly contributed to, the discriminatory conduct of the various municipalities" and "knowingly allowed municipalities to administer the . . . exam despite its discriminatory impact on hiring" are also insufficient to state an aiding and abetting claim under § 4 (5). These conclusory assertions of discriminatory conduct by "various municipalities" fail to allege a particular practice or act by any identified municipality from which an aiding and abetting claim could derive.

[*715] d. Claim under MERA. We address briefly the plaintiffs' claim under the Massachusetts Equal Rights Act, *G. L. c. 93, § 102* (MERA). Because of our determination that the plaintiffs have a remedy under *G. L. c. 151B, § 4 (4A)*, the plaintiffs cannot also proceed on their MERA claim. Where remedies under *G. L. c. 151B* "are or were available to a complainant, [***40] those remedies are exclusive, preempting the joining of parallel MERA claims." *Martins v. University of Mass. Med. Sch.*, 75 Mass. App. Ct. 623, 624, 915 N.E.2d 1096 (2009). See *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 586, 631 N.E.2d 555 (1994) ("where applicable, *G. L. c. 151B* provides the exclusive remedy for employment discrimination not based on preexisting tort law or constitutional protections").

3. Conclusion. For the reasons stated, we affirm the dismissal of the plaintiffs' claims under *G. L. c. 151B, § 4 (1)*; *G. L. c. 151B, § 4 (5)* and *G. L. c. 93, § 102*. We vacate the judgment dismissing the plaintiffs' *G. L. c. 151B, § 4 (4A)*, claim, and we remand the case to the Superior Court for further proceedings consistent with this opinion.

So ordered.

DISSENT BY: CORDY (In Part)

DISSENT

CORDY, J. (dissenting in part). I agree with the court's conclusion that the Commonwealth's human resources division (division) is not the employer of the plaintiff police officers in this case, and the plaintiffs do not have a cause of action against it or its personnel administrator under *G. L. c. 151B, § 4 (1), (4), or (5)*, or *G. L. c. 93, § 102*. The employers of the police officers are the municipalities that hire and promote them. Those municipalities may elect [***41] to use the written examinations prepared by the division to assist in the promotional process, or they may conduct their own alternative promotional examinations, including supplementing the division's examinations with performance assessments. Although the plaintiffs may have a cause of action under these and other statutory provisions against their employers [*716] (which they are pursuing in Federal court), they do not have one against the Commonwealth.¹

1 As the court correctly notes, ante at , the Commonwealth is considered a "person" under *G. L. c. 151B, § 4 (4A)*, and has thus waived sovereign immunity for purposes of claims under that subsection. See *G. L. c. 151B, §§ 1, 4 (4A)*.

I disagree with the court's conclusion that an interference claim under *G. L. c. 151B, § 4 (4A) (§ 4 [4A])*, can be established against a third party nonemployer without some showing of discriminatory intent. Such a conclusion is contrary to the statute's purpose and intent as determined through the application of accepted [**84] principles of statutory construction. Consequently, I respectfully dissent.

In the context of employment, it is unlawful for an employer to discriminate against any individual because of race. *G. L. c. 151B, § 4 (1)*. [***42] There are two accepted manners by which such employment discrimination can be demonstrated in litigation: either by way of disparate treatment (which requires a showing of discriminatory intent) or by way of disparate impact (which does not require a showing of discriminatory intent). The availability of each is dependent on the statutory language creating the cause of action. Compare *Currier v. National Bd. of Med. Examiners*, 462 *Mass. 1, 16, 965 N.E.2d 829 (2012)* ("discrimination claims set forth under the cognate Federal provisions to the equal rights act require intentional

discrimination and do not permit a plaintiff to proceed under a 'disparate impact' analysis"), with *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination*, 377 *Mass. 424, 429 n.10, 386 N.E.2d 1251 (1979)* (noting § 4 is susceptible to both disparate impact and disparate treatment claims).

In addition to barring employment discrimination by employers, § 4 (4A) also makes it unlawful "[f]or any person to coerce, intimidate, threaten or interfere with another person in the exercise or enjoyment of any right granted or protected" by *G. L. c. 151B*. The question we must answer in this case is whether a claim under § 4 (4A) can be [***43] maintained without an allegation or evidence that the "person" at issue, here the Commonwealth through its division, promulgated the promotional examinations taken by the plaintiffs with the intent and purpose [*717] of discriminating against them on account of their race. The answer to the question is dependent on the statutory language creating the cause of action.

There is no dispute that the words "coerce," "intimidate," and "threaten" that precede the word "interfere" in § 4 (4A) are each imbued with an element of purposefulness or intent. See *Planned Parenthood League of Mass., Inc. v. Blake*, 417 *Mass. 467, 474, 31 N.E.2d 985, cert. denied, 513 U.S. 868, 115 S. Ct. 188, 130 L. Ed. 2d 122 (1994)* (construing language of Massachusetts Civil Rights Act [*G. L. c. 12, § 11H*]). Specifically, coercion is "the active domination of another's will"; intimidation involves "putting in fear for the purpose of compelling or deterring conduct"; and threatening "involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." *Id.* Their presence in § 4 (4A) suggests that a cause of action brought thereunder requires such a showing. Consequently, the plaintiffs understandably seek to exploit the only ambiguity [***44] in the provision: the word "interfere." However, their argument for a broad reading that would shoehorn their claim into a provision which, for all other purposes, requires a showing of discriminatory purpose or intent is unpersuasive in light of our well-established canons of statutory interpretation.

It is fundamental that "statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 *Mass. 353, 360, 758*

N.E.2d 110 (2001). Where, as here, the plain meaning of "interfere" is open to competing interpretations,² we have relied [**85] on the doctrine of ejusdem generis in discerning legislative intent. See *Commonwealth v. Zubiel*, 456 Mass. 27, 31, 921 N.E.2d 78 (2010); *Banushi v. Dorfman*, 438 Mass. 242, 244, 780 N.E.2d 20 (2002); *Richardson v. Danvers*, 176 Mass. 413, 414, 57 N.E. 688 (1900). "This principle . . . 'allow[s] the specific words to identify the [*718] class and [restricts] the meaning of general words to things within the class.'" *Commonwealth v. Zubiel*, *supra*, quoting 2A N.J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47.17, at 379 (7th ed. 2007). Application of ejusdem generis is particularly [***45] "appropriate when a series of several terms is listed that concludes with the disputed language." *Banushi v. Dorfman*, *supra*. In such a statutory enumeration, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.*, quoting 2A N.J. Singer, *Sutherland Statutory Construction* § 47.17, at 273-274 (6th ed. rev. 2000)

2 The American Heritage Dictionary defines "interfere" as "[t]o be or create a hindrance or obstacle" and "[t]o intervene or intrude in the affairs of others; meddle." "Interfere" is listed as synonymous with "tamper," which means "to tinker with rashly or foolishly" and "to engage in improper or secret dealings, as an effort to influence." American Heritage Dictionary of the English Language 913, 1766 (4th ed. 2006). Although on one hand, the words "tamper," "meddle," and "secret dealings" suggest an element of intent, on the other, the words "[t]o be or create a hindrance or obstacle" do not of necessity suggest the same. See *id.*

In light of this applicable principle of statutory construction, I would conclude that an interference claim under § 4 (4A) requires a showing of the same type of [***46] purposeful or discriminatory intent as is plainly required by acts that would constitute coercion, threats, or intimidation.³

3 Other statutes using this series of words have also been interpreted to carry an element of intent. For example, the Fair Housing Act makes it "unlawful to coerce, intimidate, threaten, or interfere with any

person in the exercise or enjoyment of . . . any right granted or protected by [§] 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617 (2006). Consequently, to state a cause of action under this section, a plaintiff must allege (and show) that "the defendants' conduct was at least partially motivated by intentional discrimination." *South Middlesex Opportunity Council, Inc. v. Framingham*, 752 F. Supp. 2d 85, 95 (D. Mass. 2010).

The guiding principle for analyzing the present case was articulated in *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 700, 774 N.E.2d 1085 (2002), where an employer brought a declaratory judgment action against a former employee who, after signing a release of liability, had brought an age discrimination claim against the employer. The employee responded by filing a second discrimination claim, alleging that the filing of the declaratory [***47] judgment action was retaliation under § 4 (4) and threats, intimidation, coercion, and interference under § 4 (4A). In rejecting both claims, which we clarified constituted "separate and independent causes of action," *id.*, we held that an "employer does not violate the provisions of either § 4 (4) or § 4 (4A), absent evidence that the employer's purpose is other than to stop conduct it reasonably believes violates the terms of the contract" (emphasis added). *Sahli v. Bull HN Info. Sys., Inc.*, *supra* at 705, [*719] 707. The only logical inference to be drawn from the *Sahli* decision is that a cause of action under § 4 (4A) requires some type of unlawful purpose on the part of a defendant. In this light, the court's newfound recognition of disparate impact liability under § 4 (4A) significantly undercuts our own precedent.

Today's decision is also inconsistent with other interpretations of the statute. For instance, in *Woodason v. Norton Sch. Comm.*, 25 Mass. Discrimination L. Rep. [**86] 62 (2003),⁴ the Massachusetts Commission Against Discrimination (commission) rejected a discrimination claim under § 4 (4A) because the evidence failed to "establish the requisite 'intent to discriminate'" (emphasis in [***48] original). *Id.* at 64. There, and in sharp contrast to the commission's present position as amicus, the commission criticized a commissioner in a previous case involving § 4 (4A) for asserting that "'interfere' stands on its own" and must be construed liberally in light of *G. L. c. 151B*, § 9. *Id.*, quoting *Bendell v. Lemax Inc.*, 22

Mass. Discrimination L. Rep. 259, 262 (2000). To the contrary, the commission held, "In construing the word 'interfere' to give no import to the strong language surrounding it would be misguided" and therefore to be held liable, a person must have, "at the very least, 'interfered' with another's rights in a manner that was in deliberate disregard of those rights." *Woodason v. Norton Sch. Comm., supra*.

4 In *Woodason v. Norton Sch. Comm.*, 25 Mass. Discrimination L. Rep. 62 (2003), the complainant was a public school cafeteria assistant who had been terminated from her position, which she claimed constituted disability discrimination under *G. L. c. 151B, § 4 (16)*, and interference under § 4 (4A). After a hearing officer of the Massachusetts Commission Against Discrimination found for the complainant on the disability claim and the employer on the interference claim, [***49] both parties appealed to the full commission.

Similarly, in *Canfield v. Con-Way Freight, Inc.*, 578 F. Supp. 2d 235, 242 (D. Mass. 2008), the court, applying Massachusetts law, adopted the Woodason interpretation of "interference." In

denying a § 4 (4A) claim, the District Court judge noted that, because there was no evidence of "deliberate disregard," which "requires an 'intent to discriminate,'" the defendants could not be held liable for interference discrimination. *Canfield v. Con-Way Freight, Inc., supra* at 242, 243.

While language creating a cause of action may often be broad [*720] enough to pave the way either for a disparate impact or disparate treatment path to discrimination liability, that is not the case here. If the Legislature had sought to create a broader spectrum of liability, especially against persons who are not employers, it could have employed in § 4 (4A) the type of broad language it employed in § 4 (1). It did not, and absent a clear expression of such a purpose, I would not judicially graft a theory of liability onto the statute, particularly when doing so would be abrasive to our precedent and long-standing principles of statutory interpretation on which the Legislature [***50] should properly be able to rely. See *Commonwealth v. Zubiell, supra* at 31; *Sahli v. Bull HN Info. Sys., Inc., supra* at 707.

Therefore, I respectfully dissent.

SANJOY MAHAJAN & others¹ vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION & another.²

1 Victor Brogna, Stephanie Hogue, David Kubiak, Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli, Robert Skole, and Patricia Thiboutot.

2 Boston Redevelopment Authority (BRA).

SJC-11134

SUPREME JUDICIAL COURT OF MASSACHUSETTS

464 Mass. 604; 984 N.E.2d 821; 2013 Mass. LEXIS 47

November 5, 2012, Argued

March 15, 2013, Decided

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Superior Court Department on February 26, 2010. The case was heard by Elizabeth M. Fahey, J., on motions for judgment on the pleadings. The Supreme

Judicial Court granted an application for direct appellate review.

HEADNOTES

Department of Environmental Protection. Redevelopment of Land. Urban Renewal. Harbors. Parks and Parkways. Constitutional Law, Taking of property. Due Process of Law, Taking of property, Commonwealth's interest in tidelands.

COUNSEL: Denise A. Chicoine for Boston Redevelopment Authority.

Annapurna Balakrishna, Assistant Attorney General, for Department of Environmental Protection.

Gregor I. McGregor (Michael J. O'Neil & Luke H. Legere with him) for the plaintiffs.

The following submitted briefs for amici curiae:

Heather Maguire Hoffman for Shirley Kressel.

Thomas B. Bracken for The Sierra Club.

Peter Shelley & John A. Pike for Conservation Law Foundation, Inc., & others.

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

OPINION BY: CORDY

OPINION

[*605] [**823] CORDY, J. This action arises from the Department of Environmental Protection's (department's) issuance of a waterways license under G. L. c. 91 (chapter 91 license) to the Boston Redevelopment Authority (BRA) to redevelop a section of land owned by the BRA on the seaward end of Long Wharf (project site). The plaintiffs, ten residents of Boston's North End neighborhood, appealed the issuance of the chapter 91 license to the department's [***2] office of appeals and dispute resolution, and ultimately to a judge in the Superior Court, claiming the department acted unconstitutionally and beyond its statutory authority when it issued the chapter 91 license without obtaining a two-thirds vote of the Legislature as required by *art. 97 of the Amendments to the Massachusetts Constitution*.³ On cross motions for judgment on the pleadings, the motion judge ordered declaratory relief and issued a writ of mandamus ordering the department to enforce *art. 97*. We granted the BRA's application for di-

rect appellate review. We are presented with two principal questions: Whether the project site, which the BRA took by eminent domain for urban renewal purposes, is subject to *art. 97*; and if *art. 97* does apply, whether the department may issue the chapter 91 license to the BRA without triggering the requirement of a two-thirds vote of the Legislature. We conclude that the project site is not subject to *art. 97*.⁴

3 *Article 97 of the Amendments to the Massachusetts Constitution*, approved and ratified on November 7, 1972, superseded *art. 49* of the Amendments, but preserved the right of the people to enjoy the natural resources of the Commonwealth. [***3] We refer to the provision as *art. 97*.

4 We acknowledge the amicus briefs submitted by Shirley Kressel and the Sierra Club, as well as the brief submitted by the Conservation Law Foundation, the Massachusetts Association of Conservation Commissions, the Nature Conservancy, and the Trustees of Reservations.

1. Background. a. The BRA and the 1964 urban renewal plan. [*606] The BRA is both a "redevelopment authority" under *G. L. c. 121B, § 4*, and an "urban renewal agency" under *G. L. c. 121B, § 9*.⁵ Additionally, it serves as the planning board for the city of Boston and monitors private development under *G. L. c. 121A*. See *St. 1960, c. 652, §§ 12-14*.

5 A thorough comparison of the BRA's role in *G. L. c. 121A* urban redevelopment projects versus its role as an urban renewal agency in *G. L. c. 121B* urban renewal projects can be found in *Boston Edison Co. v. Boston Redev. Auth.*, 374 *Mass.* 37, 50-53, 371 *N.E.2d* 728 (1977). See *Boston Redev. Auth. v. Charles River Park "C" Co.*, 21 *Mass. App. Ct.* 777, 782-783, 490 *N.E.2d* 810 (1986).

The BRA's urban renewal powers and duties are enumerated throughout *G. L. c. 121B*, particularly in *§ 11* and *§§ 45-57A*. The legislative goals of *G. L. c. 121B* are to "eliminat[e] decadent, substandard, or blighted [***4] open" areas and to promote sound [**824] community growth. *G. L. c. 121B, § 45*. See *G. L. c. 121B, § 1* (defining decadent, substandard, and blighted open areas). The BRA is vested with the authority to effectuate

the goals of urban renewal through land assembly, title confirmation, public financial assistance, and development and design controls, all of which enable the BRA to guide private sector development toward areas in need. See *G. L. c. 121B, §§ 46-57A*. Perhaps the most significant power granted to the BRA is the power of eminent domain, which *G. L. c. 121B* confers on the BRA as is "necessary or reasonably required to carry out the purposes of [c. 121B]," *G. L. c. 121B, § 11 (d)*, such purposes being the elimination of "decadent, substandard or blighted open conditions." *G. L. c. 121B, § 45*.⁶

6 *General Laws c. 121B* grants the power of eminent domain to urban renewal agencies and otherwise provides for the acquisition and disposition of land pursuant to the purposes of urban renewal. A number of statutory sections discuss this power. *General Laws c. 121B, § 11*, provides: "Each operating agency shall have the powers . . . (d) To take by eminent domain . . . any property, real or personal, [***5] or any interest therein, found by it to be necessary or reasonably required to carry out the purposes of this chapter."

General Laws c. 121B, § 45, provides:

"It is hereby declared . . . that the acquisition of property for the purpose of eliminating decadent, substandard, or blighted open conditions thereon and preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, [and] the exercise of powers by urban renewal agencies . . . are public uses and purposes for which public money may be expended and the power of eminent domain exercised"

General Laws c. 121B, § 47, provides:

"Notwithstanding any contrary provision of this chapter, an urban renewal agency may . . . take by eminent domain, as provided in clause (d) of section eleven . . . or acquire by purchase, lease, gift, bequest or grant, and hold, clear, repair, operate and, after having taken or acquired the same, dispose of land constituting the whole or any part or parts of any area which . . . it has determined to be a decadent, substandard or blighted open area and for which it is preparing an urban [***6] renewal plan"

Pursuant to the Downtown Waterfront-Faneuil Hall urban [*607] renewal plan, dated April 15, 1964 (1964 urban renewal plan), and an order of taking, dated June 4, 1970, which incorporated that plan, the BRA acquired the project site in 1970 as part of a larger taking by eminent domain of the Long Wharf area (1970 taking). In accordance with the legislative goals of *G. L. c. 121B*, the 1964 urban renewal plan provides in Section 201:

"The [***7] basic goal of urban renewal action in the Downtown Waterfront-Faneuil Hall Area is to stimulate and to facilitate development efforts in the area, by eliminating those severe conditions of blight, deterioration, obsolescence, traffic congestion and incompatible land uses which hinder private investment in new development without the aid of governmental action, in order to (1) revitalize a key portion of downtown Boston; (2) upgrade the pattern of land uses close by the North End residential community; (3) establish a functional connection between the area and its surrounding districts: the North End, the Government Center and the Financial District; and (4) provide an environment suitable to the needs of contemporary real estate development."⁷

7 Section 202 of the Downtown Water-front-Faneuil Hall urban renewal plan, dated April 15, 1964 (1964 urban renewal plan), also outlines several planning objectives, which are as follows:

"(1) To eliminate a pattern of land uses and blighting conditions which

"(a) creates severe traffic congestion in the area;

"(b) exerts a depressing effect on adjacent areas;

"(c) inhibits the development of real property to its fullest economic potential.

"(2) To eliminate [***8] obsolete and substandard building conditions which are a factor in spreading blight to adjacent areas.

"(3) To prevent the further erosion of property values.

"(4) To protect and strengthen the tax base of the city.

"(5) To encourage productive and intensive use of land.

"(6) To create opportunities for development of a downtown residential community offering a range of housing types and rentals.

"(7) To provide sites suitable for the construction of efficient, economical buildings.

"(8) To promote the preservation and enhancement

of buildings in the Project Area which have architectural and historical significance.

"(9) To create an environment which is conducive to the investment of funds in rehabilitation, conversion and general upgrading of property.

"(10) To create an area with a mixture of land uses compatible with living, working and recreational opportunities.

"(11) To create an area for the development of marine or marine-oriented activities designed to stimulate tourism and symbolize the importance of Boston's historic relationship to the sea.

"(12) To provide for the efficient flow of traffic within and through the area.

"(13) To improve streets and utilities and the landscaping of [***9] public areas.

"(14) To provide public ways, parks and plazas which encourage the pedestrian to enjoy the harbor and its activities.

"(15) To develop the area in such a way as to stimulate improvements in adjacent areas."

[*608] [**825] b. The project site. The project site is a section of land at the eastern end of Long Wharf on which sits an open-air brick structure known as Long Wharf Pavilion. The BRA continues to hold and maintain Long Wharf, including the project site, pursuant to the 1964 urban renewal plan.⁸ Long Wharf is a designated national historic landmark, and is the site of water transportation, public transportation, hotels, retail establishments, and [*609] restaurants. It is also part of the Boston Harborwalk, a pedestrian walkway that lines the waterfront.

8 Although the 1964 urban renewal plan specified a forty-year effective period, the plan was amended in 2004 to be effective through April 30, 2015.

In 1983, the department⁹ permitted the Massachusetts Bay Transportation Authority to construct an emergency egress and ventilation shaft for the Blue Line subway tunnel, to be capped off by the structure now known as Long Wharf Pavilion. At the same time, the BRA undertook renovations to the plaza [***10] area surrounding the pavilion. The plaza measures approximately 33,000 square feet, is paved with granite flagstones, and features a large inlaid compass rose to the south of the pavilion. Other features include benches, public binoculars, and a flag pole. A segment of the Harborwalk lines the perimeter of the plaza. Although not discussed in much detail in the 1964 urban renewal plan, the plaza's current use is consistent with the plan's provision for an "observation platform" on Long Wharf.

9 The Department of Environmental Protection (department) was then referred to as the Department of Environmental Quality Engineering.

In addition to the 1964 urban renewal plan, the project site is also subject to Boston's Municipal Harbor Plan, which was approved in 1991 by the Secretary of the Executive Office of Environmental Affairs pursuant to *301 Code Mass. Regs. §§ 23.00* (2000) (municipal harbor plan). Among other objectives, the municipal harbor plan calls for the activation and revitalization of Boston's underutilized shoreline "by promoting growth through private investment [**826] that is appropriately designed, and is a balanced mix of uses that bring vitality to the waterfront and public [***11] benefits and amenities that are shared by all Boston residents." The municipal harbor plan was designed to complement waterways regulations that accompanied G. L. c. 91, already applicable to much of the waterfront area.

Considering the project site to be underutilized, the BRA proposed a plan in 2008 to redevelop it by enclosing and expanding the pavilion to accommodate a restaurant with outdoor seating, "takeout service," and a bar. Specifically, the BRA planned to expand the 3,430 square foot pavilion by 1,225 square feet. In addition to the restaurant, the proposed redevelopment includes shaded seating, restrooms, and several sets of binoculars,

all available to the public independent of patronage of the restaurant. The proposed redevelopment is intended to allow year-round [*610] use of the pavilion and provide facilities and seating to the large number of pedestrians and water transit users who frequent the area.

The BRA obtained fourteen zoning variances from the Boston zoning board of appeals that allow for live entertainment, "takeout service," and food and alcohol service until 1 A.M. at the proposed restaurant. In addition, because the project site is located on filled tidelands, [***12] the BRA was required to obtain the chapter 91 license from the department. See *G. L. c. 91, § 14; 310 Code Mass. Regs. §§ 9.00-9.55* (2012). See also *Moot v. Department of Env'tl. Protection*, 448 Mass. 340, 342, 861 N.E.2d 410 (2007), S.C., 456 Mass. 309, 923 N.E.2d 81 (2010) (discussing applicability of G. L. c. 91, which governs development on tidelands).

The department granted the chapter 91 license to the BRA on September 17, 2008. The plaintiffs appealed. They argued that the proposed restaurant would create unnecessary noise and would damage public open space, parkland, and scenic quality.¹⁰ On January 29, 2010, the commissioner of the department issued a final decision affirming the issuance of the chapter 91 license.¹¹ The plaintiffs appealed from that final decision to the Superior Court, seeking a declaratory judgment under *G. L. c. 231A* and a writ of mandamus under *G. L. c. 249, § 5*, ordering the department to enforce the requirements of *art. 97* by seeking a two-thirds vote of the Legislature prior to issuing the license. The motion judge concluded that because the 1964 urban renewal plan aimed to create parkland, open space, and a [*611] means of utilizing and enjoying the harbor, it served *art. 97* purposes and [***13] was therefore subject to *art. 97*. The judge further concluded that the issuance of the chapter 91 license constituted a transfer of legal control from the [**827] department to the BRA sufficient to effect a disposition, as well as a change in use of the land, both of which triggered the two-thirds vote requirement. Accordingly, the judge granted the plaintiffs' requested relief.¹²

10 The standard for granting a waterways license under G. L. c. 91 (chapter 91 license) for a nonwater dependent use (like the proposed restaurant) on filled tidelands is a finding by the department that the use "shall serve a proper public purpose and that

said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands." *G. L. c. 91, § 18*.

11 The plaintiffs filed their appeal from the department's office of appeals and dispute resolution (OADR) on October 9, 2008, and at a prescreening conference on December 3, 2008, the parties established a list of issues for resolution. Those issues pertained only to the chapter 91 license and did not include the *art. 97* issue. In a motion for summary decision filed during the appeals process on February 24, 2009, the plaintiffs [***14] raised the *art. 97* issue for the first time. The BRA and the department countered by asserting that *art. 97* is outside the department's express statutory authority. Based on that assertion, the OADR hearing officer (and, by adoption, the commissioner of the department) declined to consider the issue, and it was litigated for the first time in the Superior Court.

12 The plaintiffs also invoked *G. L. c. 30A, § 14*, arguing that the commissioner's decision was based on an error of law, and that issuance of the chapter 91 license was in contravention of *G. L. c. 91* statutory and regulatory requirements. See note 10, *supra*. Because the judge disposed of the case on *art. 97* grounds, she did not consider the plaintiffs' request for *G. L. c. 30A* review. Because the propriety of the chapter 91 license (apart from the potential *art. 97* issue) was not reviewed in the Superior Court, it is not properly before us on appeal.

On appeal, the plaintiffs contend that the project site is subject to *art. 97*, and that the department's issuance of the chapter 91 license constituted a use or disposition triggering the two-thirds vote requirement. The BRA counters that *art. 97* does not apply because the project [***15] site was not taken for *art. 97* purposes. The department argues that it lacks the authority to interpret and apply *art. 97*, and that even if *art. 97* did apply, the department's issuance of the chapter 91 license did not constitute a use or disposition triggering the vote requirement. Both defendants argue that the motion judge improperly voided the chapter 91 license through declaratory and mandamus relief.

2. Discussion. a. Applicability of *art. 97*. *Article 97* was approved and ratified on November 7, 1972, superseding *art. 49 of the Amendments*. See

note 3, *supra*. It provides, in pertinent part, as follows:

"The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

"The general court shall have the power to enact legislation necessary or expedient to protect such rights.

[*612] "...

"Lands and easements taken or acquired for such purposes shall not be used for [***16] other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court." (Emphases added.)

The principal issue in this case concerns whether the project site, which the BRA took by eminent domain in 1970, was "taken" for *art. 97* purposes. See *Selectmen of Hanson v. Lindsay*, 444 *Mass. 502, 504-506, 829 N.E.2d 1105 (2005)* (in order for *art. 97* vote requirement to apply, land must have been taken or acquired for *art. 97* purposes). *Article 97* clearly states that its purposes are "the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources." In contrast, land taken for urban renewal purposes is generally understood to be taken "for the purpose of eliminating decadent, substandard or blighted open conditions." *G. L. c. 121B, § 45*. See *Aaron v. Boston Redev. Auth.*, 66 *Mass. App. Ct. 804, 807, 808, 810, 850 N.E.2d 1105 (2006)* (in context of claim for prescriptive easement, land taken by BRA for urban renewal purposes held for "other public purpose," not conservation). Although as a practical matter, certain aspects of an urban renewal plan may accomplish goals similar to those outlined in [***17] *rt. 97*, the overarching purpose for which

[828]** the land is taken is distinct from art. 97 purposes.

With that distinction in mind, the issue is whether the project site can nonetheless be characterized as having been "taken or acquired for [art. 97] purposes." Reported cases interpreting *art. 97* are scarce. In concluding that the project site was taken for art. 97 purposes, the motion judge relied heavily on the June 6, 1973, opinion of then Attorney General Robert Quinn. See Rep. A.G., Pub. Doc. No. 12, at 139 (1973) (Quinn Opinion). Using the Quinn Opinion for guidance, she identified certain aims or objectives referenced in the 1964 urban renewal plan, including the creation of public ways, parks, open space, and plazas, and a means of utilizing and enjoying the harbor. Because those aims were consistent with the purposes of *art. 97*, the judge concluded that the project site, which realizes them, was taken for art. 97 purposes and is therefore subject to the two-thirds **[*613]** vote requirement. Not surprisingly, the plaintiffs rely extensively on the Quinn Opinion in their arguments before this court.

The Quinn Opinion was issued in response to a general inquiry from the Speaker of the House **[***18]** of Representatives regarding the applicability of *art. 97*, and was rendered without reference to any particular set of facts. Although the Quinn Opinion is entitled to careful judicial consideration on the question of the scope of *art. 97* and the intent of its drafters, see *Opinions of the Justices, 383 Mass. 895, 918, 424 N.E.2d 1092 (1981)*, citing Rep. A.G., Pub. Doc. No. 12, at 141 (concluding *art. 97* applies retroactively), its interpretation of *art. 97* is not binding in its particulars, and we are hesitant to afford it too much weight due to the generalized nature of the inquiry and the hypothetical nature of the response.¹³ See A.J. Cella, *Administrative Law and Practice* § 20, at 70-75 (1986) (discussing legal effect of opinions of the Attorney General).

¹³ It is highly unusual for an opinion of the Attorney General to be rendered on a hypothetical basis. See A.J. Cella, *Administrative Law and Practice* § 20, at 69 n.2 (1986) (Cella). Opinions of the Attorney General are rendered pursuant to *G. L. c. 12, § 3*, which provides for the rendering of legal advice by the Attorney General to State "departments, officers, and commissions" in matters relating to their official

duties. Cella, *supra* at 69. **[***19]** "Opinions of the Attorney General are rendered solely upon factual situations which actually confront a given state department or agency, and not upon hypothetical questions or general requests for information." *Id.* at 69 n.2, citing Rep. A.G., Pub. Doc. No. 12, 114 (1967). An advisory opinion of the Attorney General "is entitled to careful judicial consideration and is generally regarded as highly persuasive." Cella, *supra* at 74 & n.37. However:

"[I]t is clear that the courts retain the power to determine for themselves on a case by case basis whether or not, and if so, to what extent, the courts agree or disagree with an advisory opinion of the Attorney General as to the proper interpretation of some issue of law."

Id. at 75.

The Quinn Opinion suggests a more expansive reading of *art. 97* than we afford it today, and it may reasonably be read to support the plaintiffs' argument that the project site is subject to *art. 97*. We disagree with the Quinn Opinion to the extent it suggests that the vast majority of land taken for any public purpose may become subject to *art. 97* if the taking or use even incidentally promotes the "conservation, development and utilization of the . . . forest, **[***20]** water and air," Rep. A.G., Pub. **[*614]** Doc. No. 12, at 142, or that the land simply displays some attributes of *art. 97* land generally.¹⁴ *Id.* at 143. We also do not **[**829]** agree that the relatively imprecise language of *art. 97* warrants **[*615]** an interpretation as broad as the Quinn Opinion would afford it, particularly in light of the practical consequences that would result from such an expansive application, as well as the ability of a narrower interpretation to serve adequately the stated goals of *art. 97*.

¹⁴ Unconstrained by a particular set of facts, the then Attorney General, in Rep. A.G., Pub. Doc. No. 12 (1973) (Quinn Opinion) paints a broad picture of the scope of *art. 97*. In response to the question, "Does the disposition or change of use of land held for park purposes require a two thirds vote .

. . . as provided in [art. 97], or would a majority vote of each branch be sufficient for approval?" the Quinn Opinion answered, "Yes," and then went on to suggest that the actual use, appearance, or attributes of a piece of land may be better evidence of the purpose for which it was taken or acquired than the language of the instrument effectuating the acquisition. *Id.* at 143. Its most expansive language [***21] reads:

"Th[e] question as to [the applicability of art. 97 to] parks raises a further practical matter in regard to implementing Article 97 which warrants further discussion. The reasons the Legislature employs to explain its actions can be of countless levels of specificity or generality and land might conceivably be acquired for general recreation purposes or for very explicit uses such as the playing of baseball, the flying of kites, for evening strolls or for Sunday afternoon concerts. Undoubtedly, to the average man, such land would serve as a park but at even a more legalistic level it clearly can also be observed that such land was acquired, in the language of Article 97, because it was a 'resource' which could best be 'utilized' and 'developed' by being 'conserved' within a park. But it is not surprising that most land taken or acquired for public use is acquired under the specific terms of statutes which may not match verbatim the more general terms found in Article 10 of the Declaration of Rights of the Constitution or in Articles 39, 43, 49, 51 and 97 of the Amendments. Land originally acquired for limited or specified public purposes is thus not to be excluded from the operation [***22] of the

two-thirds roll-call vote requirement for lack of express invocation of the more general purposes of Article 97. Rather the scope of the Amendment is to be very broadly construed, not only because of the greater broadness in 'public purpose,' changed from 'public uses' appearing in Article 49, but also because Article 97 establishes that the protection to be afforded by the Amendment is not only of public uses but of certain express rights of the people.

"Thus, all land, easements and interests therein are covered by Article 97 if taken or acquired for 'the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources' as these terms are broadly construed. While small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify. Given the spirit of the Amendment and the duty of the General Court, it would seem prudent to classify lands and easements taken or acquired for specific purposes not found verbatim in Article 97 as nevertheless subject [***23] to Article 97 if reasonable doubt exists concerning their actual status." (Emphases added.)

Id. at 142-143.

The critical question to be answered is not whether the use of the land incidentally serves purposes consistent with art. 97, or whether the land displays some attributes of art. 97 land, but whether the land was taken for those purposes, or

subsequent to the taking was designated for those purposes in a manner sufficient to invoke the protection of art. 97. See *Selectmen of Hanson v. Lindsay*, 444 Mass. 502, 508-509, 829 N.E.2d 1105 (2005) (art. 97 protections may arise where subsequent to taking for purposes other than art. 97, land is "specifically designated" for art. 97 purpose by deed or other recorded restriction). See also *Toro v. Mayor of Revere*, 9 Mass. App. Ct. 871, 872, 401 N.E.2d 853 (1980) (applicability of art. 97 hinged on whether land had in fact been conveyed "to the conservation commission . . . to maintain and preserve it for the use of the public for conservation purposes"). In this case, while it can be argued that the project site displays some of the attributes of [**830] a park¹⁵ and serves the purpose of the utilization of natural resources -- in that it promotes access to the waterfront and the [***24] sea -- this specific use is incidental to the overarching purpose of urban renewal for which the land including the project site was originally taken. Cf. *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 403 Mass. 531, 551-552, 531 N.E.2d 1233 (1988), citing *Papadinis v. Somerville*, 331 Mass. 627, 632, 121 N.E.2d 714 (1954) (any benefit from disposition to private redeveloper of land taken for urban renewal purposes is "incidental to the main purpose of the plan, which is the elimination of a substandard, decadent, or blighted open area").

15 As the motion judge noted, a bronze plaque located on the plaza designates the area as "Long Wharf Park," and the BRA's owned-land database identifies the area at the end of Long Wharf as a "park."

In *Selectmen of Hanson v. Lindsay*, *supra*, we held that a [*616] town meeting vote to designate for conservation purposes land that had originally been taken for tax purposes did not subject that land to art. 97 protections absent recordation of a restriction on the title. Without the execution or recordation of a deed containing the conservation restriction, the land "never became specifically designated for conservation purposes in the first instance" and accordingly [***25] "was not held for a specific purpose" under art. 97, so "compliance with the provisions of art. 97 . . . was not required." *Id.* at 508-509. This was true despite the clear intent of the town meeting members to hold the property for conservation purposes. *Id.* at 505. As the plain language of art. 97 indicates, for land to be subject to the two-thirds vote requirement on

disposition or use for other purposes, it must be "taken or acquired for [the] purpose" of protecting interests covered by art. 97. In *Selectmen of Hanson v. Lindsay*, *supra* at 508-509, where the property had indisputably been acquired as a tax forfeiture and held as general corporate property, the town had to deed the land to itself for conservation purposes -- or record an equivalent restriction on the deed -- in order for art. 97 to apply to subsequent dispositions or use for other purposes. Here, where the land at issue is but a small part of a much larger taking effectuated for the purposes of urban renewal, it is difficult to identify a "specific purpose" for which the project site was acquired or held that would clearly bring it within the protection of art. 97.¹⁶ See *id.* at 509.

16 We do not conclude that land taken [***26] pursuant to an urban renewal plan is automatically immune from art. 97. See note 19, *infra*.

Because the spirit of art. 97 is derived from the related doctrine of "prior public use," cases applying that doctrine inform our analysis. See Rep. A.G., Pub. Doc. No. 12, at 146 (prior public use doctrine "background against which [art. 97] was approved"). See also Rep. A.G., Pub. Doc. No. 14, 131 (1980) ("language of Article 97 must be read in conjunction with the judicially developed doctrine of 'prior public use'"). The prior public use doctrine holds that "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." *Robbins v. Department of Pub. Works*, 355 Mass. 328, 330, 244 N.E.2d 577 (1969). See [*617] *Brookline v. Metropolitan Dist. Comm'n*, 357 Mass. 435, 440, 258 N.E.2d 284 (1970), and cases cited. However, that doctrine is only applicable "to those lands which are in fact 'devoted to one public use'" (emphasis added). [**831] *Muir v. Leominster*, 2 Mass. App. Ct. 587, 591, 317 N.E.2d 212 (1974), quoting *Robbins v. Department of Pub. Works*, *supra*. In the *Muir* case, the Appeals Court held the prior public use doctrine inapplicable to the sale for commercial [***27] purposes of a parcel of land, where that parcel had been conveyed to a city as a gift with no limitation on its use but was in fact used for thirty years as a playground and for other recreational purposes. *Muir v. Leominster*, *supra* at 588-589, 591 ("[i]n this case there had been neither prior legislative authorization of a taking for a particular

purpose nor a prior public or private grant restricted to a particular purpose").

Here, as the motion judge highlighted, the 1964 urban renewal plan enumerates, among its listed planning and design objectives, certain objectives that are consistent with *art. 97* purposes. The 1964 urban renewal plan also contains vague descriptions of the project site and Long Wharf generally that are consistent with its current use as an open space.¹⁷ Most significantly, § 202 of the 1964 urban renewal plan, entitled "Planning Objectives," states as one of its fifteen objectives, the objective "[t]o provide public ways, parks and plazas which encourage the pedestrian to enjoy the harbor and its activities." In addition, in § 203, entitled "General Design Principles," the plan lists several design principles, including:

"3. To provide maximum opportunity for [***28] pedestrian access to the water's edge.

"4. To establish an orderly sequence and hierarchy of open spaces and views for both the pedestrian and the motorist.

"5. To establish a relationship between buildings, open [*618] spaces and public ways which provides maximum protection to the pedestrian during unfavorable weather conditions."

¹⁷ Section 204(1)(f) of the 1964 urban renewal plan, under the heading "Sub-Area Design Objectives," identifies a "developmental characteristic[]" of the plan as: "The preservation or redevelopment of wharves which retain the historic tradition of fingers out into the harbor and create active and intimate water inlets. Long Wharf is to retain its historic position as the farthest projection of land into the harbor, and will become an observation platform."

By definition, *G. L. c. 121B* vests in the BRA the authority to take or acquire "decadent, substandard or blighted open area[s]" for the purpose of eliminating those undesirable conditions (emphasis added). See *G. L. c. 121B* §§ 11, 45, 47. However, it does not follow that, where a comprehensive urban renewal plan calls for some areas of a taking to be left open -- without a more spe-

cific and particularized invocation [***29] of *art. 97* purposes unique to those areas that effectively designates those areas as separate and apart from the rest of the taking -- a two-thirds vote of the Legislature is required for any subsequent change in use or disposition of those open areas. Nor do we find sufficient to invoke *art. 97* protection the fact that a comprehensive urban renewal plan may identify, among other objectives, some objectives that are consistent with *art. 97* purposes, or where certain areas taken pursuant to that plan ultimately display some attributes of *art. 97* land. A contrary rule would be particularly nonsensical where the proposed change in use or disposition that would purportedly trigger the two-thirds vote is made in furtherance of the goals of the particular urban renewal plan and is otherwise appropriate.

Given the overarching purpose of the 1964 urban renewal plan to eliminate urban blight through the comprehensive redevelopment of the waterfront area, including its revitalization through the development [**832] of mixed uses and amenities, it cannot be said that the retention of certain open spaces, like the project site, is sufficiently indicative of an *art. 97* purpose as to trigger a two-thirds vote [***30] of the Legislature should the BRA wish to slightly revise the use of certain spaces in a manner consistent with the objectives of the original urban renewal plan.¹⁸ The fact that the 1964 Urban Renewal Plan (which covered a large [*619] section of downtown Boston) provided in general terms for open spaces and pedestrian access to the water's edge is itself insufficient to invoke *art. 97* protections for parts of the original taking that ultimately serve those general purposes. The single, fleeting reference in the 1964 urban renewal plan to an "observation platform" on Long Wharf similarly fails to adequately invoke the specific purposes of *art. 97*.

¹⁸ Section 1101 of the 1964 urban renewal plan provides for modification of the plan, stating:

"The Urban Renewal Plan may be modified at any time by the Boston Redevelopment Authority provided that, if the general requirements, controls, or restrictions applicable to any part of the Project Area shall be modified after the lease or sale of such part, the

modification is consented to by the Developer or Developers of such part or their successors and assigns. Where proposed modifications will substantially or materially alter or change the Plan, the [***31] modifications must be approved by the Boston City Council and the State Division of Urban and Industrial Renewal."

Although a modification clause certainly cannot serve as a unilateral bar to the application of *art. 97*, the provision for modification demonstrates the often fluid purposes for which land is taken pursuant to an urban renewal plan.

Nevertheless, we disagree with the BRA's contention that it cannot possibly take land for *art. 97* purposes pursuant to its urban renewal powers under G. L. c. 121B. The purposes served by urban renewal and by *art. 97* are not mutually exclusive. Certainly, for the BRA to take land by eminent domain, it must exist in a "decadent, substandard, or blighted" condition. However, where an urban renewal plan accompanying a taking clearly demonstrates a specific intent to reserve particular, well-defined areas of that taking for *art. 97* purposes, the BRA conceivably may take land for such purposes while remaining within its statutory authority.¹⁹ The recording of a restriction on the use of land subsequent to a taking may also place land within the [*620] protections of *art. 97*. See *Selectmen of Hanson v. Lindsay*, 444 Mass. 502, 504-506, 829 N.E.2d 1105 (2005). Furthermore, [***32] we disagree with the BRA that the language of an order of taking is necessarily determinative of the applicability of *art. 97*. Under certain circumstances not present here, the ultimate use to which the land is put may provide the best evidence of the purposes of the taking, notwithstanding the language of the original order of taking or accompanying [**833] urban renewal plan. See Quinn Opinion, *supra* at 142-143.

19 We note, for example, that relying on the Quinn Opinion, the office of the Attorney General concluded in a December 16, 1997, letter to the BRA director that City Hall Plaza in Boston was subject to *art. 97* and a two-thirds vote of the Legislature was

required to approve the construction of a hotel and parking garage on the site. The Attorney General's letter relied primarily on the language of the Government Center urban renewal plan, which specifically stated that the site of City Hall Plaza "shall be devoted to public open space," as well as the BRA's description of the Plaza at the unveiling of the plan in 1963:

"The strong focal point of the Government Center will be the new City Hall and the Government Center Plaza. Comparable as a monumental public space to the most famous squares [***33] in Europe . . . (the) City Hall and the new plaza together will be comparable in function and relationship to the town meeting house and common in an old-time New England village" (emphasis in original).

b. Occurrence of triggering condition. Even if *art. 97* did apply to the project site, the issue would remain whether the department's issuance of the *chapter 91* license constituted a disposition or change in use of the land triggering the two-thirds vote requirement. Although not necessary to our holding, we briefly address the issue.

The answer to this question depends on whether the chapter 91 license is in fact a mere license, or if it is more properly characterized as an easement. Although the granting of an easement over *art. 97* land constitutes a disposition triggering the two-thirds vote requirement, a disposition of any lesser property interest does not. See *Opinions of the Justices*, 383 Mass. 895, 919, 424 N.E.2d 1092 (1981) (relinquishment by Commonwealth of any vestigial property interests in tidelands other than "lands and easements" would not trigger *art. 97* voting requirement); *Miller v. Commissioner of the Dep't of Envtl. Mgt.*, 23 Mass. App. Ct. 968, 969-970, 503 N.E.2d 666 (1987) (department's issuance [***34] of revocable one-year permit to operate ski area did not trigger two-thirds vote under *art. 97*).

General Laws c. 91, § 15, states that "the grant of a license" under that chapter "shall not convey a

property right."²⁰ The [*621] BRA owns the project site, and accordingly, the BRA's right to lease the Long Wharf Pavilion to a restaurant operator derives not from the chapter 91 license, but from the fact that the BRA owns the land. The chapter 91 license merely certifies that the planned use, including the lease, complies with G. L. c. 91 and accompanying department regulations. It does not, as the motion judge concluded, transfer from the department to the BRA "an extent of legal control over the land at issue."²¹ Any disposition triggering the [**834] *art. 97* voting requirement would need to be granted by the BRA -- as would be the case with the lease to the restaurant operator -- not to the BRA.

20 In support of their argument that the chapter 91 license confers a property right on the BRA, the plaintiffs point out that the license is not revocable at will but only for noncompliance, lasts thirty years, runs with the land, and must be recorded to be valid. In addition, any revocation of the chapter [***35] 91 license is considered a taking that requires just compensation for "valuable structures, fillings, enclosures, uses or other improvements built, made or continued in compliance with said authorization or license." *G. L. c. 91, § 15*.

Furthermore, *G. L. c. 91, § 15*, provides:

"A license issued pursuant to this chapter is hereby made a mortgageable interest lawful for investment by any banking association, trust company, savings bank, cooperative bank, investment company, insurance company, executor, trustee, or other fiduciary, and any other person who is now or may hereafter be authorized to invest in any mortgage or other obligation of a similar nature."

We conclude that, while the aforementioned characteristics of the chapter 91 license acknowledge the economic value of the license, they do not make the license "tantamount to an easement," because the department has no property interest in the project site over which to grant an easement.

21 In concluding that the department's issuance of the chapter 91 license constituted a disposition of the land, the motion judge relied on language from the Quinn Opinion, *supra* at 144, stating that "all means of transfers or change of legal or [***36] physical control are thereby covered, without limitation." First, the notion that any change of legal or physical control no matter how small constitutes a disposition for *art. 97* purposes conflicts with our opinion in *Opinions of the Justices, 383 Mass. 895, 918, 424 N.E.2d 1092 (1981)*, issued after the Quinn Opinion, and with the Appeals Court's holding in *Miller v. Commissioner of the Dep't of Envtl. Mgt., 23 Mass. App. Ct. 968, 969-970, 503 N.E.2d 666 (1987)*. Second, and perhaps more important, in issuing the chapter 91 license, the department has not transferred legal control over the project site. As the agency charged with enforcing G. L. c. 91, the department has no affirmative legal control over the project site; it is merely vested with the authority to ensure that uses that implicate G. L. c. 91 conform with its requirements and the accompanying regulations.

The chapter 91 license itself is "granted upon the express condition that any and all other applicable authorizations . . . shall be secured by the Licensee prior to the commencement of any activity or use authorized pursuant to this License" (emphasis in original). The license also states that it is "granted subject to all applicable Federal, State, [***37] County, and Municipal laws, ordinances and regulations." Even if, *arguendo*, the chapter 91 license created a property right, the right it created is a contingent [*622] future interest and would not trigger the voting requirement until the interest vests on obtaining all necessary approvals.

Nor does the issuance of the chapter 91 license constitute a "use[] for other purposes" that would trigger the legislative vote. For lands to which *art. 97* does apply, *art. 97* legislative approval is likely just one of the many approvals a project proponent will need to acquire in order to proceed with the project. These approvals are issued by various State and local regulatory agencies and are largely independent of one another, yet all are necessary to proceed with the project. It would make little practical sense to condition the application for one

such approval, in this case the chapter 91 license, on the successful application for another approval. The chapter 91 license facilitates the change in use in the same way the zoning variances and other necessary approvals do. A project proponent like the BRA could conceivably obtain the necessary approvals to change the use of land and, for myriad reasons, [***38] never follow through on the planned use. *Article 97* requires a two-thirds vote of the Legislature prior to an actual change in use, not mere preparations for that change.

3. Conclusion. For the reasons discussed, we conclude that *art. 97* does not apply to the project site and, therefore, a two-thirds vote of the Legislature is not required to approve the planned redevelopment. Because the motion judge did not review the issuance of the chapter 91 license pursuant to *G. L. c. 30A, § 14*, we remand the case to the Superior Court for proceedings consistent with this opinion.²²

22 We note, however, that with *art. 97* inapplicable and relief in the form of mandamus therefore inappropriate, we have serious doubts whether the plaintiffs can demonstrate standing to otherwise challenge the chapter 91 license. The department's hearing officer concluded that the plaintiffs did not have standing because they failed to demonstrate that the issuance of the license may cause them to "suffer an injury in fact, which is different either in kind or magnitude from that suffered by the general public which is within the scope of the public interest protected by [G. L. c. 91]." See *310 Code Mass. Regs. § 9.02*. [***39] In her final decision, the commissioner declined to adopt the hearing officer's finding of a lack of standing because of her conclusion that the plaintiffs' challenge failed on the merits.

So ordered.

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL vs. MASSACHUSETTS BOARD OF HIGHER EDUCATION/ROXBURY COMMUNITY COLLEGE.

SJC-11250

SUPREME JUDICIAL COURT OF MASSACHUSETTS

465 Mass. 791; 991 N.E.2d 646; 2013 Mass. LEXIS 577

March 5, 2013, Argued

July 12, 2013, Decided

PRIOR HISTORY: [1]**

Suffolk. Civil action commenced in the Superior Court Department on November 10, 2009. The case was heard by Kimberly S. Budd, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Mass. Cmty. College Council v. Mass. Bd. of Higher Educ./Roxbury Cmty. College, 81 Mass. App. Ct. 554, 965 N.E.2d 217, 2012 Mass. App. LEXIS 168 (2012)

HEADNOTES

Arbitration, Confirmation of award, Collective bargaining. Education, Public colleges and universities. Public Employment, Collective bargaining. Labor, Arbitration, Collective bargaining, Public employment.

COUNSEL: Will Evans for the plaintiff.

Carol Wolff Fallon for the defendant.

Deirdre Heatwole & Joseph Ambash, for University of Massachusetts, amicus curiae, submitted a brief.

James B. Cox, Special Assistant Attorney General, & Alison Little Sabatello, for Bridgewater State University & others, amici curiae, submitted a brief.

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

OPINION BY: BOTSFORD, J.

OPINION

[*791] BOTSFORD, J. The plaintiff Massachusetts Community College [*792] Council (union) and the defendant Massachusetts Board of Higher Education/Roxbury Community College (college) were parties to a collective bargaining agreement (agreement) containing a provision that "[t]he granting or failure to grant tenure shall be arbitrable but any award is not binding." After a professor, who was a member of the union, was denied tenure at the college, the union submitted his grievance to arbitration. An arbitrator concluded that the college violated the terms of the agreement, [**2] and ordered as a remedy that the professor be reinstated to his position, and that he be eligible for a new evaluation and tenure review process. A judge in the Superior Court affirmed the arbitrator's award. The judge reasoned that the issue before the arbitrator was the manner in which the professor was reviewed and considered for tenure, not the substantive tenure decision itself, and that the arbitrator's decision was binding on the college. The college appealed, and the Appeals Court concluded that under the "clear language" of the above-quoted provision of the agreement, the arbitrator's award was not binding on the college, and therefore the judge erred in confirming the arbitrator's award under *G. L. c. 150C, § 10. Massachusetts Community College Council v. Massachusetts Bd. of Higher Educ./Roxbury Community College*, 81 Mass. App. Ct. 554, 562-563, 965 N.E.2d 217 (2012) (Massachusetts Community College Council). We also conclude that the Superior Court judgment must be reversed.

Background. On January 8, 2001, the college hired Virgilio Fernando Acevedo as an assistant professor, a tenure-track position, in the social science department. The terms of his employment were governed by the agreement, [**3] which covered full-time and part-time faculty and professional staff.¹

1 The agreement relevant to this case was in effect from June 1, 2006, to June 30, 2009.

In 2004, the college promoted Acevedo from assistant professor to associate professor. Acevedo's dean gave him an unsatisfactory evaluation for the fall 2005 semester that the college later rescinded and removed from his official personnel file in March, 2007. On October 6, 2006, as provided for in the agreement, the vice-president of academic affairs notified Acevedo of his eligibility for tenure consideration by the college's Unit [*793] Personnel Practices Committee (tenure review committee). The tenure review committee ultimately voted to recommend a denial of tenure for Acevedo.² Again as provided in the agreement, the tenure review committee forwarded its recommendation to higher administrative authorities, including the president of the college, who recommended to the college's board of trustees that Acevedo be denied tenure; the board of trustees accepted the recommendation in May of 2007. As provided in the agreement when tenure is denied, Acevedo received a terminal, one-year contract extending from July 1, 2007, through June [**4] 30, 2008.

2 The majority of the Unit Personnel Practices Committee (tenure review committee) voted to recommend denying tenure to Acevedo on two separate occasions, voting before the college rescinded the dean's fall 2005 unsatisfactory performance evaluation on March 5, 2007, and then again after that evaluation had been removed from Acevedo's personnel file.

Acevedo grieved the decision to deny him tenure, alleging the college acted arbitrarily and capriciously in reaching its decision to deny tenure and issuing a one-year terminal contract. The grievance was not resolved in either of the first two steps of the agreement's grievance procedure, and the union thereafter filed a demand for arbitration with the American Arbitration Association on behalf of Acevedo. A mutually agreed upon arbitrator held hearings on three days in the spring of 2009.

The arbitrator considered two questions that the parties had agreed upon:

"1. Did the [college] violate the Collective Bargaining Agreement by the manner in which the Grievant,

Professor Virgilio Fernando Acevedo, was reviewed and considered for tenure, denied tenure, and/or given a terminal contract, which ended his employment effective May 31, [**5] 2008?

"2. If so, what shall be the remedy?"

On July 30, 2009, the arbitrator issued her award. She concluded "the tenure process that led to [Acevedo's] receiving a terminal contract was seriously flawed," and ruled that the college's actions leading up to the denial of tenure and the issuance of a terminal contract violated the bargained-for terms of the agreement. As a remedy, the arbitrator ordered the college immediately [*794] to reinstate Acevedo to his position as an associate professor with full seniority, benefits, and back pay, and, thereafter, to form a new tenure review committee composed of completely new members and to conduct a new tenure evaluation process based solely on the criteria set forth in the agreement. The arbitrator stated that she would retain jurisdiction to resolve disputes between the parties concerning the remedial section of the award.

On November 10, 2009, the union filed a complaint in the Superior Court to confirm the arbitration award pursuant to *G. L. c. 150C, § 10*. The college filed a motion to dismiss the action, claiming that the court lacked subject matter jurisdiction because the arbitrator's award was a nonbinding award concerning the denial of tenure. [**6] A Superior Court judge denied the motion without prejudice. Thereafter, the college filed a motion for judgment on the pleadings. After a hearing, a different Superior Court judge (motion judge) denied the college's motion and allowed the union's motion to confirm the arbitration award.

Discussion. 1. Arbitration of tenure review disputes under the agreement. To frame our discussion we summarize the relevant provisions of the agreement, which are contained in arts. X, XI, and XIII.

Article X, entitled "Grievance Procedure," establishes a three-step grievance procedure for resolution of disputes under the agreement. Arbitration, which is step three, is the subject of art. 10.06. It provides, in art. 10.06(A)(1), that "[t]he decision or award of the arbitrator shall be final and binding for the [union], the employee and the [college] in

accordance with applicable provisions of state law." Article 10.06(C), concerning the arbitrator's authority, provides in part: "Unless otherwise provided in this Agreement, the arbitrator shall have the authority to make a final and binding award on any dispute concerning the interpretation or application of this Agreement." As indicated at the outset, [**7] art. 10.06(F) provides: "The granting or failure to grant tenure shall be arbitrable but any award is not binding." It is followed by art. 10.06(G), providing that "in making a decision, the arbitrator shall apply the express provisions of this Agreement and shall not alter, amend, extend or revise any term or condition hereof."

[*795] Article XI, entitled, "Appointment and Reappointment -- Tenure," focuses specifically on tenure in art. 11.03. Article 11.03(A) provides that tenure may be granted by the college on recommendation of the college's president, and art. 11.03(C) sets out procedures for tenure review. These include provision for the annual election of a tenure review committee by union members; the direction that tenure review committee members shall review "all relevant material within [the tenure candidate's] official personnel file and shall forward recommendations for either tenure or a one (1) year terminal appointment to the appropriate Dean[s]"; the dean's obligation to review the recommendations of the tenure review committee and the immediate supervisor and forward his or her own tenure recommendation to the president; the president's obligation to review the dean's recommendation [**8] and forward his or her recommendation to the college's board of trustees; and the direction that a recommendation for a one-year terminal contract, which is to follow from the president's recommendation of tenure denial, be accompanied by a statement of reasons. (Art. 11.03.)

The final relevant article is art. XIII, entitled "Evaluation." It first describes in art. 13.01 the objectives of evaluations, which include providing "a basis upon which decisions shall be made concerning the reappointment, promotion . . . tenure . . . and termination, dismissal and discipline of a unit member." Article 13.02 then sets out a series of specific criteria to govern faculty evaluations, which are to "be uniformly applied."

The college argues that under the plain terms of the agreement, the arbitrator's award in this case was nonbinding because art. 10.06(F) renders an award concerning the "failure to grant tenure . . .

[to be] not binding." The Appeals Court agreed. *Massachusetts Community College Council*, 81 Mass. App. Ct. at 561-563. We approach the issue from a slightly different perspective. Under the agreement, it is up to the arbitrator to interpret its terms.³ But whether a party has agreed [**9] to binding arbitration of a particular dispute is always a question for the court. See, e.g., *Commonwealth v. Philip Morris Inc.*, 448 Mass. 836, 843-844, 864 N.E.2d 505 (2007); *Local 1710, Int'l Ass'n of Fire Fighters AFL-CIO v. Chicopee*, 430 Mass. 417, 420-422, 721 N.E.2d 378 (1999) [*796] (*Local 1710*), abrogated in part on other grounds by *Massachusetts Highway Dep't v. Perini Corp.*, 444 Mass. 366, 373 n.10, 376 n.11, 828 N.E.2d 34 (2005). See also *Falmouth Police Superior Officers Ass'n v. Falmouth*, 80 Mass. App. Ct. 833, 838, 957 N.E.2d 1107 (2011) ("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. . . . Whether given parties have agreed to arbitrate a dispute is a matter of contract interpretation and, thus, is normally for the court to decide" [citations omitted]).⁴

3 See art. 10.06(C) of the agreement, quoted in the text, supra.

4 In each of the cases cited in the text, supra, the court discussed whether the parties had agreed to arbitrate a particular dispute without making any express distinction between binding and nonbinding arbitration. However, it is clear that the arbitration procedure involved in each case [**10] was a binding one. See *Commonwealth v. Philip Morris Inc.*, 448 Mass. 836, 841, 864 N.E.2d 505 (2007); *Local 1710, Int'l Ass'n of Fire Fighters AFL-CIO v. Chicopee*, 430 Mass. 417, 418-419, 721 N.E.2d 378 (1999) (*Local 1710*); *Falmouth Police Superior Officers Ass'n v. Falmouth*, 80 Mass. App. Ct. 833, 836-837, 957 N.E.2d 1107 (2011) (*Falmouth*). That binding arbitration was the issue makes sense, of course, given that one of the most significant hallmarks of binding arbitration is the exceptionally limited nature of judicial review available. See *Falmouth*, 80 Mass. App. Ct. at 836-837, and cases cited. See *School Comm. of Boston v. Boston Teachers Union, Local 66, AFL-CIO*, 378 Mass. 65, 69, 389 N.E.2d 970 (1979). Accordingly, the question

whether a party has agreed to binding arbitration of a particular dispute is critical.

In this case, there is no question that in art. 10.06(F), the college agreed to nonbinding arbitration of disputes about tenure decisions. Rather, the core question raised is whether the college agreed to binding arbitration of any aspects of such tenure decisions, and more specifically, whether the dispute presented here for arbitration -- did the college violate the agreement "by the manner in which [Acedo] was reviewed and considered [**11] for tenure, denied tenure, and/or given a terminal contract[?]" -- was one that the college (as well as the union) had agreed would be subject to binding and final resolution by an arbitrator.

Based on the terms of the agreement and art. 10 in particular, we answer the question no. The dispute before the arbitrator was an express concern about the college's "failure to grant tenure" to Acedo.⁵ Accordingly, as the college contends, the [*797] dispute between the parties could be the subject of arbitration, but not one of binding arbitration.

5 Acedo's grievance stated that "[t]he college acted arbitrarily by denying me tenure and issuing a one year terminal contract" (emphasis added). In substance, that was the issue presented for arbitration, and that is what the arbitrator decided: "[t]he [college] violated the [agreement] by the manner in which [Acedo] was reviewed and considered for tenure, denied tenure and given a terminal contract" (emphasis added).

The union challenges this view, arguing, as the motion judge concluded, that the arbitrator's award was binding on the parties because it did not tread on the substantive -- and concededly out-of-bounds -- issue whether Acedo should [**12] be granted or denied tenure, but only concerned the procedures employed by the college in reviewing Acedo's tenure application. As the union and the motion judge point out, our cases have established the principle that, while the decision whether a particular teacher is entitled to tenure at a public educational institution is a nondelegable responsibility of those ultimately responsible for the management of the institution -- whether a school committee or the trustees of a public college -- the institution's managers may still bind themselves to follow a set of defined procedures in making tenure

or other types of nondelegable decisions, and those procedures "may be the basis for an arbitrable grievance." *Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teachers Ass'n/Mass. Community College Council*, 423 Mass. 23, 27-28, 666 N.E.2d 479 (1996). See *Massachusetts Bd. of Higher Educ./Holyoke Community College v. Massachusetts Teachers Ass'n/Mass. Community College/National Educ. Ass'n*, 79 Mass. App. Ct. 27, 32-34, 943 N.E.2d 485 (2011). See also, e.g., *School Comm. of Holbrook v. Holbrook Educ. Ass'n*, 395 Mass. 651, 655, 481 N.E.2d 484 (1985); *School Comm. of W. Bridgewater v. West Bridgewater Teachers' Ass'n*, 372 Mass. 121, 124-125, 360 N.E.2d 886 (1977); **[**13]** *School Comm. of Danvers v. Tyman*, 372 Mass. 106, 113-114, 360 N.E.2d 877 (1977). But this general principle has no bearing on this case; the agreement's terms render it inapplicable. The agreement certainly prescribes a set of procedures to govern tenure review in art. 11.03 and, to a lesser extent, art. XII. But in art. 10.06(F), the agreement expressly and specifically circumscribes the scope of arbitration that is permitted for disputes about tenure review: "[t]he granting or failure to grant tenure shall be arbitrable but any award is not binding." A reading of art. 10.06(F) as incorporating a distinction between substance and procedure -- **[*798]** as only applying to the ultimate decision whether to grant or deny tenure, and not the tenure review process as well⁶ -- fails to respect the comprehensive scope of the agreement's phrase, "[t]he granting or failure to grant tenure," and creates a dichotomy that the phrase simply does not support.⁷ That the parties and arbitrator in this case framed the dispute as concerned with "the manner in which" (emphasis added) Acevedo was "denied tenure" does not change the fact that at bottom, the denial of -- or in the words of art. 10.06(F), the "failure to grant" **[**14]** -- tenure was the issue.

6 The union argues for an even more refined construction, asserting that art. 10.06(F) is designed to allow "a grievant to submit to nonbinding arbitration the question of whether the [c]ollege should have granted tenure (or possibly denied tenure to another) based on a comparison between the grievant's personnel record and the records of faculty who were granted tenure." As the Appeals Court noted, see *Massachusetts Community College Council v. Massachu-*

setts Bd. of Higher Educ., 81 Mass. App. Ct. 554, 562 n.17, 965 N.E.2d 217 (2012), the union offers no record or other support for this interpretation, and we have found none. 7 We note that the arbitrator did not differentiate between the procedure and substance associated with the tenure review process in her award.

In sum, the terms of the agreement persuade us that the college and the union did not agree to binding arbitration of any aspect of a tenure denial determination, and therefore did not agree to binding arbitration of the Acevedo grievance.^{8, 9}

8 Our conclusion is not inconsistent with the arbitrator's award. Although the college indicated at the start of the arbitration its position that any award in this case would **[**15]** not be binding, the college was willing to proceed with the arbitration, as indeed it was obligated to do under art. 10.06(F). Whether the result of such an arbitration is to be binding or nonbinding is a separate question, one that an arbitrator need not necessarily address, and in this case, did not: the arbitrator's award nowhere references art. 10.06(F) or the issue of binding versus nonbinding awards.

9 Because we decide that the arbitrator's award was nonbinding, we need not reach the college's argument that the award intruded on the nondelegable authority and responsibility that the college's administrators and trustees hold with respect to tenure decisions. See *G. L. c. 15A*, § 22 (c). See also *Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teachers Ass'n/Mass. Community College Council*, 423 Mass. 23, 29-30, 666 N.E.2d 479 (1996); *Massachusetts Bd. of Higher Educ./Holyoke Community College v. Massachusetts Teachers Ass'n/Mass. Community College/National Educ. Ass'n*, 79 Mass. App. Ct. 27, 32-34, 943 N.E.2d 485 (2011).

2. Judicial review of the award under *G. L. c. 150C*. The union takes the position that we should not consider any aspect **[*799]** of the merits in this case, because the college **[**16]** failed to challenge the arbitrator's award by initiating an action under *G. L. c. 150C*, § 11, within the thirty-day time frame prescribed by § 11 (b),¹⁰ for

doing so, and therefore, allowance of the union's motion to confirm the award was required as matter of law under *G. L. c. 150C, § 10*.¹¹

10 *General Laws c. 150C, § 11 (b)*, provides in relevant part: "An application [to vacate an arbitration award] under this section shall be made within thirty days after delivery of a copy of the award to the applicant"

11 *Section 10 of G. L. c. 150C* provides: "Upon application of a party, the superior court shall confirm an award, unless within the time limits, hereinafter imposed grounds are urged for vacating, modifying or correcting the award, in which case the court shall proceed as provided in [*G. L. c. 150C, §§ 11 and 12*]."

We disagree. Collective bargaining agreements for public employees, including the agreement here, are authorized and governed by *G. L. c. 150E*. Pursuant to *G. L. c. 150E, § 8*, public employers and employees are authorized to include in a collective bargaining agreement a grievance procedure "culminating in final and binding arbitration to be invoked in the event of [***17*] any dispute concerning the interpretation or application of [the collective bargaining] agreement." This same section further provides that "binding arbitration hereunder shall be enforceable under the provisions of [*G. L. c. 150C*]." Reading *G. L. c. 150E, § 8*, and *G. L. c. 150C, §§ 10 and 11*, together, we understand the provisions of §§ 10 and 11 to become relevant and available to a public employer or union only with respect to a binding arbitration award. Indeed, the plain import of the

words used in §§ 10 and 11 leads to the same conclusion: it makes no sense for the Superior Court to be asked to "confirm an award" (*G. L. c. 150C, § 10*) or, alternatively, to "vacate an award" (*G. L. c. 150C, § 11*) that the parties have agreed is not binding on them. See *Perry v. Commonwealth, 438 Mass. 282, 285, 780 N.E.2d 53 (2002)* (reading statutory language in "commonsense manner"); *Acme Laundry Co. v. Secretary of Envtl. Affairs, 410 Mass. 760, 777, 575 N.E.2d 1086 (1991)* (same); *Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186, 191-192, 837 N.E.2d 1147 (2005)* (same). Accordingly, we agree with the Appeals Court that because the arbitrator's award was a nonbinding one, the college was not obligated to apply under *G. L. c. 150C, § 11, [***18*] to [**800*]* vacate the award within thirty days of its receipt to avoid being bound by it, and concomitantly, the union was not entitled to have the award judicially confirmed and enforced pursuant to *c. 150C, §§ 10 and 13*.¹² See *Massachusetts Community College Council, 81 Mass. App. Ct. at 559 nn.12 & 13, 563*.

12 *General Laws c. 150C, § 13*, provides in part: "Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and shall be enforced as any other judgment or decree."

Conclusion. We reverse the judgment of the Superior Court confirming the arbitration award, and remand the case to the Superior Court for entry of a judgment of dismissal.

So ordered.

MASSACHUSETTS NURSES ASSOCIATION vs. CAMBRIDGE PUBLIC HEALTH COMMISSION.¹

1 Doing business as Cambridge Health Alliance.

No. 11-P-1957.

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 909; 976 N.E.2d 839; 2012 Mass. App. LEXIS 265

October 12, 2012, Decided

SUBSEQUENT HISTORY: Review denied by *Mass. Nurses Ass'n v. Cambridge Pub. Health Comm'n*, 464 Mass. 1102, 979 N.E.2d 1111, 2012 Mass. LEXIS 1201 (Mass., Dec. 19, 2012)

HEADNOTES

Cambridge. Public Health. Nurse. Retirement. Public Employment, Retirement benefits. Municipal Corporations, Board of health, Insurance. Insurance, Health and accident, Premiums.

COUNSEL: [***1] Andrew Nathanson for the defendant.

James F. Lamond for the plaintiff.

OPINION

[*909] [**840] The Cambridge Public Health Commission (Commission) appeals from a judgment that declares the Commission subject to *G. L. c. 32B, § 9E*, and from a permanent injunction that requires the Commission to pay the same subsidiary health insurance rate for its Massachusetts Nurses Association [*910] (MNA) retirees who are members of the Cambridge Retirement System (CRS) as the city of Cambridge (city) does for its own retirees. We vacate the declaratory judgment and permanent injunction, and a judgment shall enter declaring that the Commission is not subject to *G. L. c. 32B, § 9E*.

1. Background. In 1996, the Legislature enacted comprehensive legislation abolishing the Cambridge Department of Health and Hospitals (CDHH) and creating the Commission, "a body politic and corporate" and "public instrumentality" exercising an "essential public function." St. 1996, c. 147 (c. 147), § 4(a).² The legislation also provided that upon the effective date every employee of the CDHH (including MNA members)

"shall become an employee of, and shall be transferred to, the [C]ommission without any loss of accrued rights to holidays, sick leave, vacations [***2] or other benefits of employment and, by such transfer except as otherwise provided, such employee's seniority, wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances under law or contract shall not be impaired; provided, however, that thereafter each such employee

shall perform his duties under the direction, control and supervision of the chief executive officer [of the Commission]."

St. 1996, c. 147, § 6(f).

2 The legislation provides that the Commission "shall not be subject to the supervision of any other department, commission, board, bureau, agency or officer of the city except to the extent and in the manner provided by this act." St. 1996, c. 147, § 4(a).

Similarly, every CDHH employee who was a member of the CRS under *G. L. c. 32 [**841]* prior to the merger continued to be a member of the CRS and "subject to the laws applicable thereto." St. 1996, c. 147, § 6(g).

Subsequent to the merger, the Commission paid ninety percent of the group health insurance premiums of its retirees, including its MNA member nurses. In 2010, the Commission announced that it intended to reduce from ninety percent to fifty percent its subsidiary health insurance contribution [***3] rate for all of its employees retiring after August 31, 2010.³

3 The city, which had adopted *G. L. c. 32B, § 9E*, had been paying ninety percent of its retirees' monthly health insurance premiums. The city has since reduced its contribution to eighty-five percent for individuals retiring on or after October 1, 2009.

The MNA sought a declaration that under c. 147 the Commission may not adopt a different subsidiary health insurance rate for its retired employees than the city. The Commission moved to dismiss, contending that c. 147 did not require what the MNA sought, and that it is not a political subdivision under *G. L. c. 32B* and had not "accepted" its terms. A Superior Court judge denied the Commission's motion and granted the MNA the declaratory and injunctive relief sought.

2. Discussion. At issue is whether c. 147 requires the Commission to contribute to the health insurance of retiree MNA members who became Commission employees by operation of law in 1996 at the same rate as the city contributes to its retirees. We conclude that the Commission is not

required to do so under c. 147 or in conjunction with *G. L. c. 32B*.⁴

4 Indeed, the Commission is not bound by those statutes to contribute [***4] to the group health insurance premiums of its retirees at all.

[*911] The provisions of *G. L. c. 32*, governing pensions, and *G. L. c. 32B*, concerning health insurance coverage, are "cognate statutes, but statutes that nevertheless consider separate and distinct subjects. . . . Pensions and health insurance coverage are fundamentally different in nature." *Larson v. School Comm. of Plymouth*, 430 Mass. 719, 724, 723 N.E.2d 497 (2000). A pension is "an earned benefit which cannot be taken away." *Ibid*. Health insurance coverage is "an unearned benefit, no different in concept from holidays, future sick leave, or other similar benefits." *Ibid*. As an unearned benefit, health insurance, like "wages, hours . . . and . . . other terms and conditions of employment" is subject to mandatory collective bargaining between public employers and public employees. *School Comm. of Medford v. Labor Relations Commn.*, 8 Mass. App. Ct. 139, 140, 392 N.E.2d 541 (1979) (citation omitted).

Under *G. L. c. 32B*, § 9, a retiree bears the full cost of his health insurance premium unless the "municipality" has accepted the more generous provisions of *G. L. c. 32B*, § 9A or § 9E. See *G. L. c. 32B*, § 9; *Yeretsky v. Attleboro*, 424 Mass. 315, 316 n.4, 317, 676 N.E.2d 1118 (1997) [***5] (utilizing term "municipality" for all political subdivisions mentioned in *G. L. c. 32B*). If the municipality accepts § 9A, it pays fifty percent of the retiree's health insurance premium; if it accepts § 9E, then the municipality may elect to pay "a subsidiary or additional rate" greater than fifty percent of health insurance premiums to its retirees. *G. L. c. 32B*, § 9E, inserted by St. 1968, c. 100, § 2.

We need not resolve whether the Commission is an entity that even has the power to accept *G. L. c. 32B* because, unlike the city, the Commission has never [**842] formally accepted its provisions.⁵ Without explicit acceptance, *G. L. c. 32B* is not applicable to the Commission. See *Jenkin v. Medford*, 380 Mass. 124, 126-127, 401 N.E.2d 845 (1980). To the extent the MNA argues that the Commission is bound by the retiree health insur-

ance provisions of *G. L. c. 32B*, such obligation must arise, if at all, from the provisions of c. 147. We discern nothing in c. 147 that imposes any obligation upon the Commission to provide health insurance benefits to its retirees who were city employees at the time of merger at the same rate as the city. Indeed, the tenor and intent of c. 147 are otherwise.

5 The Commission argues [***6] strenuously that it does not fit within any of the listed categories that may accept *G. L. c. 32B*. Nor does that statute provide a mechanism for a "body politic and corporate" such as the Commission to accept its provisions.

Simply summarized, the "shall not be impaired" language in c. 147, § 6(f), speaks to a bundle of rights, some durable and others not. The pension rights of all CDHH employees who previously were members of the CRS and became employees of the Commission carried over, as the legislation expressly provided so. See c. 147, § 6(g). Other rights and benefits, including salaries, health insurance, and other unearned benefits survived only for a defined period of time after the merger and remained the subject of future collective bargaining. The Commission remained free to negotiate these benefits on its own terms. See c. 147, § 6(b) (Commission not subject to supervision of city except to extent and manner provided), 6(f) (rights and obligations under existing collective bargaining agreements assumed and imposed upon Commission and remain in effect for ninety days after implementation or until new agreement reached).

The declaratory judgment and permanent injunction contained [***7] in the order [*912] dated July 1, 2011, are vacated,⁶ a judgment shall enter declaring that the Commission is not subject to *G. L. c. 32B*, § 9E, and the complaint is otherwise dismissed.

6 Because the declaratory judgment and permanent injunction rest upon an erroneous view of the law, we need not address the Commission's arguments regarding the injunction's overbreadth.

So ordered.

CAROL MOORE¹ vs. TOWN OF BILLERICA.

1 As the mother and next friend of Shannon Moore.

No. 12-P-1294.

APPEALS COURT OF MASSACHUSETTS

83 Mass. App. Ct. 729; 989 N.E.2d 540; 2013 Mass. App. LEXIS 96

March 1, 2013, Argued

June 7, 2013, Decided

PRIOR HISTORY: [***1]

Middlesex. Civil action commenced in the Superior Court Department on July 14, 2009. The case was heard by Garry V. Inge, J., on a motion for summary judgment.

HEADNOTES

Massachusetts Tort Claims Act. Governmental Immunity. Municipal Corporations, Governmental immunity. Negligence, Governmental immunity.

COUNSEL: John J. Cloherty, III, for the defendant.

Sean T. Goguen (George N. Panas with him) for the plaintiff.

JUDGES: Present: Grasso, Trainor, & Carhart, JJ.

OPINION BY: TRAINOR

OPINION

[**541] [*729] TRAINOR, J. The defendant, the town of Billerica (town), appeals from the denial of its motion for summary judgment on this suit brought under the Massachusetts Tort Claims Act (MTCA). In its motion for summary judgment, the defendant argued that it is immune from suit under *G. L. c. 258, § 10(b)* and *(j)*, as appearing in St. 1978, c. 512, § 15, and immune from liability under the recreational use statute, *G. L. c. 21, § 17C(a)*, as appearing in St. 1998, c. 268.² The judge denied [*730] the motion, citing "[g]enuine issues of material fact as to, inter alia, causation and . . . degree of discretion, if any, on the part of those in charge of maintaining the public property in question." For the reasons that follow, we reverse the order.

2 Although this appeal is interlocutory, the MTCA issues are properly before us under the doctrine of present execution. See *Brum v. Dartmouth*, 428 Mass. 684, 687-688, 704 N.E.2d 1147 (1999); [***2] *Kent v. Commonwealth*, 437 Mass. 312, 316, 771 N.E.2d 770 (2002). The doctrine does not apply to the recreational use statute. See *Marcus v. Newton*, 462 Mass. 148, 152-153, 967 N.E.2d 140 (2012). Nevertheless, we exercise our discretion to consider the recreational use issue, even though the town lacks the right to appeal it at this stage, because the matter is fully briefed and the issue is one of public importance. See *Boxford v. Massachusetts Hy. Dept.*, 458 Mass. 596, 601 n.13, 940 N.E.2d 404 (2010).

Background. We begin with a summary of the undisputed facts. The Kids Konnection playground in the town abuts the outfield fence of a little league baseball field. The playground is protected from flying baseballs by a high net supported by telephone poles. The net did not extend far enough toward right field to protect an area of the playground that contained a stage and picnic tables.³ Both the playground and the baseball field were town property and were open to the public for use free of charge.

3 The parties dispute whether the stage area was actually part of the playground. Because all facts are to be construed in favor of the nonmoving party, we will assume that the stage area was part of the playground.

On August 23, 2007, Carol [***3] Moore (Carol) brought her four year old daughter Shan-

non to the Kids Konnection playground.⁴ There, Carol met her friends Vickie Stagliola and Angela Sargent, who brought their children to the playground as well. At the same time, several teenage boys were playing "home run derby" on the baseball field. The goal of the game was to hit baseballs over the fence, and Stagliola had seen a baseball hit the netting earlier that day.

4 We use first names to avoid confusion.

Shannon and a playmate went to the unprotected stage area to pick flowers. [*542] One of the boys hit a home run toward the stage area. After the ball cleared the fence, he heard a loud noise and then a little girl crying.⁵ He rushed to the area to see what had happened. An unidentified parent informed Carol that a little girl was crying and had been hit by a baseball. The ball [*731] had struck Shannon in the head, and she suffered serious injuries as a result.

5 The boy who hit the ball had not seen anyone in the stage area before he hit the ball.

Carol, as Shannon's mother and next friend, sued the town. The town claimed immunity and moved for summary judgment. The judge denied the motion, and the town appeals.

Discussion. "We review the [***4] denial of a summary judgment motion de novo, to determine '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.'" *Anderson v. Gloucester*, 75 Mass. App. Ct. 429, 432, 914 N.E.2d 926 (2009), quoting from *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991) (citation omitted).

1. Immunity under § 10(j). The town claims that it is immune from suit under *G. L. c. 258, § 10(j)*, because Carol's claim is nothing more than an allegation that the town failed to prevent harm to her daughter. Carol counters that the town should not be immunized because this claim falls within the enumerated exception of negligent maintenance of public property. See *G. L. c. 258, § 10(j)(3)*.

Section 10(j) provides that the limited waiver of sovereign immunity under the MTCA shall not apply to

"any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer."

The [***5] principal purpose of this provision is "to exclude liability for 'an act or failure to act to prevent or diminish' certain 'harmful consequences.'" *Brum v. Dartmouth*, 428 Mass. 684, 692, 704 N.E.2d 1147 (1999), quoting from § 10(j). "Thus, there is immunity in respect to all consequences except where 'the condition or situation' was 'originally caused by the public employer.'" *Ibid*. "[I]mmunity under § 10(j) is not restricted to those claims arising from the violent or tortious behavior of third persons." *Jacome v. Commonwealth*, 56 Mass. App. Ct. 486, 489, 778 N.E.2d 976 (2002).

The *Brum* and *Jacome* cases are instructive. In *Brum*, a high [*732] school principal was aware that a group of individuals might come to the school to attack a particular student, but neither the principal nor any other school officials took any precautions. *Brum, supra* at 686-687. When the assailants came to the school, they proceeded unimpeded to a second-floor classroom and stabbed the student to death. *Id.* at 687. Nevertheless, the Supreme Judicial Court held that the town was immune under § 10(j) for its failure to prevent the killing. *Id.* at 696.

This court reached a similar conclusion in *Jacome*. There, a group of teenagers went to the beach to [***6] swim, but the lifeguards stopped them because water conditions were unsafe. *Jacome, supra* at 488. The group returned when the lifeguards were gone (but at a time when the lifeguards were still supposed to be on duty) and went in the [*543] water. *Ibid*. A rip tide pulled one of the group (Wilson) under, and he drowned. *Ibid*. We held that the Commonwealth could not be liable because it was immune under § 10(j):

"Had the public employees acted differently, e.g., had the beach been closed, had conspicuous warning signs been posted, had lifeguards remained on duty until 6:00 P.M., it is possible that the tragedy might

have been averted. But the very statement of these possibilities demonstrates why this claim is barred by § 10(j). They are all examples of ways in which the public employees might have prevented the harm to Wilson, and consequently they fall within the immunity from suit in such circumstances that the Legislature has preserved" (emphasis in original).

Id. at 490.

The situation here is the same as those in *Brum* or *Jacome*. Certainly, the town could have prevented the injury to Shannon. It could have extended the netting, posted warning signs, or erected fencing to prevent young children [***7] from wandering into the stage area. Those, however, are just "examples of the ways in which the public employees might have prevented the harm." *Ibid.* There is potentially an infinite list of possible preventive actions that public employees could have taken in any situation. It is almost impossible to imagine an injury that could not have been prevented, so the failure to undertake such actions cannot be the basis of defeating the town's immunity under § 10(j).

[*733] Carol argues, however, that the town is not entitled to § 10(j) immunity because the town's actions in this case fall within the enumerated exception for "negligent maintenance of public property." See *G. L. c. 258, § 10(j)(3)*.⁶ Carol contends that "maintenance" within the statute includes the act of keeping an area in safe condition. According to Carol, the failure to protect small children from the risk of errant baseballs, either by failing to post warning signs or erecting a barrier, constitutes negligent maintenance. We disagree.

6 The exception provides that § 10(j) immunity shall not apply to "any claim based on negligent maintenance of public property." *G. L. c. 258, § 10(j)(3)*.

The statute does not define "maintenance" [***8] or "maintain," so we look to "its generally accepted plain meaning." *Allen v. Boston Redev. Authy.*, 450 Mass. 242, 256, 877 N.E.2d 904 (2007). "Maintain" is defined as "to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline." Merriam Web-

ster's Collegiate Dictionary 749 (11th ed. 2005). plain definition assumes that what is to be maintained has already been constructed. The few cases that have addressed § 10(j)(3) seem to adopt that assumption. See *Greenwood v. The Easton*, 444 Mass. 467, 474-475, 828 N.E.2d 945 (2005) (by placing telephone poles as parking lot barriers, the town had a duty to maintain them in a safe condition and that duty included properly anchoring them); *Twomey v. Commonwealth*, 444 Mass. 58, 64, 825 N.E.2d 989 (2005) (§ 10(j)(3)'s maintenance exemption bolstered the court's conclusion that the statute requiring the Commonwealth to "erect and maintain" traffic signs, *G. L. c. 85, § 2*, encompassed a duty to ensure that the stop sign was visible to motorists); *Rodriguez v. Cambridge Hous. Authy.*, 59 Mass. App. Ct. 127, 136-137, 795 N.E.2d 1 (2003), *Rodriguez.*, 443 Mass. 697, 823 N.E.2d 1249 (2005) (where residents were prohibited from changing the locks, the authority's maintenance obligation included [***9] changing the locks after receiving notice of a lost key). The maintenance of a playground envisions [**544] the general upkeep of the playground's equipment and grounds, not preventing all risks of danger to its visitors. Stretching the definition of "maintenance of public property" to require the town to extend the netting, erect a barrier, or post warning signs would effectively swallow the immunities provided by § 10(j), rendering [*734] them entirely barren and ineffective.⁷ See *Neff v. Commissioner of the Dept. of Industrial Accidents*, 421 Mass. 70, 75-76, 653 N.E.2d 556 (1995). Accordingly, we do not believe that § 10(j)(3) applies to the facts of this case.

7 Before the enactment of § 10(j), the cases interpreting *G. L. c. 258, § 10(b)*, distinguished between building a fence and maintaining an already-erected fence. See *Tryon v. Lowell*, 29 Mass. App. Ct. 720, 724, 565 N.E.2d 456 (1991) ("whether or not in a particular situation a decision to erect a fence is discretionary, the maintenance of or failure to maintain a fence after its erection does not entail a discretionary function").

The injuries to Shannon were not caused by the town's negligent maintenance of the playground. This case is therefore controlled by the reasoning [***10] set forth in *Brum* and *Jacome*, and because the theories advanced by Carol were based on the town's failure to prevent or diminish the injuries,

the town must be held immune from suit under § 10(j).⁸

8 Because the town is immune from suit under § 10(j), we need not address the parties' arguments under § 10(b), which immunizes the government from suit over its discretionary functions. We note that while the decision to build a fence or barrier is ordinarily a discretionary function immunized under § 10(b), see *Barnett v. Lynn*, 433 Mass. 662, 664, 745 N.E.2d 344 (2001); *Alter v. Newton*, 35 Mass. App. Ct. 142, 146-147, 617 N.E.2d 656 (1993), the same immunity does not necessarily apply to other cautionary steps, such as posting a warning sign. See *Alter*, *supra* at 147.

2. Recreational use statute. Because it is undisputed that Carol, Shannon, and the teenage boys were engaged in recreation and were not charged a fee for use of the town-owned baseball field and playground, the town is also immune from liability if it did not engage in "wilful, wanton, or reckless conduct."⁹ *G. L. c. 21, § 17C*. See *Ali v. Boston*, 441 Mass. 233, 238-239, 804 N.E.2d 927 (2004); *Dunn v. Boston*, 75 Mass. App. Ct. 556, 562, 915 N.E.2d 272 (2009). We conclude that, as a matter [***11] of law, the town's actions (or inactions) regarding the playground were not wilful, wanton, or reckless. Therefore, the town enjoys immunity from liability under the recreational use statute.

9 Having decided that the town is immune, the recreational use question is moot. We exercise our discretion to decide the question, however, because the "issue[] [is] significant and ha[s] been fully briefed and it is in the public interest to do so." *Doe v. Police Commr. of Boston*, 460 Mass. 342, 343 n.3, 951 N.E.2d 337 (2011). See *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Ct. Dept.*, 403 Mass. 628, 629 n.4, 531 N.E.2d 1261 (1988), cert. denied, 490 U.S. 1066, 109 S. Ct. 2064, 104 L. Ed. 2d 629 (1989); *Commonwealth v. Cory*, 454 Mass. 559 560 n.3, 911 N.E.2d 187 (2009). See also note 2, *supra*.

[*735] *Sandler v. Commonwealth*, 419 Mass. 334, 644 N.E.2d 641 (1995), defines what constitutes reckless conduct under the recreational use statute.

"Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another. The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run [***12] that risk or of his failure reasonably to recognize it."

Id. at 336 (citation omitted). In *Sandler*, the plaintiff suffered [**545] serious injuries from a bicycle crash that was caused by hitting an uncovered drain in an unlit tunnel. The Commonwealth's employees responsible for maintaining the tunnel knew (and had known for a while) that the drain cover was missing and that the lights were out. *Id.* at 337-338. After citing a litany of cases where recklessness was found, *id.* at 339 n.4, the Supreme Judicial Court concluded that the Commonwealth's failure to remedy the defects of this tunnel was not wilful, wanton, or reckless behavior. *Id.* at 338-340. Therefore, even though the employees "did not respond reasonably," "the degree of the risk of injury . . . [did] not meet the standard that we have established for recklessness." *Id.* at 338.

Carol argues that the town met the recklessness standard because it knew of the danger of baseballs entering the playground area, as evidenced by installing a net between the field and the playground.¹⁰ While that may be true, the failure to extend the netting, erect a barrier, or post warning signs by the stage area does not rise to reckless conduct. The risk [***13] that a child in the stage area would be hit by a ball does not "present[] a high degree of probability that substantial harm will result to another." *Id.* at 336. Nor is "[t]he risk of death or grave bodily injury . . . known or reasonably apparent." *Ibid.* The facts here simply do not approach the level of behavior that is required to [*736] allow this case to go before a jury. We therefore conclude that, as a matter of law, the town was not wilful, wanton, or reckless for failing to prevent the injuries to Shannon.

10 Carol also argues that the determination of recklessness should be left to the jury. We note that *Sandler* came to the Supreme Judicial Court on appeal from the

denial of the Commonwealth's motion for directed verdict. *Sandler, supra* at 334-335. Even after the jury found liability, the court still held that the Commonwealth's behavior could not be reckless as a matter of law.

Conclusion. The order denying the town's motion for summary judgment is reversed. A new order is to enter allowing the town's motion for summary judgment.

So ordered.

EDWARD J. NOONAN vs. BOARD OF ASSESSORS OF SPRINGFIELD.

12-P-909

APPEALS COURT OF MASSACHUSETTS

83 Mass. App. Ct. 1125; 985 N.E.2d 414; 2013 Mass. App. Unpub. LEXIS 440

April 17, 2013, 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.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

SUBSEQUENT HISTORY: Review denied by *Noonan v. Bd. of Assessors of Springfield, 2013 Mass. LEXIS 503 (Mass., June 6, 2013)*

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

JUDGES: Vuono, Rubin & Sullivan, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

Edward J. Noonan filed his petition with the Appellate Tax Board one day after the expiration of the three-month period provided by *G. L. c. 59, § 65*. The Appellate Tax Board dismissed his appeal as untimely, and this appeal followed.

We see no error in the dismissal. Noonan argues that because the Governor declared a "state of emergency" under the Massachusetts Civil Defense Act, St. 1950, c. 639, § 5, as amended by St. 1968, c. 579, § 2, covering Springfield during the pendency of the appeals period, the appeals period itself must be extended by the number of days that the state of emergency existed. Noonan relies on *Carstensen v. Zoning Bd. of Appeals of Cambridge, 11 Mass. App. Ct. 348, 416 N.E.2d 522 (1981)*. In that case, the time for the filing of the appeal expired on February 9, 1978, during a state of emergency proclaimed by the Governor due to the blizzard of 1978. *Id. at 351-352*. This court held that each day of the state of emergency was properly excludable from the length of time for appeal. *Ibid.* Consequently, the notice of appeal filed after the expiration of the thirty-day [*2] limit was nonetheless deemed timely filed. See *ibid.* *Carstensen* does not stand for the proposition that all formally declared states of emergency require the exclusion of the days they are in effect

from the calculation of judicial, regulatory, or other legally determined periods for the filing of legally operative documents. As the court explained, each executive order declaring a state of emergency must "be read in conjunction with St. 1950, c. 639, § 8A, which provides that any general law, ordinance or by-law inconsistent with any promulgation issued under the act 'shall be inoperative while such order or . . . regulation is in effect.'" *Id. at 351 n.8*. Even assuming it was not relevant to the decision in *Carstensen* that (unlike this case) the appeals period actually expired during the state of emergency, the circumstances in this case are easily distinguished from those in *Carstensen*. There, the executive order declaring the state of emergency "suspended virtually all business and government between February 7, 1978, and February 12, 1978." *Ibid.* It was this aspect of the executive order with which the court found the running of the statutory appeals period inconsistent.

In this [*3] case, the declaration of a state of emergency, triggered by the very serious touch-

down of tornadoes in the western and central parts of the Commonwealth, did not suspend any business or government operations. Noonan notes that the Governor's office issued "tweets"¹ urging drivers to "stay off the roads" and instructing nonemergency personnel in designated counties not to report to work on June 2, 2011. Even if one or both of these tweets were construed as executive orders pursuant to the Civil Defense Act, the running of the appeals period is not inconsistent with either of them.

1 A "tweet" is a short message published on Twitter, a social-networking service, that allows users to post pithy messages and read the tweets of others.

Decision of Appellate Tax Board affirmed.

By the Court (Vuono, Rubin & Sullivan, JJ.),

Entered: April 17, 2013.

MICHAEL V. O'BRIEN¹ vs. NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, LOCAL 911.

1 In his capacity as the city manager of the city of Worcester.

No. 12-P-155.

APPEALS COURT OF MASSACHUSETTS

83 Mass. App. Ct. 376; 983 N.E.2d 1232; 2013 Mass. App. LEXIS 37

December 10, 2012, Argued

March 1, 2013, Decided

SUBSEQUENT HISTORY: Appeal denied by *O'Brien v. New Eng. Benevolent Ass'n, Local 911, 465 Mass. 1107, 2013 Mass. LEXIS 524 (2013)*

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on August 13, 2009. The case was heard by Kimberly S. Budd, J.

DISPOSITION: Judgment affirmed.

HEADNOTES

Arbitration, Police, Collective bargaining, Authority of arbitrator. Public Policy. Municipal Corporations, Police, Collective bargaining. Police, Discharge, Collective bargaining. Public Employment, Police, Termination, Collective bargaining.

COUNSEL: Tim D. Norris for the plaintiff.

Peter J. Perroni for the defendant.

JUDGES: Present: Berry, Fecteau, & Carhart, JJ.

OPINION BY: FECTEAU

OPINION

[*376] [**1233] FECTEAU, J. The plaintiff, the city manager of the city of Worcester (city), appeals from a judgment of the Superior Court allowing the defendant's motion to confirm an arbitration award. After hearing, the arbitrator, having found that a police officer's actions were reasonable and did not justify his termination "for cause," ordered the city to reinstate and make whole the officer, who had been terminated for actions that the city alleged constituted gross misconduct. The plaintiff contends that the arbitrator's decision infringes on the city's managerial prerogative and otherwise violates public policy by requiring the city to [*377] retain an officer who (i) violated three teenagers' constitutional rights and (ii) engaged in felonious conduct by assaulting the teenagers without cause. The plaintiff [**1234] also argues that the arbitrator exceeded his authority under the applicable collective bargaining agreement (CBA) by improperly interpreting [***2] and applying various statutory, regulatory, and other administrative rules incorporated therein. The judge was not persuaded that the arbitrator's decision to reinstate the officer amounted to a violation of public policy and confirmed the arbitration award. We affirm.

Background. From the arbitrator's decision we draw the following facts, in summary fashion. On the evening of April 7, 2007, Worcester police Officer David Rawlston, who was on injury leave and in his home on Tory Fort Lane in Worcester with his wife and child, received a telephone call from his neighbors informing him that they had seen three unidentified teenagers lurking about his house and his driveway, looking into his automobiles, and moving toward his backyard. Rawlston retrieved his department-issued handgun and a flashlight. After searching the interior of his house, Rawlston met his neighbors outside in his driveway, where they pointed out several teenagers a few houses up the street and identified those individuals to Rawlston as the ones they had earlier seen outside Rawlston's home. The teenagers then began walking back down the street toward Rawlston, and as Rawlston attempted to illuminate them with his [***3] flashlight, they "fanned out" so that they could not all be seen at the same time. Based on his training and experience, Rawlston perceived the oncoming teenagers as a threat to

himself and his neighbors; he raised his gun, identified himself as a police officer, and ordered the teenagers to drop to the ground and lie on their stomachs. The teenagers complied. As Rawlston was securing one of the teenagers, he inadvertently hit the teenager in the back of the head with his revolver. He may also have kicked, presumably inadvertently, another of the teenagers. There were no injuries. At that point, the police arrived, having been summoned earlier by the neighbors. The additional officers interviewed the teenagers and released them.

Rawlston grieved the termination decision as authorized by the then-operative CBA, which allowed for an employee's election [*378] between arbitration and a hearing before the civil service commission under *G. L. c. 31*. The arbitrator, in a lengthy and thorough decision, disagreed with every general fact and legal conclusion of significance on which the decision to terminate Rawlston was based.² Among other things, the arbitrator concluded that the teenagers lied about [***4] why [**1235] they were in the residential area and that they intended mischief; that Rawlston reasonably feared for his and his neighbors' safety when the teenagers "fanned out"; that Rawlston had good cause to draw his weapon; that Rawlston's hitting one teenager in the back of the head with his weapon and possibly kicking another were accidental and resulted in no injuries; that Rawlston did not use unnecessary force or assault the teenagers; that Rawlston's stopping the teenagers, ordering them to the ground, and searching them was based on good cause suspicion; that Rawlston never "lied" to his superiors and that the superiors simply misunderstood his statements;³ and that, in short, the city did not [*379] demonstrate that Rawlston engaged in misbehavior or that there otherwise existed "good cause" for his termination. As the arbitrator summarized:

"In conclusion, I am satisfied that the evidence and testimony presented to me warrant the conclusion that the version of events advanced by Officer Rawlston and supported by other witnesses should be accepted. I am further satisfied that Officer Rawlston did not precipitate the events of that confrontation, but rather responded to the provocative movements [***5] of those three individuals back down Tory Fort

Lane toward their victims. Officer Rawlston, by virtue of those circumstances, was denied the full spectrum of equipment and image that is inherent in the expectation of a continuum of force. I am satisfied that he applied his scant resources in a reasonable manner given the fact that he was outnumbered and had no reason to believe that these persons had engaged in merely a trespass. While he had no proof of a felony, he had no reason to rule out that option until an investigation revealed otherwise. Given the above, I am satisfied that the City has failed to meet its burden with respect to all alleged violations of rules and regulations.

"...

"My findings in this case are substantially at odds with the findings of the Hearing Officer and, hence, with the decision of the [plaintiff] who adopted those findings. I am satisfied that there was not just cause for the termination of Officer Rawlston, and he is to be reinstated with full back pay and benefits, less any and all outside earnings or unemployment compensation."

2 The plaintiff, as appointing authority, notified Rawlston of the following grounds for the termination:

"You did not undertake [***6] these actions for any valid purpose; instead, you sought to enforce your own brand of neighborhood justice. This is completely inconsistent with the public trust bestowed upon you with your appointment to the position of police officer in the City of Worcester. You utilized your police training and service weapon to threaten, detain and assault these youths, and you used your position as a police officer to attempt to evade responsibility for your ac-

tions. You compounded your mistake by giving untruthful statements to the officers who responded to this incident, and you failed to give a truthful and complete report in response to [the police chiefs] order to you. . . . Based upon the evidence presented at the hearing and the facts found by the Hearing Officer, I find that you have engaged in serious misconduct with respect to your behavior towards the three teenagers . . . and your untruthful statements during the investigation of that incident. I find these offenses to be so injurious to the public's confidence in its police department that they warrant your discharge from employment as a City of Worcester police officer . . ."

3 As to the city's claim of untruthfulness, Rawlston's [***7] supervisor testified to the effect that Rawlston told him that he personally had seen the teenagers peering into his windows and cars. Rawlston did not so indicate in his own routine report, indicating instead that it was the neighbor who saw the teenagers peering into the cars. The arbitrator concluded that Rawlston's supervisor was mistaken, and that Rawlston did not make the statement, attributing it to an error in transmission of the neighbor's information through the dispatcher to the responding officers.

The matter then proceeded to the Superior Court where, in a well-reasoned memorandum of decision, the judge confirmed the award. In essence, the judge was not persuaded that the arbitration award "contravenes public policy" and invades managerial prerogative, observing that such contentions rely upon assumptions that Rawlston, in fact, engaged in serious misconduct toward the teenagers on that night and then interfered with the ensuing investigation by making untruthful statements [*380] -- assumptions that were specifically rejected by the arbitrator. Instead, the arbitrator neither found, as a matter of fact, nor concluded, as a matter of law, that Rawlston had en-

gaged in misconduct. [***8] Accordingly, in confirming the arbitration award, the judge concluded, properly, that she lacked the authority to "second guess" [**1236] the arbitrator's factual findings or legal conclusions.

Discussion. Pursuant to art. 14, § 1, of the governing CBA, Rawlston could not "be removed, dismissed, discharged, suspended, reprimanded or disciplined except for just cause." He elected binding arbitration, pursuant to art. 14, § 6, of the CBA, rather than appeal to the civil service commission.⁴ The case of *Lynn v. Thompson*, 435 Mass. 54, 61-62, 754 N.E.2d 54 (2001), cert. denied, 534 U.S. 1131, 122 S. Ct. 1071, 151 L. Ed. 2d 973 (2002), instructs:

"Unlike our review of factual findings and legal rulings made by a trial judge, we are 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. A matter submitted to arbitration is subject to a very narrow scope of review. Absent fraud, errors of law or fact are not sufficient grounds to set aside an award. Even a grossly erroneous [arbitration] decision is binding in the absence of fraud. An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; [*381] it may appear [***9] foolish. Yet, it may not be subject to court interference" (quotations and citations omitted).⁵

As the foregoing quotation demonstrates, the legal standards governing a court's review of an arbitrator's decision are quite circumscribed.⁶

4 *General Laws c. 150E, § 8*, as amended through St. 1989, c. 341, § 118, states in relevant part:

"The parties 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 . . . ; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supercede any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive,

of chapter thirty-one, [***10] section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one."

5 Compare the standard for judicial review of a final decision of the civil service commission, which, pursuant to *G. L. c. 31, § 44*, is governed by the provisions of *G. L. c. 30A, § 14*. "Review of conclusions of law is de novo. The commission's factual determinations must be supported by substantial evidence, meaning such evidence as a reasonable mind might accept as adequate to support a conclusion. A reviewing court must consider the entire administrative record and take into account whatever fairly detracts from its weight. We defer, however, to the credibility determinations made by the hearing officer." *Andrews v. Civil Serv. Commn.*, 446 Mass. 611, 615-616, 846 N.E.2d 1126 (2006) (quotations and citations omitted).

6 Even within the confines of such limited judicial review, we observe, nonetheless, that in this case, the arbitrator set forth his reasoning in a thoughtful, comprehensive, and lengthy decision; from all that appears of record, the decision has ample

factual grounding and does not appear to be "erroneous, inconsistent, or unsupported by the record at the arbitration [***11] hearing." *Lynn v. Thompson, supra* at 61.

Like the municipality in the case of *Lynn v. Thompson, supra*, the plaintiff here seeks to set aside the arbitration award on the ground that it violates public policy. "We apply a stringent, three-part analysis to establish whether the narrow [**1237] public policy exception requires us to vacate the arbitrator's decision." *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 818, 824 N.E.2d 855 (2005). It seems clear that the city's claim meets the first two of three criteria for application of the public policy exception.⁷ The critical issue here is the third: whether "the arbitrator's award reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal." *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 605, 722 N.E.2d 441 (2000). This factor cannot be met "by the expedient of ignoring the arbitrator's finding" that Rawlston had acted [*382] reasonably under the circumstances and had not violated the rights of the teenagers, nor used excessive or improper force, nor had improperly used his firearm. *Lynn v. Thompson*, 435 Mass. at 63.

7 First, the "policy in question must be well defined and dominant, [***12] and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Lynn v. Thompson*, 435 Mass. at 63 (quotation omitted). Second, "[t]he public policy exception does not address disfavored conduct, in the abstract, but [only] disfavored conduct which is integral to the performance of employment duties." *Ibid.* (quotation omitted).

The city's reliance on *Boston v. Boston Police Patrolmen's Assn.*, *supra*, is misplaced. As the Supreme Judicial Court stated: "To prevail, the city must therefore demonstrate that public policy requires that [the officer's] conduct, as found by the

arbitrator, is grounds for dismissal, and that a lesser sanction would frustrate public policy. The question to be answered is not whether [the officer's conduct] itself violates public policy, but whether the agreement to reinstate him does so. If an award is permissible, even if not optimal for the furtherance of public policy goals, it must be upheld." *Id.* at 819 (quotations and citations omitted). Furthermore, as we stated in *Boston v. Boston Police Patrolmen's Assn.*, 74 Mass. App. Ct. 379, 381, 907 N.E.2d 241 (2009), quoting from *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. at 603-604, [***13] "given the 'strong public policy favoring arbitration . . . the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy.'"

In *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. at 819, unlike the case at bar, the arbitration award was vacated as a violation of public policy because the arbitrator ordered reinstatement in spite of having made findings showing egregious conduct, including "that [the officer] had falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony and over a period of two years about his official conduct, and knowingly and intentionally squandered the resources of the criminal justice system on false pretexts." See *Boston v. Boston Police Patrolmen's Assn.*, 74 Mass. App. Ct. at 380 (in vacating the arbitrator's award of suspension and reinstatement instead of termination, the court considered it significant that "[t]he arbitrator concluded that [the officer's] conduct . . . was 'offensive, way out-of-line and worthy of substantial discipline'").

Here, the factual and legal underpinnings necessary to the application of the public policy exception is lacking. The arbitrator [***14] did not issue an award of reinstatement that flies in the face [*383] of factual findings of misconduct; there is no inconsistency [**1238] between the findings of the arbitrator and his award of reinstatement.

Judgment affirmed.

**ROBERT O'NEILL vs. SCHOOL COMMITTEE OF NORTH
BROOKFIELD & another.¹**

1 Town of North Brookfield.

SJC-11108

SUPREME JUDICIAL COURT OF MASSACHUSETTS

*464 Mass. 374; 982 N.E.2d 1180; 2013 Mass. LEXIS 24; 34 I.E.R. Cas.
(BNA) 1663*

**October 4, 2012, Argued
February 8, 2013, Decided**

PRIOR HISTORY: [*1]**

Civil action commenced in the Superior Court Department on October 11, 2006. The case was heard by Mary-Lou Rup, J., on motions for summary judgment; a motion for reconsideration was considered by her; and entry of final judgment was ordered by her. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

School and School Committee, Superintendent of schools, Retirement benefits. Contract, Employment.

COUNSEL: Brian M. Maser for the defendants.

John J. Driscoll for the plaintiff.

Sandra C. Quinn & Matthew D. Jones, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

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

OPINION BY: BOTSFORD

OPINION

[*374] [**1181] BOTSFORD, J. Robert O'Neill served as superintendent of schools in the town of North Brookfield (town) from 1998 to 2005. His employment contract provided that on his retirement, he would be reimbursed thereafter for a percentage of his health [*375] insurance premiums on an annual basis.² The question we

consider is whether an employment contract between a school committee and a superintendent that contains a provision for annual reimbursement of health insurance premiums in the indefinite future is invalid and unenforceable because it exceeds the six-year limit on such contracts imposed by *G. L. c. 71, § 41*. [***2] We answer the question "No" and affirm the judgment of the Superior Court.

2 Because the annual reimbursement obligation set out in Robert O'Neill's employment contract does not have an endpoint, the parties treat it as an obligation that is measured by O'Neill's life. We do as well.

Background. The school committee of North Brookfield (school committee) hired O'Neill as superintendent of schools in the spring of 1998. O'Neill continued in that position until July of 2005, and during that time he was party to a series of employment contracts with the school committee. Each provided that while employed as superintendent, O'Neill was to receive all employment-related benefits available to teachers, including health insurance coverage pursuant to *G. L. c. 32B*.³

3 General Laws c. 32B provides for contributory group insurance, including contributory group health insurance plans, for employees of counties, cities, and towns. See *G. L. c. 32B, § 1*, as amended by St. 1975, c. 806, § 1. The town of North Brookfield (town) and the school committee of North Brookfield (school committee) (collectively, defendants) argued at the

summary judgment stage of this case that the agreement between the defendants [***3] and O'Neill to reimburse a portion of his health insurance premiums after retirement is governed by c. 32B. The motion judge concluded that the parties' agreement, and more specifically its provision for reimbursement of health insurance costs, fell outside the scope of c. 32B as the reimbursement provision related to a plan for individual health insurance and did not implicate the contributory group health insurance plans of the town. Chapter 32B does not control the outcome of this case, and on appeal, the defendants largely abandon the argument.

[**1182] On October 21, 2002, O'Neill and the school committee executed an employment contract with an effective date of July 1, 2002, and extending through June 30, 2005. This contract contained for the first time a provision entitling O'Neill, on his retirement, to be reimbursed annually for a fixed percentage of the premium costs for an individual health insurance plan (reimbursement clause). The reimbursement clause reads:

"Upon retirement from the North Brookfield Public Schools, the Superintendent will be reimbursed annually [*376] for the cost of an individual retirement [health] plan of his choice. Said reimbursement will equal the percentage of the [***4] cost of the plan based on years of service as Superintendent. For each year of completed service, the reimbursement will equal 10% of the annual cost of the plan. Said reimbursement percentage will be capped equal to the town reimbursement percentage for retired employees at the time of the Superintendent's retirement."⁴

The subsequent, and final, employment contract between the school committee and O'Neill, effective July 1, 2003, through June 30, 2006, contained the same reimbursement clause.

4 O'Neill served as superintendent for seven years and thus is entitled under the reimbursement clause formula to reimbursement for seventy per cent of his annual

insurance plan costs. At the time O'Neill retired, the town's reimbursement percentage for retired public employees with ten or more years of service was eighty per cent.

On January 7, 2005, O'Neill notified the school committee of his intent to retire from his position as superintendent, effective August 31, 2005. The school committee thereafter requested that O'Neill advance his retirement date to July 8, and O'Neill agreed. The parties memorialized this understanding in a written memorandum of agreement in which O'Neill agreed to retire [***5] from his position as superintendent on July 8 in exchange for, among other things, his receipt of all benefits to which he was entitled under his then-existing employment contract, i.e., the contract that was to be in effect through June 30, 2006.

O'Neill did retire on July 8, 2005, and thereafter he continued to subscribe to the town's health insurance plan through the Consolidated Omnibus Budget Reconciliation Act (COBRA) program. When his COBRA coverage expired, O'Neill procured an individual health insurance plan from Blue Cross/Blue Shield. On October 18, O'Neill requested the school committee in writing to reimburse seventy per cent of his health insurance costs accruing from August, 2005, to the date of the request. The new superintendent of schools forwarded the request to the town, but the town did not respond. In January, 2006, O'Neill sent a second request for reimbursement for a fixed percentage of the premium costs for his health insurance policy from the date of retirement through January. On March 7, the town notified [*377] O'Neill in writing that it would not honor the request, stating, "[S]ince you are no [**1183] longer an employee, the [t]own is under no obligation to continue to [***6] honor any terms of your prior contract upon your retirement."

On October 10, 2006, O'Neill filed this action in the Superior Court against the school committee and the town (collectively, defendants)⁵ for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance of the contract. The parties filed cross-motions for summary judgment on October 30, 2008. After a hearing, a judge in the Superior Court denied the defendants' motion for summary judgment and allowed O'Neill's. The defendants filed a motion to reconsider the judgment over a year later, and on December 14, 2010, the judge denied the motion. Final judgment entered on January 11, 2011,

providing that O'Neill was to recover from the defendants a total of \$46,052.57 -- representing the amount of O'Neill's health insurance premium costs that should have been reimbursed from August 15, 2005, to the date of judgment, plus interest and costs⁶ -- and ordering the defendants to reimburse O'Neill annually for seventy per cent of the cost of his health care plan as specific performance of his final employment contract and the parties' memorandum of agreement. The defendants filed timely [***7] notices of appeal.

5 At oral argument, the attorney representing the defendants argued that the school committee did not have the authority to bind the town to perform a contract. We agree that the school committee may not bind the town to perform a contract that is beyond the school committee's statutory authority or otherwise illegal. If, however, the argument being advanced is that the town as a general matter is not bound to perform any contract executed solely by the school committee because the town itself is not a party, the argument clearly is without merit; the school committee is in substance an agency of the town.

6 The reimbursement figure for the five years and five months covered by the judgment came to \$27,673.18, the interest was \$17,968.77, and the costs were \$410.62 -- totaling \$46,052.57.

Discussion. O'Neill's employment contract with the school committee is governed by *G. L. c. 71, § 41*, as amended through St. 1996, c. 450, § 127 (*§ 41*).⁷ *Section 41* provides in relevant part:

"A school committee may award a contract to a superintendent of schools or a school business administrator for [*378] periods not exceeding six years which may provide for the salary, fringe benefits, and [***8] other conditions of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performance of duties or office, liability insurance, and leave for said superintendent or school business administrator" (emphasis added).

7 *General Laws c. 71, § 41* (*§ 41*), was amended in 2006, 2008, and 2010, but those amendments do not bear on the issue on appeal. See St. 2010, c. 399; St. 2008, c. 314, § 1; St. 2006, c. 267.

The defendants argue that a continuing requirement to perform an obligation defined in a contract is evidence of an active, ongoing contract, and accordingly, the obligation to reimburse O'Neill for a percentage of his health insurance costs annually for his life signals that O'Neill's final employment contract was a lifetime agreement that exceeded six years in duration and therefore violated *§ 41*. O'Neill, on the other hand, contends that the annual reimbursement of a portion of health insurance costs is simply a benefit provided for in O'Neill's final employment contract, and the fact that it was to be paid [**1184] annually after the contract expired does not mean that the contract itself extended beyond its stated three-year [***9] term. We agree.

Section 41 vests broad discretion in a school committee to hire a superintendent and to set compensation, conditions of employment, and other benefits of employment. The statute provides a nonexclusive ("including but not limited to") list of benefits. This list includes some, such as severance pay, that in substance are earned during the period of employment but as a practical matter are paid out after the contract terminates;⁸ and others, such as salary, that are only paid during the contract term. While the record contains no information concerning the contract negotiations that led to O'Neill's final two employment contracts as superintendent, the reasonable inference to be drawn [*379] from the presence of the reimbursement clause in them is that both parties knew at the time that O'Neill was not likely to remain superintendent for the ten-year period required for him to qualify for the town's general program, adopted pursuant to *G. L. c. 32B*, covering public employees' postretirement health insurance benefits, and therefore they negotiated a separate provision that specifically provided for postemployment payment of a portion of health insurance costs.

8 During oral argument, [***10] the attorney for the town argued that severance payments, as explicitly mentioned in *§ 41*, fundamentally are different from lifetime health insurance reimbursement because

severance payments are earned during the period of employment and simply paid after termination. In our view, the reimbursement clause provides for substantively the same kind of benefit: the amount paid as reimbursement for health insurance costs after termination of the contract is tied explicitly to the number of years O'Neill was employed and serving as superintendent.

We disagree with the defendants that the reimbursement clause converts O'Neill's final employment contract of three years' duration into a lifetime agreement that would presumptively exceed six years. The reimbursement clause entitles O'Neill to reimbursement for a percentage of his health insurance costs going forward, but all the remaining provisions of the contract -- for example, those describing his duties and responsibilities as superintendent, requiring his fulfilment of those duties, fixing his salary, and entitling him to all medical, hospital, and life insurance benefits available to the town's teachers -- ceased to be in effect on O'Neill's [***11] retirement on July 8, 2005. In other contexts, we have recognized that a contract that has expired may include enforceable obligations to be performed by the parties thereafter. See *Boston Lodge 264, Dist. 38, Int'l Ass'n of Machinists & Aerospace Workers v. Massachusetts Bay Transp. Auth.*, 389 Mass. 819, 821, 452 N.E.2d 1155 (1983) (enforcing provision in collective bargaining agreement requiring payment of cost-of-living adjustments during certain periods following expiration of agreement: "[a]lthough the term of the collective bargaining agreement had ended, there continued . . . a contractual obligation to make cost-of-living adjustments under certain conditions"). The same holds true here. Although O'Neill's final, three-year employment contract with the school committee had come to a (premature) end on July 8, 2005, the school committee had agreed under the express terms of that contract to reimburse O'Neill for a portion of his health insurance costs thereafter.⁹ The directive of § 41 that no employment contract between a school committee and a [**1185] superintendent exceed six years does not absolve the defendants of responsibility to fulfil [*380] this contractual obligation, because O'Neill's final contract [***12] fit well within the statute's term limitation.¹⁰

9 The 2005 memorandum of agreement between the school committee and O'Neill

effectively restated, and thereby reinforced, this contractual obligation.

10 The defendants argue that for the same reasons this court invalidated evergreen clauses in *Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 935 N.E.2d 1260 (2010) (Fireman & Oilers), we must invalidate the provision in O'Neill's contract requiring them to reimburse O'Neill. The reimbursement clause, however, is not an evergreen clause, and Fireman & Oilers provides no support for the defendants' position.

Evergreen clauses operate to extend all contractual terms beyond the termination date of that agreement. See *Firemen & Oilers*, 458 Mass. at 163 ("effect of an evergreen clause is to preserve and maintain all the provisions of a [collective bargaining agreement]" [emphasis added]). See *Gustafson v. Wachusett Regional Sch. Dist.*, 64 Mass. App. Ct. 802, 809 n.11, 836 N.E.2d 1097 (2005) ("even after the expiration of the term of the agreement, its provisions will continue in force until changed by the parties or until the negotiation of a new agreement"). In contrast, as discussed in the [***13] text, the reimbursement clause deals only with the payment of a portion of health insurance premiums on O'Neill's retirement, and does not affect any other provision of O'Neill's contract that ended with his retirement on July 8, 2005. The defendants' argument fails because it is built on the legally incorrect premise that when a contract provides for an agreed-upon benefit to extend beyond the contract term, the entire contract is extended.

The defendants also argue that, in any event, the reimbursement clause, or more specifically the payments it calls for, do not qualify as one of the "conditions of employment" that § 41 authorizes the school committee to include in an employment contract with a superintendent of schools. The defendants reason that because these payments are not to be made while O'Neill was employed as superintendent but only after his retirement, they are a form of retirement allowance or supplemental retirement benefit and simply not covered by the plain terms of § 41.¹¹ Their argument, they claim, is bolstered by reference to *G. L. c. 41, § 108N* (§

108N), a statute defining the scope of employment contracts between a city or town and a city or town manager, town [***14] administrator, town accountant, city auditor, or a person performing similar duties.¹² In § 108N, the Legislature authorizes cities and towns to include in employment [*381] contracts with such employees precisely the same employment benefits as are set out in § 41 -- indeed, the Legislature uses the identical language in both statutes -- but then separately states that these contracts also may provide for "supplemental retirement and insurance benefits"; § 41 contains no such separate provision. The defendants read this distinction between the two statutes as a [**1186] crystal-clear sign that the Legislature did not intend in § 41 to authorize a school committee to include any type of retirement benefit, including postretirement payments for health insurance coverage, in a contract with its superintendent.

11 See supra at .

12 *General Laws c. 41, § 108N*, provides in pertinent part:

"Notwithstanding the provision of any . . . law to the contrary, any city or town acting through its board of selectmen or city council or mayor with the approval of the city council, as the case may be, may establish an employment contract for a period of time to provide for the salary, fringe benefits, and other conditions [***15] of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performances of duties or office, liability insurance, and leave for its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town accountants, city auditor or city manager, or the person performing such duties having a different title.

"Said contract shall be in accordance with and subject

to the provisions of the city or town charter In addition to the benefits provided municipal employees under [G. L. cc. 32 and 32B] said contract may provide for supplemental retirement and insurance benefits" (emphasis added).

We do not read §§ 41 and 108N in the manner advanced by the defendants. *Section 108N* by its terms allows a town to provide supplemental insurance benefits to the employees covered by the section in addition to the insurance benefits that these employees would be entitled to receive under G. L. c. 32B. But § 108N, like § 41, is silent on the question whether an employment contract between a city or town and an employee performing duties covered by the section may provide for postretirement health [***16] insurance if the employee, like O'Neill, does not qualify for coverage under c. 32B because he or she had not been employed for the requisite number of years. As a general matter, an employer's provision of health insurance coverage to an employee -- whether while the employee is still employed or on his or her retirement -- represents a "fringe benefit" of the employment. *Sections 41 and 108N* both expressly authorize the public employer in question, school committee or municipality, to provide for fringe benefits in contracts with the employees covered by these statutes. The postretirement reimbursement for health insurance costs provided to O'Neill by the reimbursement [*382] clause derives directly from his seven-year employment as superintendent, constitutes a bargained-for fringe benefit of his employment, and is not supplemental to other, already-guaranteed benefits. We read § 41, as well as § 108N, to authorize this type of benefit.

The defendants do not contend that O'Neill failed to perform his final employment contract with the school committee, or that the contract was unsupported by sufficient consideration. Nor do the defendants argue that the health insurance policy or policies [***17] that O'Neill has purchased after his retirement are excessively expensive or profligate in any way. Accordingly, as the motion judge concluded, O'Neill is entitled to the specific enforcement of the reimbursement clause in his final employment contract. See generally

Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 374, 893 N.E.2d 1187 (2008), citing *Pierce v. Clark*, 66 Mass. App. Ct. 912, 851 N.E.2d 450 (2006) (if defendant breached contract with plaintiff employees, plaintiffs would be entitled "to the value of the bargained-for benefit of which they have been deprived").

Finally, the defendants' assertion that enforcing this employment contract violates public policy is wholly without merit. Rather, as O'Neill contends, what may offend public policy is for a public

employer such as the school committee or the town to enter into a valid contract with an employee that permissibly guarantees certain postretirement benefits and later, after the employee has fully performed, refuse to honor the plain terms of the agreement.

Conclusion. The judgment of the Superior Court is affirmed.

So ordered.

RETIREMENT BOARD OF MAYNARD vs. ANTHONY TYLER & others.¹

1 Justices of the Concord Division of the District Court Department of the Trial Court.

No. 11-P-1890.

APPEALS COURT OF MASSACHUSETTS

83 Mass. App. Ct. 109; 981 N.E.2d 740; 2013 Mass. App. LEXIS 10

September 10, 2012, Argued
January 18, 2013, Decided

SUBSEQUENT HISTORY: Appeal denied by *Ret. Bd. of Maynard v. Justices of the Concord Div. of the Dist. Court Dep't of the Trial Court*, 465 Mass. 1101, 2013 Mass. LEXIS 390 (Mass., May 2, 2013)

PRIOR HISTORY: [***1]

Middlesex. Civil action commenced in the Superior Court Department on July 6, 2010. The case was heard by Dennis J. Curran, J., and entry of an amended judgment was ordered by him.

HEADNOTES

Fire Fighter, Retirement. Pension. Public Employment, Forfeiture of pension. Municipal Corporations, Pensions, Fire department.

COUNSEL: Edward F. McLaughlin for Anthony Tyler.

Thomas F. Gibson for the plaintiff.

JUDGES: Present: Grasso, Kantrowitz, & Graham, JJ. GRAHAM, J. (dissenting).

OPINION BY: KANTROWITZ

OPINION

[*109] [**741] KANTROWITZ, J. In this pension forfeiture matter, we hold that although the criminal actions of Anthony Tyler were reprehensible, they did not violate, under applicable statutes and case law, his office or position as a firefighter. As such, we are constrained to reverse a determination to the contrary.

Facts. The defendant, Anthony Tyler, was a Maynard firefighter and an emergency medical technician. In 2006, it came to light that Tyler had, for a number of years, been sexually abusing young boys. One of Tyler's victims was the son of another Maynard firefighter; the other victim was also related to [*110] a Maynard firefighter.² Tyler was indicted on various charges in 2006³ and again in 2007.⁴

2 The Maynard board of retirement, in an unchallenged finding, concluded that there was "no evidence" that the incidents took place on town property or that Tyler was on duty [***2] when the incidents took place.

3 Tyler was indicted on three counts of indecent assault and battery on a person over fourteen.

4 Tyler was indicted on one count of rape and one count of indecent assault and battery on a person over fourteen.

Tyler could have been discharged from his position on the grounds of moral turpitude, in which case he would have forfeited his pension. *G. L. c. 32, § 10(1)*. See *Herrick v. Essex Regional Retirement Bd.*, 77 *Mass. App. Ct.* 645, 648-653, 933 *N.E.2d* 666 (2010). Instead, the town of Maynard (town) and the Maynard fire department (department) took no action. Conversely, Tyler, in 2006, following his first set of indictments, applied for retirement benefits, which were granted. Tyler later pleaded guilty to some of the various indictments, others being nol prossed, and began serving his prison sentence.

Upon notice from the district attorney's office that Tyler's case had been resolved, see *G. L. c. 32, § 15(5)*, the Maynard retirement board (board) began an inquiry to determine whether, under *G. L. c. 32, § 15(4)*, Tyler remained entitled to his pension.⁵ After a hearing, the board voted to suspend Tyler's pension, generally concluding that "the fact that the molestations [***3] were committed on a fellow firefighter's son [constituted a] 'direct link'" between Tyler's offenses and his position.

5 During the subsequent hearing, Tyler's direct superior, Fire Chief Stephen Kulik, testified that while he was aware of the criminal charges against Tyler, as well as his arrest, the department took no action to discipline him. Furthermore, Kulik had a discussion with the board about Tyler's retirement application prior to its approval.

Tyler appealed the board's decision to the District Court. After a hearing, a District Court judge set aside the board's decision and ordered that Tyler's benefits be reinstated retroactive to the date of their termination.⁶ The District Court judge [*111] concluded that "Tyler's convictions do not constitute violations of the laws applicable to his position as a Maynard firefighter with a nexus

sufficient to trigger pension forfeiture under *G. L. c. 32, § 15(4)*."

6 The District Court judge observed that "[a]lthough Tyler knew his victims through his fellow firefighters, his offenses were personal in nature." The District Court judge went on to observe that "[t]here is no evidence in the record that Tyler used a fire truck . . . to entice a young [***4] person; or that while in uniform he importuned a young person to visit a past fire site in order to commit indecent acts."

[**742] The board then filed the instant certiorari petition to the Superior Court. Based upon the pleadings and the administrative record, the Superior Court judge concluded that in this case, a sufficient nexus or "direct link" existed between Tyler's criminal conduct and "the laws applicable to his office or position" as to require forfeiture.

Law. This case is controlled by *G. L. c. 32, § 15(4)*, inserted by St. 1987, c. 697, § 47, and subtitled "Forfeiture of pension upon misconduct." The statute states in pertinent part, "[i]n 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" (emphasis added).

The scope of the law was enunciated in *Gaffney v. Contributory Retirement Appeal Bd.*, 423 *Mass. 1*, 3-5, 665 *N.E.2d* 998 (1996), where the court held that it was clear that the Legislature intended the forfeiture provision to apply to any criminal activity connected with the office or position of the wrongdoer. The court, however, "did not intend pension forfeiture [***5] to follow as a sequelae of any and all criminal convictions. Only those violations related to the member's official capacity were targeted." *Id.* at 5. Further, the court enunciated that the facts of each case had to be examined to determine the existence of "a direct link between the criminal offense and member's office or position." *Ibid.* In *Gaffney*, there was such a link in that the member, the superintendent of Shrewsbury's sewer and water department, stole monies from his own department. See *Durkin v. Boston Retirement Bd.*, *post*, (2013); *Flaherty v. Justices of the Haverhill Div. of the Dist. Ct. Dept. of the Trial Ct.*, *post*, (2013).

Similarly, in *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 179, 843 N.E.2d 603 (2006), the court held that by committing perjury before a Federal grand jury and obstructing justice, the member had violated the tenets of his clerk-magistrate position in that telling the truth was at the heart of a clerk-magistrate's role. As the member's crimes could not be separated from the nature of [*112] his particular office, his pension was rightfully withheld. *Id.* at 179-180.

Conversely, in *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. at 654-655, we held that the [***6] member, a custodian, was improperly denied his pension after he was convicted of indecent assault and battery of his daughter. We concluded, in part, that there was no direct link between his repugnant criminal actions and his job. *Id.* at 654.

So too, in *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 954 N.E.2d 541 (2011), a pension was ordered reinstated. The member, a library employee, was arrested after the police discovered images of child pornography on his home computer. *Id.* at 539. We held that "[w]hile we do not ignore the severity of the offenses to which [the member] pleaded guilty, . . . the facts underlying the convictions did not present 'the type of direct link intended by the Legislature.'" *Id.* at 543, quoting from *Herrick*, *supra* at 654.

Discussion. The key question thus is whether Tyler's reprehensible criminal activity violated a law applicable to his position. *General Laws c. 32, § 15(4)*, has consistently been given a narrow interpretation. *Bulger*, *supra* at 174-175. Had the Legislature wished to broaden the statute's reach, it clearly could have done so. That it did not compels our conclusion.

[**743] Here, the board and the Superior Court judge determined that "although there [***7] is no evidence that the crimes took place at the fire station, or that Tyler was ever on duty when he committed the crimes, the fact that the crimes were perpetrated on a coworker's child" was evidence of a "direct link." Additionally, given Tyler's position as a firefighter and his obligation to protect the public, his criminal activities "violated the fundamental tenets of his position."

These considerations, while understandable, are so broad however as to engulf nearly every public official, especially police officers and firefighters, convicted of any crime. The reach of the

statute as currently written is not so broad. A direct link must be established between one's actions and his official position.

We recognize the essential role firefighters play, extinguishing fires and protecting life and property. *G. L. c. 48, § 42*. Although Tyler knew his victims through his fellow firefighters, [*113] his offenses were nonetheless personal in nature, occurring outside the firehouse while Tyler was not on duty. Moreover, there was no evidence that Tyler used his position, uniform, or equipment for the purposes of his indecent acts, nor were the acts committed on department property.⁷

7 The board [***8] also claims that Tyler violated the rules of the department, which constitutes independent grounds to deny his pension. While his convictions violated the department's rules, and could have affected his employment or civil service status, they do not affect his pension, other than to say he could have been fired for moral turpitude and lost his pension.

Conclusion. As there was no "direct link" between Tyler's conviction and his position, the judgment of the Superior Court is reversed.

So ordered.

DISSENT BY: GRAHAM

DISSENT

GRAHAM, J. (dissenting). On October 12, 2006, Anthony Tyler, a Maynard firefighter and emergency medical technician (EMT), was indicted on charges that, for years, he had been sexually molesting his neighbor's minor child. Tyler's neighbor was a fellow Maynard firefighter. On the same day, Tyler resigned and submitted an application for superannuation retirement. His application was accepted, and Tyler began collecting retirement benefits. On March 20, 2008, he pleaded guilty to three counts of indecent assault and battery on a person fourteen years or older; he was sentenced to three years and a day in State prison and was placed on probation for five years, probation to commence from [***9] and after the sentence.

After Tyler began serving his sentence, a second sexual abuse victim came forward, and on July 22, 2008, Tyler pleaded guilty to indecent assault and battery on a person fourteen years or

older, and was sentenced to three years and a day, from and after the sentence he was already serving.

Following the criminal proceedings, the Maynard board of retirement (board) conducted a hearing, and determined that Tyler was required to forfeit his retirement allowance pursuant to *G. L. c. 32, § 15(4)*.¹ The board's decision was reversed by a judge of the District Court. On certiorari review, a judge of [*114] the Superior Court quashed the decision of the District Court judge and remanded the case to the board, [**744] concluding that Tyler was not entitled to receive his retirement allowance.

1 The statute states in pertinent 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." *G. L. c. 32, § 15(4)*, inserted by St. 1987, c. 697, § 47.

The majority has concluded that, while Tyler's criminal behavior was "reprehensible," his behavior and convictions [***10] do not constitute violations of the laws applicable to his position as firefighter, within the purview of *G. L. c. 32, § 15(4)*, and did not involve the administration of his duties and responsibilities as a firefighter and EMT.² I dissent.

2 The majority acknowledges that, had Tyler not resigned so quickly, he could have been discharged from his position on the grounds of moral turpitude, in which case he would have forfeited his pension. See *G. L. c. 32, § 10(1)*; *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 648-652, 933 N.E.2d 666 (2010).

General Laws c. 32, § 15(4), was enacted "to broaden the range of crimes that would lead to pension forfeiture" after the Supreme Judicial Court's decision in *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 488 N.E.2d 401 (1986). *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 3, 665 N.E.2d 998 (1996). To determine whether a member's criminal conviction falls within the scope of *G. L. c. 32, § 15(4)*, we must "consider what laws are applicable to the office or position." *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 175, 843 N.E.2d 603 (2006).

While there is no statute creating the position of firefighter, *G. L. c. 48, § 42*, as amended by St. 1973, c. 1048, § 1, provides for the [***11] establishment of fire departments and charges the department chiefs with "extinguishing fires in the town and the protection of life and property in case of fire." "There are certain forms of employment which carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct consistent with this special trust is an obligation of the employment." *Perryman v. School Comm. of Boston*, 17 Mass. App. Ct. 346, 349, 458 N.E.2d 748 (1983) (specifically making reference to cases involving police officers, judges, and teachers). Illustrative of the special trust conferred on firefighters and EMTs is *G. L. c. 119, § 21*, as amended through St. 2008, c. 176, § 83, which includes firefighters and EMTs as "mandated reporter[s]." [*115] Mandated reporters are required to file a report if they have "reasonable cause to believe that a child is suffering physical or emotional injury resulting from . . . abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare, including sexual abuse." *G. L. c. 119, § 51A(a)*, as amended through St. 2008, c. 176, § 95.

The majority places great significance on the fact that Tyler's criminal convictions [***12] were for conduct that did not occur within the firehouse or while he was on duty. However, the required nexus is not that the crime be committed while the member was on duty, in the workplace, or using the tools of the workplace, but only that the criminal behavior be connected with the member's position. "The nature of [the member's] particular crimes cannot be separated from the nature of his particular office when what is at stake is the integrity of [the] system." *State Bd. of Retirement v. Bulger*, 446 Mass. at 180.

Here, Tyler was sentenced to prison for repeatedly sexually abusing young victims, the very type of criminal behavior he was required by law to report. His convictions are directly related to his position as a firefighter and EMT because they demonstrate a violation of the public's trust as well as a repudiation of his official duties. Clearly, this is not a case where the words of the statute are "stretched to accomplish a result not expressed." *Collatos, supra* at 687. Contrast *Herrick* [**745] *v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 654, 933 N.E.2d 666 (2010) (criminal behavior of a custodian, convicted of indecent

assault and battery of his daughter, not directly linked with [***13] his job); *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 543-545, 954 N.E.2d 541 (2011) (action of a library employee, who kept images of child pornography on his home computer, did not present the type of direct link intended by the Legislature).

I conclude that Tyler's convictions involved violations of the laws applicable to his positions as firefighter and EMT pursuant to *G. L. c. 32, § 15(4)*, and mandated the forfeiture of his retirement allowance.

MICHAEL J. ROTONDI vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & another.¹

1 Retirement board of Stoneham.

SJC-11068

SUPREME JUDICIAL COURT OF MASSACHUSETTS

463 Mass. 644; 977 N.E.2d 1042; 2012 Mass. LEXIS 1000

September 5, 2012, Argued
October 29, 2012, Decided

PRIOR HISTORY: [***1]

Suffolk. Civil actions commenced in the Superior Court Department on January 27 and 30, 2006. After consolidation, the case was heard by Garry V. Inge, J., on motions for judgment on the pleadings. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Judgment affirmed.

HEADNOTES

Contributory Retirement Appeal Board. Public Employment, Retirement. Retirement. Words, "Regular compensation."

COUNSEL: Walter M. Foster for the plaintiff.

Maryanne Reynolds, Assistant Attorney General, for Contributory Retirement Appeal Board.

Michael Sacco for retirement board of Stoneham.

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

OPINION BY: CORDY

OPINION

[*644] [**1043] CORDY, J. This case comes before us on the plaintiff's application for direct appellate review of a decision of a judge in the Superior Court affirming a decision of the Contributory Retirement Appeal Board (CRAB). [**1044] It requires us to decide whether the \$200 fixed annual compensation threshold set forth in *G. L. c. 32, § 3 (2) (d)*, applies to elected officials who are otherwise eligible to become members of the contributory retirement [*645] system for public employees and whether health insurance contributions and professional association dues paid on behalf of such an official are to be considered as "[fixed] annual compensation" for the purposes of this [***2] subsection. Because we conclude that the \$200 threshold applies to "any person," including an elected official, otherwise eligible for membership under *G. L. c. 32*, and the value of health insurance contributions and association dues does not qualify as "[fixed] annual compensation," we affirm the judgment of the Superior Court.

1. Michael J. Rotondi was elected town moderator of the town of Stoneham (town) in April, 1993, and was regularly reelected to that position until April, 2011. From 1993 to 1999, he earned one hundred dollars per year as town moderator. In

1999, his salary increased to \$200.² In addition to his salary, Rotondi received health insurance through the town.³

2 Rotondi's salary was increased to \$205, effective July 1, 2003, by the May 5, 2003, vote of the Stoneham town meeting. This increase, which Rotondi justified to town meeting members as a "clerical accounting matter," was subsequently rescinded by a July 28, 2003, vote of the town meeting, retroactive to June 30, 2003. Thus, at no relevant time was Rotondi's salary greater than \$200.

Rotondi also sought to alter the way he was paid in order artificially to inflate his salary so it would appear to be greater than [***3] \$200. On July 1, 2003, Rotondi approached the town's accountant and requested that his salary be paid in monthly instalments of \$16.67 instead of the lump sum he would ordinarily receive at the end of each fiscal year. The accountant obliged, provided Rotondi submitted monthly time sheets. Having been paid a lump sum of \$200 for the 2002-2003 fiscal year at the end of June, with the commencement of the monthly instalments in July, Rotondi received a total of \$283.35 in the 2003 calendar year. (He neglected to submit a time sheet for December, 2003, and thus only received five monthly instalments in 2003.) Rotondi then claimed that even if *G. L. c. 32, § 3 (2) (d)*, applied to elected officials, he exceeded the \$200 limit, having been paid \$283.35 in 2003. This argument lacked any merit as there was no actual change in his annual salary, which remained set at \$200.

3 The cost of Rotondi's health insurance benefits generally increased over time.

In July, 2001, Rotondi became a member of the State retirement system as a full-time employee of the Department of Environmental Protection. In December, 2001, he requested to join the town's contributory retirement system and purchase credit for [***4] his past eight years of service as an elected town [*646] moderator.⁴ On January 23, 2002, the retirement board of Stoneham (board) denied his request on the ground that he had not applied for membership within ninety days of his election as required by *G. L. c. 32, § 3 (2) (a) (vi)*.

Accordingly, within ninety days of his reelection as town moderator in April, 2003, Rotondi reapplied for membership. At this time, the board deferred action on Rotondi's application and asked its counsel to consider the applicability of the "two hundred dollars or less" rule set forth in *G. L. c. 32, § 3 (2) (d)*, to elected officials like Rotondi. Around the same time, Rotondi sought the opinion of the public employee retirement administration commission (PERAC) regarding his eligibility to join the system as an elected official earning exactly \$200 per year. In a letter to Rotondi and a memorandum to all retirement boards, PERAC asserted that it has "long opined" that *G. L. c. 32, § 3 (2) (a) (vi)*, [**1045] provides that "a compensated elected official is entitled to membership in the appropriate retirement system regardless of the amount of his or her compensation," and the "two hundred dollars or less" limitation [***5] in *§ 3 (2) (d)* was not intended to apply to elected officials. Nevertheless, relying on the advice of its own counsel, the board voted on July 29, 2003, to deny Rotondi's application on the ground that he did not earn more than \$200 per year in his position as town moderator. Rotondi appealed from the decision to CRAB pursuant to *G. L. c. 32, § 16 (4)*. CRAB referred the matter to the division of administrative law appeals for a hearing. On October 25, 2004, an administrative magistrate affirmed the board's decision. Rotondi appealed to CRAB, which affirmed the magistrate's decision. At this time, PERAC moved to intervene; both PERAC and Rotondi filed motions for reconsideration; and CRAB reaffirmed its original decision. Pursuant to *G. L. c. 30A, § 14*, Rotondi sought judicial review of CRAB's decision in the Superior Court. PERAC filed a separate action seeking review of the same decision, and on the parties' joint motion the cases were consolidated.⁵ CRAB then filed a motion for remand to allow [*647] CRAB to examine the legislative history of *§ 3 (2) (d)* in more detail and reconsider its decision. A Superior Court judge allowed the motion, and after reevaluating its analysis, CRAB affirmed [***6] its original decision by a one-to-one vote.⁶ The case returned to the Superior Court, where Rotondi and the board filed cross motions for judgment on the pleadings. By memorandum of decision and order, the judge denied Rotondi's motion for judgment on the pleadings, allowed the board's motion, and affirmed CRAB's decision. Judgments entered on February 15, 2011.

4 The contributory retirement system permits the retroactive purchase of creditable service in certain situations. See generally *G. L. c. 32, § 3 (3)* (late entry into membership).

5 The public employee retirement administration commission (PERAC) has not joined in this appeal.

6 The third seat on the Contributory Retirement Appeal Board (CRAB) was vacant at the time CRAB affirmed its decision.

Throughout the litigation and in this appeal, Rotondi makes two principal arguments: that as an elected official, he is exempt from the \$200 threshold set forth in *G. L. c. 32, § 3 (2) (d)*; and even if subject to the threshold, his annual compensation regularly exceeded \$200 based on the value of his health insurance benefits and his town-paid membership dues in the Massachusetts Moderators Association.

2. In reviewing CRAB's decision that *G. L. c. 32, § 3 (2) (d)* [***7], applies to any person, including elected officials, who apply for membership in a public retirement system, we are required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *G. L. c. 30A, § 14 (7)*.⁷ See *Bulger v. Contributory Retirement Appeal Bd.*, 447 Mass. 651, 658-659, 856 N.E.2d 799 (2006); *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241-242, 850 N.E.2d 533 (2006); *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 618-619, 682 N.E.2d 624 (1997). We set aside a CRAB decision only if it is legally erroneous or not supported by substantial evidence. See *Murphy v. Contributory Retirement Appeal Bd.*, ante 463 Mass. 333, 344, 974 N.E.2d 46 [*648] (2012); *Retirement Bd. of Salem v. Contributory Retirement Appeal Bd.*, 453 Mass. 286, 289, 901 N.E.2d 131 (2009), and cases cited. Where the issue is ultimately one of statutory interpretation, however, we exercise de novo review as we do for all questions of law. See *Pelonzi v. Retirement Bd. of Beverly*, 451 Mass. 475, 478 n.8, 886 N.E.2d 707 (2008); *Bulger v. Contributory Retirement Appeal Bd.*, supra at 657; *Plymouth v. Civil Serv. Comm'n*, 426 Mass. 1, 5, 686 N.E.2d 188 (1997).

7 As they have in past litigation, see *Pelonzi v. Retirement Bd. of Beverly*, 451 Mass. 475, 478 n.8, 886 N.E.2d 707 (2008),

[***8] both PERAC and CRAB have contended throughout the present litigation that as government agencies with expertise in the area of retirement law, their interpretations are entitled to deference. Because PERAC has not joined in this appeal, and the issue is one of statutory interpretation, we need not consider which body, if either, is entitled to greater deference. See *id.*, and cases cited ("While we give weight to the experience of both PERAC and CRAB, here they offer conflicting interpretations. Ultimately, the issue is one of statutory interpretation, which presents a question of law for the court").

We begin with the language of the statute, "the principal source of insight into the legislative purpose." *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37, 364 N.E.2d 1215 (1977). "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). "Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and courts must interpret the statute so [***9] as to render the legislation effective, consonant with reason and common sense." *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 358, 844 N.E.2d 623 (2006) (Spina, J., concurring).

General Laws c. 32, § 3 (2), which governs eligibility for membership in the contributory retirement system for public employees, provides, in relevant part:

"(a) Membership in a system as a member in service . . . shall comprise the following persons:

". . .

"(vi) Any person hereafter elected by popular vote to a state, county or municipal office or position who files with the board on a prescribed form a written application for membership within ninety days after the date of assuming office; provided, that a member becoming an elected official shall retain his membership and an elected official

who is a member shall remain a member upon his re-election or upon his election or appointment to any other position which would otherwise entitle him to membership.

"...

"(d) In all cases involving part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment [*649] or service of any employee in any governmental unit, including such employment or service of any state official, the board shall have [***10] and exercise full jurisdiction to determine such employee's eligibility for membership; provided, that any person holding a position for which the annual compensation is fixed in an amount of two hundred dollars or less shall not be eligible for membership except by vote of the board . . ." (emphasis added).

The main question is whether *G. L. c. 32, § 3 (2) (d)*, applies to elected officials. This debate necessarily turns on the meaning of the words "any person" in *§ 3 (2) (d)*, and whether that condition is intended to apply only to the types of individuals listed in the antecedent clause -- i.e., part-time, provisional, temporary provisional, or temporary employees -- or whether it applies to literally "any person" in the retirement system under any of the membership [**1047] categories set out in *G. L. c. 32, § 3 (2)*.⁸ Rotondi claims that *§ 3 (2) (d)* cannot and does not limit the membership rights of elected officials, because *§ 3 (2) (a) (vi)* automatically confers membership on elected officials. This is incorrect. *General Laws c. 32, § 3 (2) (a)*, establishes several categories of membership in a public retirement system. Elected officials are but one category of membership. *Section 3 (2) (a)* [***11] merely establishes, as a threshold matter, categories of individuals who are generally eligible to participate in the public retirement system. It does not exempt elected officials, or any other category of membership, from limitations imposed by other provisions of *G. L. c. 32*, including the condition in *§ 3 (2) (d)* affecting "any person" whose "annual compensation is fixed in an amount of two hundred dollars or less."⁹

8 Because we conclude that "any person" refers literally to any person under the ambit of *G. L. c. 32*, and thus applies to elected officials, it is unnecessary to decide whether Rotondi may be considered a "part-time" or "intermittent" employee under *G. L. c. 32, § 3 (2) (d)*.

9 We acknowledge that *Joyce vs. Braintree Retirement Bd.*, CRAB Docket No. CR-03-401 (Nov. 16, 2004), where CRAB concluded that for elected individuals covered by *§ 3 (2) (a) (vi)*, "there is no limitation based on compensation as found in *3 (2) (d)*," is inconsistent with CRAB's present position and our decision today. We accept CRAB's representation that the *Joyce* decision was "made without substantial analysis and was incorrect." See *Rotondi vs. Stoneham Retirement Bd.*, CRAB Docket No. CR-03-551 (Dec. [***12] 30, 2005).

[*650] Prior to 1947, *G. L. c. 32, § 3 (2) (d)*, as appearing in St. 1945, c. 658, § 1, read in pertinent part:

"In all cases involving part-time, provisional, temporary, temporary provisional, seasonal, or intermittent employment or service of any employee in any governmental unit, including such employment or service of any state official or of any person elected by popular vote to a county or municipal office or position, the board shall have and exercise full jurisdiction to determine such employee's eligibility for membership" (emphasis added)."

In 1947, the Legislature deleted the italicized text, see *G. L. c. 32, § 3 (2) (d)*, as appearing in St. 1947, c. 660, § 2, and inserted, after the word "membership," the clause that is the subject of this appeal: "provided, that any person holding a position for which the annual compensation is fixed in an amount of two hundred dollars or less shall not be eligible for membership except by vote of the board." *G. L. c. 32, § 3 (2) (d)*, as amended by St. 1947, c. 667, § 2. Rotondi argues that the deletion of the words "any person elected by popular vote" evidences an intent to exempt elected officials from the requirements imposed by *§ 3 (2) (d)* [***13]. But that deletion can only be properly interpreted in light of the contemporaneous addi-

tion of the \$200 threshold applicable to "any person." Despite the lack of legislative history on the subject, both parties acknowledge that the deletion of the language pertaining to elected officials was likely designed to limit the discretion of local retirement boards, which, prior to the amendment, could have denied membership to any elected official regardless of compensation or nature of service. Following the amendment, retirement boards could no longer refuse to admit elected officials to the system for political or other capricious reasons. However, because retirement boards will always have a legitimate interest in denying membership to individuals whose service is limited in nature -- as evidenced by a salary of \$200 or less -- there is no similar justification for limiting the discretion [**1048] of retirement boards to deny membership to elected officials like the plaintiff. Had the Legislature intended the "any person" language to refer only to the immediate antecedent -- i.e., "part-time, provisional, [*651] temporary, temporary provisional, seasonal or intermittent" employees -- it likely would [***14] have used the language "any such employee" or at least "any such person" (emphasis added), or, in § 3 (2) (a) (vi), would have made clear that the eligibility of elected officials is not conditioned on any other provisions using the common "notwithstanding any other provisions of this chapter" or similar language.

We briefly turn our attention elsewhere in *G. L. c. 32* and note that the legislative history of *G. L. c. 32, § 4 (1) (o)*, strongly suggests that certain elected officials, town moderators specifically among them, are not granted automatic membership by virtue of § 3 (2) (a) (vi). Prior to 2009, *G. L. c. 32, § 4 (1) (o)*, as amended through St. 2008, c. 302, § 7, provided:

"Any member who served as a selectman, alderman, city councilor, school committee member or town moderator as the result of election by direct vote of the people, in which position he received no compensation, may establish credit for such service by depositing in the annuity savings fund of the system of which he is a member a sum equal to the amount which would have been paid into such during such period if such position had been compensated at the rate of twenty-five hundred dollars

per year, plus buyback [***15] interest to the date of payment; provided, however, that the provisions of this paragraph shall not apply to any member first elected on or after January 1, 1986" (emphasis added).¹⁰

If, as the plaintiff argues, § 3 (2) (a) (vi) provides a special category of membership for elected officials that is immune from limitations imposed by other sections of c. 32, then § 4 (1) (o) would be completely superfluous. It would purportedly provide for membership for unpaid town moderators, who, by virtue of their status as elected officials, are automatically [*652] granted membership. Although Rotondi was first elected in 1993, and, thus, § 4 (1) (o) does not apply to him, its amendment demonstrates a clear legislative intent that § 3 (2) (a) (vi) does not confer unconditional membership rights to elected officials.

10 *General Laws c. 32, § 4 (1) (o)*, as appearing in St. 2009, c. 21, § 5, now reads: "The service of a state, county or municipal employee employed or elected in a position receiving compensation of less than \$5,000 annually, which service occurs on or after July 1, 2009, shall not constitute creditable service for purposes of [c. 32]." We therefore note that were a similar dispute to arise [***16] from employment occurring on or after July 1, 2009, § 4 (1) (o) would definitively exclude from membership employees, elected or otherwise, who earn less than \$5,000 in regular compensation.

3. We also conclude that at no time did Rotondi receive "[fixed] annual compensation" in an amount greater than \$200. In the past this court has dealt with what constitutes "[r]egular compensation," as that term is defined by *G. L. c. 32, § 1*, and the relevant PERAC regulation, *840 Code Mass. Regs. § 15.03(1)-(2)* (2010), for the purposes of calculating retirement allowances. See *Pelonzi v. Retirement Bd. of Beverly*, 451 Mass. 475, 481-482, 886 N.E.2d 707 (2008); *Bulger v. Contributory Retirement Appeal Bd.*, 447 Mass. 651, 658-659, 856 N.E.2d 799 (2006). Although the present case requires us to define the limits of the term "[fixed] annual compensation" as it is used in *G. L. c. 32, § 3(2) (d)*, we conclude that there is no substantive difference between the term "[fixed] annual compensation" and the term "[r]egular [**1049] compensation" as it is defined by § 1

and 840 Code Mass. Regs. § 15.03(1)-(2). We find no reason to distinguish between forms of compensation that qualify for the purposes of calculating an individual's retirement allowance, [***17] and forms of compensation that qualify in satisfying a minimum eligibility requirement like the one set forth in § 3 (2) (d). An interpretation that draws this parallel is consistent with the well-established statutory intent of c. 32 to "exempt irregular payments of compensation from the retirement base." *Hallett v. Contributory Retirement Appeal Bd.*, 431 Mass. 66, 70, 725 N.E.2d 222 (2000). See *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd.*, 383 Mass. 336, 341, 419 N.E.2d 277 (1981) (definition of "[r]egular compensation" intended to "safeguard against . . . adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems").

General Laws c. 32, § 1, provides, in relevant part:

"Regular compensation' . . . shall mean the salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus, overtime, [*653] severance pay for any and all unused sick leave, early retirement incentives, or any other payments made a result of giving notice of retirement"

Although the "in whatever form" language may seem expansive at first glance, the accompanying PERAC [***18] regulation and the decisions of this court in no way support an interpretation that would include health insurance premiums and association dues within the definition of "regular compensation."¹¹ See 840 Code Mass. Regs. § 15.03(1)-(2). In order to qualify as "regular compensation," payments must be "recurrent,' 'regular,' and 'ordinary' remuneration." *Bulger v. Contributory Retirement Appeal Bd.*, *supra* at 658 (cash housing allowance constituted "regular compensation," where it was understood by both parties that payment would not actually pay for housing but was intended to supplement plaintiff's salary in attempt to convince him to extend his contract as university president). See *Bower v. Contributory Retirement Appeal Bd.*, 393 Mass. 427, 429, 471 N.E.2d 1296 (1984). In contrast, in *Pelonzi v. Re-*

tirement Bd. of Beverly, *supra*, we held that the personal use value of a city-supplied automobile was not to be included as "regular compensation" in calculating a city commissioner's retirement allowance, because, inter alia, it is not a "payment" made to the employee. We noted in the *Pelonzi* case that barring a single exception for "evaluated maintenance [in the form of full or partial boarding and housing] [***19] as provided for in [*G. L. c. 32, § 22 (1) (c)*]," the Legislature did not include "any similar explicit directions for the treatment of [a] noncash benefit" in *G. L. c. 32, § 1. Pelonzi v. Retirement Bd. of Beverly*, *supra* at 481. See 840 Code Mass. Regs. § 15.03(1)-(2). See generally *Hallett v. Contributory Retirement Appeal Bd.*, *supra*; *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd.*, *supra* (discussing intent of statutory scheme to control retirement costs and [**1050] promote [*654] predictability by placing reasonable limits on qualifying compensation).

11 We note that for active service subsequent to July 1, 2009, 840 Code Mass. Regs. § 15.03(3)(f) (2010) specifically excludes from the definition of "regular compensation" a multitude of benefits, including any "indirect, in-kind or other payments for such items as housing, lodging, travel, clothing allowances, annuities, welfare benefits, lump sum buyouts for workers' compensation, job-related expense payments, automobile usage, insurance premiums, [or] dependent care assistance"

Even PERAC, which otherwise supported the plaintiff's position throughout the litigation below, refuted his contention that the value of health [***20] insurance benefits and the cost of association dues count toward his annual compensation for the purposes of satisfying the \$200 threshold under § 3 (2) (d). A holding that would include health insurance benefits and other fringe benefits under the definition of "[fixed] annual compensation" would be plainly at odds with the definition and illustration of "[r]egular compensation" under *G. L. c. 32, § 1*, and the relevant PERAC regulation. The practical consequences of such a decision would be staggering. Apart from the obvious fact that health insurance premiums are not paid to the employee, as is virtually every recognized form of "regular compensation," see *Pelonzi v. Retirement Bd. of Beverly*, *supra*; 840 Code Mass. Regs. §

15.03(1)-(2), health care costs fluctuate annually and have increased greatly over time. They are not "fixed" compensation and cannot serve as a prac-

tical basis for calculating an employee's retirement allowance or initial eligibility.

Judgment affirmed.

MARIA SERRAZINA vs. SPRINGFIELD PUBLIC SCHOOLS.

SJC-11147

SUPREME JUDICIAL COURT OF MASSACHUSETTS

464 Mass. 1011; 983 N.E.2d 705; 2013 Mass. LEXIS 30

February 15, 2013, Decided

PRIOR HISTORY: *Serrazina v. Springfield Pub. Sch.*, 80 Mass. App. Ct. 617, 954 N.E.2d 1147, 2011 Mass. App. LEXIS 1277 (2011)

HEADNOTES

School and School Committee, Arbitration, Suspension from employment, Termination of employment, Compensation of personnel. Arbitration, School committee, Confirmation of award. Damages, Back pay. Labor, Arbitration.

COUNSEL: [***1] Maurice M. Cahillane (William E. Mahoney with him) for the defendant.

Timothy J. Ryan (Henry M. Downey with him) for the plaintiff.

OPINION

[*1011] [**705] When the plaintiff, Maria Serrazina, became the subject of a certain Federal indictment, the defendant school department suspended her, without pay under *G. L. c. 268A, § 25*, from her position as a school adjustment counselor. Thereafter, she entered into a pretrial diversion agreement with Federal authorities, and the indictment ultimately was dismissed. After Serrazina sought reinstatement, the school department terminated her employment pursuant to *G. L. c. 71, § 42*, and she filed a grievance chal-

lenging the termination. An arbitrator ordered that she be reinstated. Serrazina then commenced an action in the Superior Court seeking confirmation of the arbitration award, as well as back pay for the period of her suspension and the period between her termination and reinstatement. A Superior Court judge affirmed the arbitration award reinstating Serrazina, but allowed the school department's motion for summary judgment with respect to her back pay claims. Serrazina appealed, challenging the denial of compensation. The Appeals Court affirmed the denial with [***2] respect to the period between her termination and reinstatement, but reversed with respect to the period of her suspension. *Serrazina v. Springfield [**706] Pub. Sch.*, 80 Mass. App. Ct. 617, 954 N.E.2d 1147 (2011). We granted Serrazina's application for further appellate review.

[*1012] We have considered the parties' arguments and thoroughly reviewed the record. We agree with the result reached by the Appeals Court for substantially the same reasons. The judgment of the Superior Court is reversed insofar as it denies Serrazina back pay for the period of her suspension beginning on August 10, 2004, and ending on October 22, 2007; it is otherwise affirmed. The case is remanded for a calculation consistent with this opinion.

So ordered.

SHERIFF OF SUFFOLK COUNTY vs. JAIL OFFICERS AND EMPLOYEES OF SUFFOLK COUNTY.¹

1 In 1999, AFSCME Council 93, Local 1134, was the union representing Joseph Upton and the jail officers generally. In 2003, Jail Officers and Employees of Suffolk County (union) was formed and is now the union to which all jail officers employed by the sheriff of Suffolk County (sheriff) belong. This union is the appellee in the present case. See *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 451 Mass. 698, 698 n.1 (2008) (Sheriff of Suffolk County I).

SJC-11229

SUPREME JUDICIAL COURT OF MASSACHUSETTS

465 Mass. 584; 990 N.E.2d 1042; 2013 Mass. LEXIS 469

February 4, 2013, Argued
June 14, 2013, Decided

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on April 24, 2001. Following review by this court, 451 Mass. 698, 888 N.E.2d 945 (2008), a complaint for contempt, filed on August 24, 2009, was heard by John C. Cratsley, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court. *Sheriff of Suffolk County v. Jail Officers & Employees*, 451 Mass. 698, 888 N.E.2d 945, 2008 Mass. LEXIS 340 (2008)

DISPOSITION: Judgment affirmed.

HEADNOTES

Sheriff. Public Employment, Collective bargaining, Termination. Labor, Public employment, Collective bargaining. Arbitration, Collective bargaining, Award. Damages, Back pay, Mitigation, Interest. Interest. Governmental Immunity. Waiver. Judgment, Enforcement, Interest. Practice, Civil, Interest, Waiver.

COUNSEL: Timothy J. Casey, Assistant Attorney General, for the plaintiff.

John M. Becker for the defendant.

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

OPINION BY: CORDY

OPINION

[*585] [**1044] CORDY, J. This appeal arises from an action in the Superior Court to enforce an arbitrator's award of back pay to a jail officer employed and wrongfully discharged by the sheriff of Suffolk County (sheriff). The sheriff appeals from the judge's ruling that the jail officer, Joseph Upton, had no duty to mitigate his damages by seeking comparable employment. The Jail Officers and Employees of Suffolk County (union), on behalf of Upton, cross appeals from the judge's decision not to assess statutory postjudgment interest on the arbitrator's award. Although we conclude that Upton did have a duty to mitigate his damages, we affirm the judgment on the grounds that the sheriff waived this [***2] issue by failing to raise it earlier in the proceedings, and that, regardless, she failed to meet her burden of proof on the issue.² We also affirm the judge's decision not to assess postjudgment interest on sovereign immunity grounds.

2 At the time this matter was litigated in the Superior Court, the sheriff of Suffolk County was a woman. Currently, the sheriff of Suffolk County is a man. As a matter of convenience, we will refer to the sheriff of Suffolk County as "she" in this opinion.

1. Background. This appeal represents the putative final chapter in a case that, at the time of an earlier decision in 2008, already had a "long and

tortuous procedural history." *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 451 Mass. 698, 699, 888 N.E.2d 945 (2008) (Sheriff of Suffolk County I). On December 29, 1999, Upton was discharged [**1045] from his position as a jail officer at the Nashua Street jail in Boston (jail) following an incident in which Upton allegedly "filed untimely and then false reports" concerning an assault of an inmate that he witnessed. *Id.* On Upton's behalf, the union grieved the termination pursuant to the applicable collective bargaining agreement, and ultimately sought [***3] an arbitrator's review. *Id.* Following two days of hearings in November and December, 2000, the arbitrator [*586] found, inter alia, that Upton had filed "incomplete, misleading or false reports" concerning the assault, but ruled that although the sheriff had "just cause" to discipline Upton, Upton should not have been discharged. *Id.* The arbitrator ordered that Upton was to be suspended for six months without pay and then reinstated "with full back pay and benefits, less any outside earnings and/or unemployment compensation."³

3 By the time of the arbitrator's award in March, 2001, well over six months had elapsed since Upton's discharge in December, 1999. The effect of the award was thus to provide for Upton's immediate reinstatement and receipt of back pay. *Sheriff of Suffolk County I, supra at 699 n.3.*

The sheriff filed an appeal in the Superior Court pursuant to *G. L. c. 150C, § 11*, seeking to vacate the award on the ground that the order reinstating Upton exceeded the arbitrator's authority because it was contrary to "well-defined public policy." *Id. at 699-700.* The Superior Court confirmed the award. *Id. at 700.* The sheriff appealed the confirmation to the Appeals Court, which also affirmed [***4] the judgment. *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 62 Mass. App. Ct. 915, 817 N.E.2d 336 (2004). We denied the sheriff's application for further appellate review without prejudice, remanding the case to the Appeals Court for reconsideration in light of our decision in *Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 824 N.E.2d 855 (2005), regarding public policy grounds for setting aside arbitration awards. *Sheriff of Suffolk County I, supra at 700.* On remand, the Appeals Court again affirmed the Superior Court judgment confirming the arbitrator's award, *Sheriff*

of Suffolk County v. Jail Officers & Employees of Suffolk County, 68 Mass. App. Ct. 903, 860 N.E.2d 963 (2007). We then granted the sheriff's application for further appellate review. *Sheriff of Suffolk County I, supra at 700.* Although we determined that "the ambiguous record [did] not permit us to answer [the] question [whether public policy requires vacation of the award]," we concluded that "a remand of the case for clarification of the record [was] not possible, and that in the particular circumstances presented, a remand for a new arbitration proceeding would [have been] inappropriate." *Id. at 698-699.* By the time of our [***5] decision, the arbitrator had died, and it would have been impractical to remand the matter for rehearing before a different arbitrator due to the "unavailability [*587] of several critical witnesses" almost nine years after Upton had been discharged. *Id. at 702 n.5, 703.* Accordingly, because it was "obviously necessary to resolve [the] case," we affirmed the judgment of the Superior Court confirming the arbitrator's award. *Id. at 703.* Following our affirmance in a decision released on June 23, 2008, judgment entered in the Superior Court on July 25, 2008, and Upton was reinstated and returned to work in August, 2008.

2. Dispute over back pay award. On his return to work, Upton executed a document under the pains and penalties of [**1046] perjury declaring that his offset earnings in the nearly nine years since his discharge totaled \$14,943. As of August, 2009, the sheriff had not paid Upton any back pay pursuant to the arbitrator's award. Consequently, on August 24, 2009, the union filed a complaint for contempt in the Superior Court asking that the sheriff be held in contempt for failing to pay back pay pursuant to the 2008 Superior Court judgment confirming the arbitrator's award. In the unique procedural [***6] circumstances of this case, the judge determined to hold an evidentiary hearing, not on the matter of contempt, but rather on the proper calculation of back pay (minus offsets) that Upton was entitled to receive under the terms of the arbitrator's award, which had continued to accrue during the approximately eight-year period between the time of the award and the date on which Upton was reinstated. Following the hearing, the parties submitted proposed findings of fact and rulings of law. The judge issued a decision on April 12, 2011, ruling that Upton had no duty to mitigate his damages or that, alternatively, the sheriff had failed to meet her burden of proof on the issue of mitigation, such that Upton was owed

the full amount of back pay due less only actual earnings and unemployment compensation. The judge further ruled that Upton was not entitled to postjudgment interest on the award.

In addition to recounting the procedural history detailed above, the judge made the following findings of fact. Upton did not work regularly following his discharge from the jail. He did not actively look for a new job due to his belief that he would be reinstated when he continually prevailed at every [***7] stage of the litigation. During his period of unemployment, Upton received significant amounts of money from his parents in order to pay [*588] bills and take care of his children. In 2000, Upton received \$12,930 in unemployment compensation. In January, 2004, Upton represented on an automobile loan application that he was employed at a restaurant in Charlestown where he earned \$2,000 per month and had worked for eighteen years. However, in reality, Upton had not worked at that restaurant since before 1991. Upton had trained as a carpenter, and in 2006 and 2007, he worked as a self-employed carpenter earning \$5,000 per year. In January, 2007, Upton applied for another automobile loan, stating on the application that he had worked continuously as a carpenter since 2000 and earned \$2,400 per month. The judge found that Upton had lied on both loan applications in order to ensure that he received the loans, and that his only earnings in 2006 and 2007 were the \$10,000 he made as a carpenter. In January, 2008, Upton worked for two weeks as a bouncer, earning \$1,280. He was injured on the job and later received \$10,500 in workers' compensation.

From those findings, the judge identified six items [***8] of offset totaling \$36,723,⁴ which, when subtracted from the gross back pay due (\$431,447.67), meant Upton was owed \$394,724.67 in back pay.⁵ The judge concluded that Upton "reasonably believed that he would be returning to [**1047] work after the [arbitrator's] award was issued [and,] [t]herefore, [he had] no duty to mitigate his damages, and must subtract only his actual interim earnings from his gross back pay award." Alternatively, the judge held that the sheriff had "failed to show at trial what [Upton] could have earned in a substantially similar full-time position elsewhere."

4 This figure was achieved by adding Upton's unemployment compensation, his

earnings as a carpenter and a bouncer, his worker's compensation payment, and payments from the city of Boston and the City of Boston Credit Union, of \$1,034 and \$979, respectively. These two payments were drawn from the sworn statement of offset earnings made by Upton on his return to work at the jail, although their exact nature is unclear from the record.

5 Per stipulation of the parties, the gross back pay due to Upton totals \$431,447.67 before any offsets are applied.

3. Discussion. a. Mitigation of damages. Following a bench trial, we review [***9] a judge's findings of fact under the clearly erroneous standard and his conclusions of law de novo. *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503, 952 N.E.2d 908 (2011); *City [*589] Rentals, LLC v. BBC Co.*, 79 Mass. App. Ct. 559, 560, 947 N.E.2d 1103 (2011). On appeal, the sheriff challenges the judge's ruling that Upton had no duty to mitigate his damages or, in the alternative, that the sheriff failed to meet her burden of proof on this issue.

As an initial matter, it is not entirely clear on what basis the judge concluded that Upton "[had] no duty to mitigate his damages," or what exactly the judge intended that statement to mean. In their briefs before this court, the parties have focused a great deal on the significance of the arbitral award's silence on the mitigation of damages issue, but it does not appear that the judge considered this fact in reaching his conclusion that no duty existed. While we ultimately agree with the judge's conclusion that the sheriff failed to meet her burden of proof on the mitigation of damages issue, and also conclude that the sheriff waived the issue, we disagree that Upton had no duty to mitigate.

It is a well-established rule that "[w]here one is under contract for personal [***10] service, and is discharged, it becomes his duty to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to use honest, earnest and intelligent efforts to this end. He cannot voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party." *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 6, 85 N.E. 877 (1908) (Maynard). See *Ryan v. Superintendent of Schs. of Quincy*, 374 Mass. 670, 672, 373 N.E.2d 1178 (1978) (Ryan); *McKenna v. Commissioner of Mental Health*, 347 Mass. 674, 675-676, 199

N.E.2d 686 (1964) (McKenna); Restatement (Second) of Contracts § 350, at 126 (1981). It is further recognized that "[t]his general principle is applicable to public employees who are reinstated after having been unlawfully discharged." *Ryan, supra* (public school teacher). See *Police Comm'r of Boston v. Ciccolo, 356 Mass. 555, 559, 254 N.E.2d 429 (1969)* (police officer); *McKenna, supra* (State hospital employee). We see no reason why, as a general matter, this principle should not apply in Upton's case.⁶

6 In concluding that Upton had no duty to mitigate, the judge relied, at least in part, on language from *McKenna v. Commissioner of Mental Health, 347 Mass. 674, 676-677, 199 N.E.2d 686 (1964) [***11]* (McKenna), stating that "there is no judicial penalty" for failure to make an effort to find substitute employment. *Id. at 676*, quoting Corbin, *Contracts § 1039*. However, the court in *McKenna* went on to explain that "if [the employee] fails to make the reasonable effort [to find substitute employment] with the result that his injury is greater than it would otherwise have been . . . [t]he law does not penalize his inaction; it merely does nothing to compensate . . . for the loss that he helped to cause by not avoiding it" (emphasis added). *McKenna, supra*. The statement that there is no "judicial penalty" for failing to mitigate one's damages is thus largely semantic.

We also disagree with the union's contention that the arbitration [*590] award's silence on the mitigation issue necessarily means that no such duty applied to Upton. [**1048] There is nothing in the record to suggest that the issue of mitigation of damages was raised or contested before the arbitrator, or that he considered or decided the issue in granting the award. The arbitrator's award simply reads:

"Upton's discharge is revoked and he is suspended for six months with no pay or benefits and without accumulation of seniority during [***12] that period of time effective from the original date of discharged.

"Thereafter he will be reinstated with full back pay and benefits, less

any outside earnings and/or unemployment compensation."

While there are no reported decisions from courts in the Commonwealth addressing the precise situation where an arbitrator's award is silent on the duty to mitigate, two cases from the United States Court of Appeals for the Seventh Circuit are instructive. In *Automobile Mechanics Local 701 v. Joe Mitchell Buick, Inc., 930 F.2d 576 (7th Cir. 1991)* (Joe Mitchell Buick), the court held that an arbitrator has the discretion to decide whether an award of reinstatement and repayment for loss of earnings included in it a duty to mitigate damages. In a case where the employer expressly raised mitigation before the arbitrator, the court reasoned, "[i]t is settled that arbitrators have discretion to decide whether lost earnings should be offset by interim earnings or a failure to mitigate, so that their silence on such issues means that no such offsets are to be made." *Id. at 578*.

However, a slightly different case is presented where neither party raised the issue before the arbitrator. In *International Union of Operating Eng'rs, Local No. 841 v. Murphy Co., 82 F.3d 185, 186 (7th Cir. 1996) [***13]* (Murphy Co.), the court was [*591] faced with an arbitrator's award ordering that a group of union employees who had been fired "be reinstated to the employment and made whole." Neither party raised the issue of damages at the arbitration proceeding, which instead "focused exclusively on the propriety of the firings." *Id.* The employer argued that the phrase, "made whole," was ambiguous and imposed what the employer deemed to be appropriate offsets for interim earnings. *Id. at 186-187*. While not agreeing with the employer that the award was necessarily ambiguous, the court acknowledged that, "[g]iven the lack of evidence, the arbitrator's decision to rule on the damages issue is certainly questionable," and the arbitrator may have exceeded his authority by issuing "an award based 'upon a matter not submitted' to the arbitrator." *Id. at 187*, quoting *9 U.S.C. § 11(b) (1994)*. Nevertheless, the court held the employer waived the offset issue because the employer failed to raise it before the arbitrator, or in the alternative, to challenge the arbitration award within the three-month time period provided by the Federal Arbitration Act, *9 U.S.C. § 12 (1994)* (FAA). *Murphy Co., supra at 188-190*. Although [***14] we take no position on the rule of the Seventh Circuit that

silence on the issue of mitigation is to be considered an unambiguous statement that no such duty exists, see *Murphy Co.*, *supra* at 189, citing *Joe Mitchell Buick*, *supra* at 578, we agree with the holdings in both *Joe Mitchell Buick* and *Murphy Co.* insofar as they take into consideration whether the issue was explicitly raised before the arbitrator, as in *Joe Mitchell Buick*, *supra* at 578, or whether any challenge to the award was waived by a failure to raise the issue of mitigation before the arbitrator or, in a timely fashion, to challenge the award as having exceeded the arbitrator's authority, as in *Murphy Co.*, *supra* at 188-190.

Here, the sheriff failed to raise the issue of mitigation of damages before [**1049] the arbitrator. And, despite the fact that the arbitrator's award clearly contemplated to a certain extent the question of damages -- as evidenced by its provision for offsets for outside earnings and unemployment compensation -- yet was silent on the issue of mitigation, the sheriff did not raise the mitigation issue as part of her initial challenge to the award pursuant to *G. L. c. 150C, § 11*, that ultimately culminated in [***15] [**592] our decision in *Sheriff of Suffolk County I*, *supra*. Like their Federal counterpart, *9 U.S.C. § 12*, which requires that challenges to arbitral awards be commenced within three months from the date of the award, *G. L. c. 150C, §§ 11 and 12*, require that actions to vacate, modify, or correct an arbitral award be commenced within thirty days of the issuance of the award. While the sheriff timely filed her action to vacate the award on the ground that the order to reinstate Upton was contrary to public policy, see *Sheriff of Suffolk County I*, *supra* at 699-700, the sheriff raised the mitigation issue for the first time in response to the union's motion for contempt in the Superior Court, which the union filed in August, 2009, more than eight years after the issuance of the arbitrator's award. "Unless grounds are urged for vacating, modifying or correcting the award within [the thirty-day period set forth in *G. L. c. 150C, §§ 11 and 12*], the award becomes virtually impregnable." *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 489 (1st Cir. 1983). Accordingly, the issue is waived.

Even if the mitigation issue were not waived, the union would still prevail. The employer bears the burden of proof [***16] on the issue of mitigation of damages. *McKenna*, *supra* at 677, and cases cited. An employer meets this burden of proof by proving the following:

"(a) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment, (b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs."

Black v. School Comm. of Malden, 369 Mass. 657, 661-662, 341 N.E.2d 896 (1976) (Black). Additionally, the employer must show what the employee "could have earned in other similar work." *McKenna*, *supra*. This court has not articulated a clear definition of "comparable employment" in the context of mitigation of damages, apart from opining that comparable employment for a tenured art teacher who had been wrongfully discharged included both tenured and nontenured art teacher positions. See *Ryan*, [**593] *supra* at 676. Accordingly, we turn to other jurisdictions for guidance. In *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 231, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982), the United States Supreme Court reasoned that an "unemployed [***17] or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position." Other jurisdictions have similarly defined comparable employment as employment that offers similar long-term benefits and opportunities for promotion as compared to the original position. See *Greenway v. Buffalo Hilton Hotel*, 951 F. Supp. 1039, 1061 (W.D.N.Y. 1997), *aff'd as modified*, 143 F.3d 47 (2d Cir. 1998) ("In order for the work to be comparable or substantially similar, the new position must afford a plaintiff virtually identical promotional opportunities, compensation, job responsibilities, working condition, and status as the former position"). See also *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983), *cert. denied*, 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d [**1050] 537 (1984); *Meyer v. United Air Lines, Inc.*, 950 F. Supp. 874, 876 (N.D. Ill. 1997).

The sheriff relies on a single case, *McKenna*, *supra*, for its statement that "[the discharged employee] is entitled to recover his back salary less what he did in fact earn following his discharge or in the exercise of proper diligence might have earned in another employment," to argue that she

met her burden of proof by "demonstrat[ing] [***18] what Upton actually earned, or in the exercise of reasonable diligence would have earned elsewhere." This argument is without merit. While that lone excerpt from McKenna does not use the term "comparable employment," it is beyond dispute that an employer must demonstrate the availability of "comparable employment," not just any employment. See, e.g., *Ryan, supra*; *Black, supra*. Given Upton's occupation as a correction officer, it is simply irrelevant to the issue of mitigation that he may have been able to further offset his lost earnings by working on a more permanent basis as a restaurant employee, carpenter, or bouncer. It is quite clear that the three positions identified by the sheriff are not comparable or remotely similar to Upton's employment as a correction officer. Further, employment as a restaurant employee, carpenter, or bouncer does not offer the same stability, benefits, or potential for promotion. Accordingly, the judge correctly concluded that the sheriff had [*594] failed to demonstrate the availability of comparable employment opportunities, or what Upton could have earned in an available comparable position elsewhere.⁷

7 In addition to the fact the three employment opportunities [***19] advanced by the sheriff cannot be considered comparable in any way to Upton's employment as a correction officer, we reject the sheriff's attempt to offer Upton's falsified automobile loan applications as evidence of what Upton could have earned had he worked as a restaurant employee or carpenter on a more permanent, full-time basis. Although the judge considered those loan applications in the context of determining the amount of Upton's offset earnings, the judge was well within his discretion in finding that the automobile loan applications did not reflect the defendant's actual income during the relevant period, and the sheriff presented no evidence that the earnings claimed on the applications reasonably approximated what Upton actually would have earned at those jobs if he had held them for the periods that he claimed.

Presumably recognizing that she has not met her burden of proof of comparable employment opportunities, the sheriff urges this court to adopt the rule set forth in *Quint v. A.E. Staley Mfg. Co.*,

172 F.3d 1, 16 (1st Cir. 1999), that "where an employee has remained completely idle following her discharge," the employer "should be relieved of any burden to prove the [***20] existence of substantially equivalent positions." The stated rationale behind this rule is that where a discharged employee has declined to seek other employment, it is "reasonable to presume that she did so for an articulable reason," such as her belief "that a job search would have been futile," and that she "is likely to be in the better position to explain her preemptive decision to take no action to obtain employment." *Id.* We decline to adopt this rule. First, the Quint decision does not make entirely clear whether the burden shifts from the employer to the employee where the employee "has remained completely idle," *id.*, and sought no employment of any kind, or instead where the employee has failed to seek comparable employment. See *id.* (noting employer bears burden "[a]s long as the claimant has made some effort to secure other employment," but variously stating burden shifts "once an employer has shown that the claimant sought no jobs," and "once it has been shown that the former employee [**1051] made no effort to secure suitable employment" [emphases added]). Second, and more importantly, we concur in the view expressed by the United States Court of Appeals for the Sixth Circuit that [***21] "basic principles of equity and fairness mandate that the burden [*595] of proof must remain on the employer because the employer's illegal discharge of the employee precipitated the search for another job." *National Labor Relations Bd. v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

b. Postjudgment interest. The union cross-appeals from the part of the judge's order denying its request for postjudgment interest. The judge declined to assess postjudgment interest, reasoning that the sheriff is an agency of the Commonwealth entitled to sovereign immunity following the sheriff department's transfer to the Commonwealth on January 1, 2010, by St. 2009, c. 61, §§ 3 and 26, and postjudgment interest is not available against the Commonwealth in contract claims. *C & M Constr. Co. v. Commonwealth*, 396 Mass. 390, 391-392, 486 N.E.2d 54 (1985) (*C & M Constr. Co.*). The judge did not consider whether the sheriff enjoyed immunity from postjudgment interest prior to the transfer to the Commonwealth. In its brief before this court, the union states without citation that the sheriff did not enjoy sovereign immunity prior to the transfer, and that,

because the obligation to pay interest arose prior to the transfer, [***22] the sheriff must pay interest from the date of the arbitration award until the date of the transfer on January 1, 2010. See St. 2009, c. 61, § 6 ("Notwithstanding any general or special law to the contrary, all valid liabilities and debts of the office of a transferred sheriff, which are in force on the effective date of this act, shall be obligations of the commonwealth as of that date . . ."). Alternatively, the union argues that two exceptions to the application of sovereign immunity should apply in this case: that even if sovereign immunity would otherwise bar an award of postjudgment interest, the sheriff has waived that immunity by submitting the dispute to arbitration; and that equitable considerations require the awarding of postjudgment interest here, where the sheriff's continued pursuit of appeals over the better part of one decade has "unduly delayed the proceedings" and resulted in Upton being unreasonably denied his back pay. The sheriff counters that the union's claim for postjudgment interest is barred because it did not arise until 2011, more than one year after the transfer, when the union first requested postjudgment interest as part of its proposed findings of fact [***23] and rulings of law following the bench trial. The sheriff also disputes the [*596] applicability of either of the "exceptions" to immunity against postjudgment interest advanced by the union.

In their briefs, neither party addresses at any length or with any citation whether the sheriff actually possessed sovereign immunity prior to the 2010 transfer, and neither party was prepared to argue the matter at oral argument. In a postargument submission, the sheriff takes the position that she was entitled to sovereign immunity at all times relevant to the present litigation, and has not waived her immunity from postjudgment interest. In its response, the union effectively concedes that, absent waiver, the sheriff was indeed entitled to sovereign immunity, and chooses instead to readvance its argument that the sheriff waived immunity from postjudgment interest by agreeing to submit the dispute to arbitration as part of the collective bargaining agreement. Accordingly, we assume without deciding that the sheriff was, as a general matter, entitled to sovereign immunity prior to 2010, see *Boston v. Massachusetts Comm'n Against Discrimination*, 39 Mass. App. Ct. 234, 245, [**1052] 654 N.E.2d 944 (1995), and take up the union's [***24] waiver arguments.

"[A]n action for interest after judgment is a separate action based upon a statutory right and is not part of the underlying claim on which the judgment is based." *C & M Constr. Co.*, *supra* at 391-392. See *G. L. c. 235, § 8*. A public entity's consent to suit on a contract by virtue of entering into that contract does not thus constitute a waiver of immunity from postjudgment interest. *C & M Constr. Co.*, *supra*. Accordingly, the question becomes "whether there is any other source of waiver of sovereign immunity." *Id.* at 392. This court has already held that perhaps the most likely potential source, the postjudgment interest statute itself, *G. L. c. 235, § 8*, does not effect such a waiver.⁸ *C & M Constr. Co.*, *supra* at 393; *Broadhurst v. Director of the Div. of Employment Sec.*, 373 Mass. 720, 726, 369 N.E.2d 1018 (1977) (reasoning enactment of statute awarding postjudgment interest against Commonwealth in eminent domain cases evidenced legislative intent that *G. L. c. 235, § 8*, not be applied to claims against [*597] Commonwealth). Nor does "[t]he primary statutory basis for the waiver of sovereign immunity," the Massachusetts Tort Claims Act, *G. L. c. 258*, impose liability on the Commonwealth [***25] for postjudgment interest. *C & M Constr. Co.*, *supra* at 392. See *Onofrio v. Department of Mental Health*, 411 Mass. 657, 658, 584 N.E.2d 619 (1992). Therefore, the general rule is that "the Commonwealth . . . is not liable for postjudgment interest in the absence of a clear statutory waiver of sovereign immunity in that regard." *Chapman v. University of Mass. Med. Ctr.*, 423 Mass. 584, 586, 670 N.E.2d 166 (1996) (Chapman).

8 *General Laws c. 235, § 8*, generally provides for postjudgment interest on judgments "rendered upon an award of . . . a committee or referees, or upon the report of an auditor or master, or upon the verdict of a jury or the finding of a justice."

The union principally argues that the sheriff waived any immunity from postjudgment interest by agreeing to arbitrate the dispute under the collective bargaining agreement. It cites to only one case on point, *Massachusetts Highway Dep't v. Perini Corp.*, 79 Mass. App. Ct. 430, 947 N.E.2d 62 (2011), which affirmed the confirmation of an arbitrator's award of postjudgment interest over a public entity's⁹ claim of sovereign immunity, on the ground that the public entity did not need to specifically consent to postaward interest where it "consented to be bound by the [arbitrator's]

[**26] resolution of the claims involved," *id. at 442*, pursuant to a postdispute agreement to arbitrate certain identified claims. *Id. at 432*. The court further explained:

"[I]n light of the broad authority given to the [arbitrator] in the parties' [postdispute agreement to arbitrate], and the narrow scope of review provided by the Legislature . . . we believe that [the public entity's] waiver of sovereign immunity to arbitrate these claims included an implicit waiver from paying interest as part of the relief to be granted by the [arbitrator]."

Id. at 444. The remainder of the cases cited by the union in support of its waiver argument do not discuss sovereign immunity at all, and presumably [**1053] the issue was not raised. See *Watertown Firefighters, Local 1347, I.A.F.F., AFL-CIO v. Watertown*, 376 Mass. 706, 710, 717-718, 383 N.E.2d 494 (1978) (affirming judge's imposition [*598] of interest on arbitrator's award against town); *Marlborough Firefighters, Local 1714, I.A.F.F., AFL-CIO v. Marlborough*, 375 Mass. 593, 600-601, 378 N.E.2d 437 (1978) (same); *Coughlan Constr. Co. v. Rockport*, 23 Mass. App. Ct. 994, 997-998, 505 N.E.2d 203 (1987) (same); *Blue Hills Regional Dist. Sch. Comm. v. Flight*, 10 Mass. App. Ct. 459, 471-473, 409 N.E.2d 226 (1980), S.C., 383 Mass. 642 (1981) [***27] (affirming confirmation of arbitrator's award of postjudgment interest against school committee); *Arlington v. Local 1297, Int'l Ass'n of Firefighters, AFL-CIO*, 6 Mass. App. Ct. 874, 875, 375 N.E.2d 343 (1978) (finding error in Superior Court judge's failure to award interest on judgment confirming arbitrator's award). Of those cases, the only one that discussed the award of interest in any depth noted that the arbitrator's award of interest was "not subject to the statutory provisions which apply to court-awarded interest on contract claims," and "the fact that 'the award . . . grants relief such that it could not grant or would not be granted by a court . . . shall not be ground for vacating or refusing to confirm the award.'" *Blue Hills Regional Dist. Sch. Comm. v. Flight, supra at 472-473*, quoting *G. L. c. 150C, § 11 (a) (5)*. See *Superadio Ltd. Partnership v. Winstar Radio Prods., LLC*, 446 Mass. 330, 339, 844 N.E.2d 246 (2006), quoting *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 376, 36

Cal. Rptr. 2d 581, 885 P.2d 994 (1994) ("arbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine the scope of their contractual authority to fashion remedies").

9 The public [***28] entity was a joint venture between the Massachusetts Highway Department and the Massachusetts Turnpike Authority, formed in connection with the Central Artery/Tunnel project. *Massachusetts Highway Dep't v. Perini Corp.*, 79 Mass. App. Ct. 430, 431, 947 N.E.2d 62 (2011).

Here, we need not consider whether or the extent to which the arbitrator legitimately may have awarded postjudgment interest, or whether such an award would survive a sovereign immunity challenge by the sheriff, since the arbitrator made no such award. See *M. O'Connor Contracting, Inc. v. Brockton*, 61 Mass. App. Ct. 278, 283-286, 809 N.E.2d 1062 (2004) (vacating on sovereign immunity grounds confirmation of arbitrator's award of multiple damages on *G. L. c. 93A* claim against municipality). The union indicates in its brief that it seeks a judicial award of postjudgment interest pursuant to *G. L. c. 235, § 8*. As our cases clearly indicate, entities entitled to sovereign immunity are not liable for interest under *G. L. c. 235, § 8*, absent an unequivocal statutory waiver not present here. See, e.g., *Chapman, supra at 586*; *C & M Constr. Co., supra at 391-393*. Accordingly, the union's waiver argument must fail.

[*599] Alternatively, the union argues that equitable [***29] considerations require an award of postjudgment interest where, as they contend occurred here, the employer "has unduly delayed the proceedings such that the employee is deprived of his back pay for an unreasonable length of time." The cases on which the union relies in support of this argument, *Perkins Sch. for the Blind v. Rate Setting Comm'n*, 383 Mass. 825, 423 N.E.2d 765 (1981) (Perkins) and *Massachusetts Gen. Hosp. v. Commissioner of Pub. Welfare*, 359 Mass. 206, 268 N.E.2d 654 (1971), are inapposite. As this court has already recognized, "Perkins did not involve a claim for interest on a judgment [pursuant to *G. L. c. 235, § 8*], but rather was a case of unreasonable detention of money due under a contract[.]" with the difference being "that in a Perkins situation the interest held to be due is 'a remedy based on a contractual obligation of the

Commonwealth." *C & M Constr. [**1054] Co., supra at 394*, quoting *Sargeant v. Commissioner of Pub. Welfare*, 383 Mass. 808, 814, 423 N.E.2d 755 (1981). Similarly, *Massachusetts Gen. Hosp. v. Commissioner of Pub. Welfare, supra at 208-209*, addressed a situation where a department of the city of Boston wrongfully failed to pay medical bills on behalf of patients receiving public assistance despite [***30] the fact that "[i]n no instance [was] the Boston department's obligation to

pay for the care in dispute." Therefore, these two cases have no application here, where the delay in paying money due under an arbitrator's award owes to the sheriff's "legitimate appeal" of that award, cf. *Chapman, supra at 588*, and the interest sought is statutory postjudgment interest. See *C & M Constr. Co., supra at 393-394*.

Judgment affirmed.

W.A. WILDE COMPANY, INC. vs. BOARD OF ASSESSORS OF HOLLISTON.

No. 12-P-121.

APPEALS COURT OF MASSACHUSETTS

84 Mass. App. Ct. 102; 2013 Mass. App. LEXIS 125

**October 1, 2012, Argued
August 8, 2013, Decided**

PRIOR HISTORY: [1]**

Suffolk. Appeal from a decision of the Appellate Tax Board.

HEADNOTES

Taxation, Real estate tax: abatement, assessment, value, Assessors.

COUNSEL: Matthew A. Luz for the taxpayer.

Peter R. Barbieri for board of assessors of Holliston.

JUDGES: Present: Wolohojian, Brown, & Carhart, JJ.

OPINION BY: BROWN

OPINION

[*102] BROWN, J. W.A. Wilde Company, Inc. (taxpayer), appeals from a decision of the Appellate Tax Board (board) denying the taxpayer's petitions to abate the fiscal year 2007 real estate taxes on two individual parcels situated in the town of Holliston (town). The question presented is whether, based on the text of *G. L. c. 58A, § 12A*,

the board was obliged to assign the burden of going forward with the necessary proof to the town's board of assessors (assessors), not the taxpayer, at the administrative hearing. The board refused. There was no error.

Facts. The taxpayer has been the lessee in possession of the parcels, both of which are improved with buildings for industrial and office use. Under its lease, the taxpayer has been required to pay more than one-half of the taxes on each of the parcels, see *G. L. c. 59, § 11*, known as 200 and 201 Summer Street. In fiscal years 2005 and 2006, the taxpayer contested the assessments,¹ [*103] filing appeals with the board under the formal procedure.² Each time, the [**2] board decided that the taxpayer did not meet its burden to prove the parcels had been overvalued.³ This same scenario recurred in fiscal year 2007.

1 For those years, 200 Summer Street was assessed at \$3,162,000, and 201 Summer Street at \$4,877,500. The assessors refused to abate the real estate taxes.

2 See *G. L. c. 58A, § 7; G. L. c. 59, §§ 64 & 65; 831 Code Mass. Regs. § 1.04* (2007).

3 "Real estate is overvalued if it is assessed in excess of its 'fair cash value.'"

Donlon v. Assessors of Holliston, 389 Mass. 848, 857, 453 N.E.2d 395 (1983), quoting from *G. L. c. 59, § 38*.

a. Fiscal year 2007 appeal. After the assessors refused to abate the taxes for fiscal year 2007, the taxpayer again filed petitions with the board under the formal procedure, contesting the 2007 assessed values -- 200 Summer Street at \$3,211,800 and 201 Summer Street at \$5,012,300 -- both of which exceeded, by \$49,800 and \$134,800, respectively, the valuations from the prior two fiscal years. See note 1, *supra*.

At the hearing before the board, the taxpayer advanced an argument that the assessors had the burden of proof to demonstrate the fiscal year 2007 assessments were warranted. This was required, the taxpayer urged, by *G. L. c. 58A, § 12A*, [**3] as amended by St. 1998, c. 485, § 2, which provides, in relevant part:

"If the owner of a parcel of real estate files an appeal of the assessed value of said parcel with the board for either of the next two fiscal years after a fiscal year for which the board has determined the fair cash value of said parcel and if the assessed value is greater than the fair cash value as determined by the board, the burden shall be upon the appellee [assessors] to prove that the assessed value was warranted . . ." (emphasis supplied).

The taxpayer offered no proof for its theory of overvaluation. The board found for the assessors and sustained the assessed valuations. The board issued its findings of fact and report, citing, among other cases, the Supreme Judicial Court's decisions in *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245, 310 N.E.2d 602 (1974) (*Schlaiker*), and *General Elec. Co. v. Assessors of Lynn*, 393 Mass. 591, 598, 472 N.E.2d 1329 (1984) (*General Electric*).⁴ Simply put, the board concluded it had not determined the fair cash value of the parcels in the fiscal years 2005 and 2006 appeals and, thus, § 12A did not apply.

4 Citations to *Schlaiker* and *General Electric* are conspicuously absent from either brief [**4] on appeal. Cf. Cowin, *Reflections in Retirement*, 55 *Boston B. J.* 13, 13-14 (*Summer 2011*) ("technical competence" of lawyers to litigate is greater today

than ever, but lawyers "often fail to consider whether doing it is useful").

Standard of review. "Our review of any decision of the board is limited to questions of law." *Towle v. Commissioner of Rev.*, 397 Mass. 599, 601, 492 N.E.2d 739 (1986). "In general, we grant substantial deference to an interpretation of a statute by the administrative agency charged with its administration." *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 618, 682 N.E.2d 624 (1997). However, statutory interpretation is ultimately for the court; "we review . . . de novo." *Ibid*.

Discussion. With regard to *G. L. c. 58A, § 12A*, the taxpayer focuses on the phrase "determined the fair cash value," and relying largely on dictionary meanings, asserts that the noun "determination" is the equivalent of a "decision."⁵ On this footing, the taxpayer contends that the board's decisions as to the fiscal years 2005 and 2006 appeals "[l]ogically" determined the fair cash value of the parcels within the meaning of § 12A.⁶

5 The taxpayer cites *Eastern Racing Assn., Inc. v. Assessors of Revere*, 300 Mass. 578, 581-582, 16 N.E.2d 64 (1938), [**5] and *Devine v. Board of Health of Westport*, 66 Mass. App. Ct. 128, 132, 845 N.E.2d 444 (2006), but neither case concerns § 12A.

6 Statutory construction is not just a matter of logic. *Brest v. Commissioner of Ins.*, 270 Mass. 7, 16, 169 N.E. 657 (1930) ("That is not all there is to the problem"). Cf. *United States v. Whitridge*, 197 U.S. 135, 143, 25 S. Ct. 406, 49 L. Ed. 696, *Treas. Dec.* 26126 (1905) (Holmes, J.) (legislative purpose is "more important aid" in discerning statute's "meaning than any rule which grammar or formal logic may lay down").

We do not construe a statute's words in isolation or apart from the legal context within which they appear. "[T]he meaning of language is inherently contextual."⁷ *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990). "Value" as "determined" by [**105] the board is the fair market value of the real estate. See *Massachusetts Gen. Hosp. v. Belmont*, 233 Mass. 190, 206, 124 N.E. 21 (1919). "The whole matter lies in the realm of fact and is to be ascertained upon all the evidence." *Commissioner of Corps. & Taxn. v. Worcester County Trust Co.*, 305 Mass.

460, 463, 26 N.E.2d 305 (1940). Essential to the inquiry is who bears the burden of persuasion and of going forward with the necessary proof at the evidentiary hearing. "It is well established that the burden of persuasion [**6] is on the taxpayer to show that its property was overvalued." *General Electric*, 393 Mass. at 598. The "burden of persuasion" in Massachusetts means "burden of proof."⁸ See *Powers v. Russell*, 30 Mass. 69, 13 Pick. 69, 76 (1832); *Commonwealth v. Taylor*, 383 Mass. 272, 281 n.10, 418 N.E.2d 1226 (1981). Closely linked to this common-law rule is the presumption, also long settled, that the "board is entitled to 'presume that the valuation made by the assessors was valid unless the taxpayer[] sustained the burden of proving the contrary.'" *General Electric*, supra, quoting from *Schlaiker*, 365 Mass. at 245. The presumption,⁹ and the fact that the taxpayer has the burden of going forward with proof, round out the context in which *G. L. c. 58A, § 12A*, must be construed. *Section 12A* essentially provides that the threshold burden of going forward with the evidence shifts to the local assessors if (a) in the prior two fiscal years, the "owner" filed an appeal for which the board "determined the fair cash value" of said parcel, and (b) the assessed value, contested by the taxpayer, is greater than the fair cash value so determined. Neither element is present here. In adjudicating the prior appeals, the board decided the taxpayer [**7] had failed to meet its burden to prove overvaluation. When a taxpayer fails to offer persuasive evidence of overvaluation, "a conclusion [by the board] that a presumptively valid assessment must stand is by its nature not such an affirmative finding as to require substantial evidence to support it." *Schlaiker*, [*106] supra at 245 n.2. "[F]ailure to introduce sufficient evidence to warrant a finding for [the taxpayer] will result in a dismissal or a directed verdict." *General Electric*, supra at 599. The *Schlaiker* and *General Electric* cases encapsulate the governing rule: a board decision to sustain a presumptively valid assessed valuation does not constitute a "determination of fair cash value" of a parcel within the meaning of *G. L. c. 58A, § 12A*.¹⁰ This reading of *§ 12A* fits the Legislature's policy that, where the proof is insufficient to find for the

taxpayer, "the board should perform a more traditional appellate function, rather than make a de novo determination of value." *Assessors of Sandwich v. Commissioner of Rev.*, 393 Mass. 580, 586, 472 N.E.2d 658 (1984).

7 "Ordinary words should be read with their common, everyday meaning when they serve as directions for ordinary people . . . ' A different principle [**8] applies to technical expressions: 'Tax language normally has an enclosed meaning or has legitimately acquired such by the authority of those skilled in its application.'" Friendly, *Benchmarks* 203 (1967), quoting from *Estep v. United States*, 327 U.S. 114, 136, 66 S. Ct. 423, 90 L. Ed. 567 (1946) (Frankfurter, J., concurring); *McDonald v. Commissioner of Int. Rev.*, 323 U.S. 57, 64, 65 S. Ct. 96, 89 L. Ed. 68, 1944-1 C.B. 94 (1944).

8 This is distinct from the burden of production, which may shift from side to side, based on the proofs at trial, or by operation of law, as in *G. L. c. 58A, § 12A*.

9 This is not a true "presumption" described by *Duggan v. Bay State St. Ry. Co.*, 230 Mass. 370, 378, 119 N.E. 757 (1918), and *Epstein v. Boston Hous. Authy.*, 317 Mass. 297, 302, 58 N.E.2d 135 (1944), but a "restat[ement] that the taxpayer bears the burden of persuasion of every material fact necessary to prove that its property has been overvalued." *Analogic Corp. v. Assessors of Peabody*, 45 Mass. App. Ct. 605, 607, 700 N.E.2d 548 (1998), quoting from *General Electric*, supra at 599.

10 The rule is also implicit in *Beal v. Assessors of Boston*, 389 Mass. 648, 452 N.E.2d 199 (1983), in which the court held that *G. L. c. 58A, § 12A*, did not apply in the circumstances of that case, for reasons not material here.

Decision of the Appellate [**9] Tax Board affirmed.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

NOTICE

SUPERIOR COURT
CIVIL ACTION
NO. 2011-01184 A

GLOBE NEWSPAPER COMPANY, INC.

vs.

EXECUTIVE OFFICE OF ADMINISTRATION AND FINANCE, & others¹

**FINDINGS OF FACT, RULINGS OF LAW, AND
ORDER FOR ENTRY OF JUDGMENT**

This is an action for injunctive and declaratory relief pursuant to the Massachusetts Public Records Law, G. L. c. 66, § 10, and the Massachusetts Declaratory Judgment Act, G. L. c. 231A, § 1. Plaintiff Globe Newspaper Company, Incorporated, (Globe) seeks records of all separation, severance, transition, or settlement agreements, involving payments of more than \$10,000, which the defendant government entities entered into with public employees since January 1, 2005, and all records of payments made from the Office of the Comptroller's account for settlements and judgments since January 1, 2005. The Globe seeks all such records to be redacted, if applicable, only of the employee's home address and telephone number.

On December 10, 2012, the parties, including two intervener public unions, tried the case

¹ Executive Office of Energy and Environmental Affairs, Executive Office of Education, Executive Office of Housing and Economic Development, Executive Office of Public Safety and Security, Office of the Secretary of Transportation and Public Works (n/k/a Massachusetts Department of Transportation), Executive Office of Health and Human Services, Executive Office of Labor and Workforce Development, Massachusetts Port Authority, and Office of the Comptroller.

jury-waived and, on March 18, 2013, presented closing arguments.² Pursuant to the Court's request prior to summation, the parties submitted an Amended Joint Stipulation of Facts, as an agreed-upon record to supplement the evidence at the one-day bench trial. The parties also filed proposed findings of fact, which they based upon the stipulation, the joint exhibits referenced in it, and the evidence offered at trial.

Based upon the stipulations jointly made by the parties and upon the credible testimony at the jury-waived trial and exhibits admitted into evidence during that proceeding, the Court makes the following findings of fact and conclusions of law.

STIPULATED FINDINGS OF FACT³

I. PARTIES

1. Plaintiff Globe Newspaper Company, Inc. (Globe) is a corporation with a principal place of business in Suffolk County, Massachusetts and is the publisher of The Boston Globe daily newspaper. Todd Wallack (Wallack) is a Globe reporter.

2. Defendant Executive Office of Administration and Finance (EOAF) is an executive office of the Commonwealth that develops and executes fiscal and administrative policies to ensure the financial stability and efficiency of state government.

3. Defendant Executive Office of Energy and Environmental Affairs (EOEEA) is an

² The Globe commenced this action on March 25, 2011, and shortly thereafter moved for a preliminary injunction. After a hearing, the Court (Sanders, J.) issued a memorandum and order, denying the Globe's motion. The Globe's petition pursuant to G. L. c. 231, § 118, seeking relief from that interlocutory order, was denied by a single justice of the Appeals Court (Kantrowitz, J.) on June 16, 2011.

³ The Court sets forth the parties' Amended Joint Stipulation of Facts as submitted, save for corrections of typographical errors and for citation style consistency.

executive office that oversees the Commonwealth's six environmental, natural resource and energy regulatory departments: the Department of Environmental Protection, the Department of Public Utilities, the Department of Energy Resources, the Department of Conservation and Recreation, the Department of Agriculture, and the Department of Fish and Game.

4. Defendant Executive Office of Education (EOE) is an executive office that serves as a single, responsible authority within the Commonwealth's comprehensive education system, which is comprised of the Department of Early Education and Care (EEC), the Department of Elementary and Secondary Education (ESE), and the Department of Higher Education (DHE). The Executive Office also works with the University of Massachusetts (UMASS) to develop, coordinate and implement the Commonwealth's public education policies.

5. Defendant Executive Office of Housing and Economic Development is an executive office responsible for the creation of homes and jobs in the Commonwealth by aligning the state's housing and economic development agencies to better coordinate policies and programs ensuring that Massachusetts maintains a global competitive edge.

6. Defendant Executive Office of Public Safety and Security (EOPSS) is an executive office responsible for supervising and coordinating the major law enforcement agencies and functions of the Commonwealth.

7. Defendant Office of the Secretary of Transportation and Public Works (n/k/a Massachusetts Department of Transportation) (DOT) is an executive office that resulted from a merger of the Executive Office of Transportation and Public Works (EOT) and its divisions with the Massachusetts Turnpike Authority (MTA), the Massachusetts Highway Department (MHD), the Registry of Motor Vehicles (RMV), the Massachusetts Aeronautics Commission (MAC), and

the Tobin Bridge.

8. Defendant Executive Office of Health and Human Services (HHS) is an executive office that comprises the largest Commonwealth secretariat. HHS has responsibilities for a wide range of services, such as: providing affordable and accessible health care to residents, administering benefits to Massachusetts veterans and caring for the most vulnerable members of society, including children, elders and individuals with disabilities. The Human Resources Operations core administrative activities are divided among three clusters: the Health Services Cluster, the Community and Disability Services Cluster, and the Children, Youth and Families Cluster, each of which has its own Human Resources Director.

9. Defendant Executive Office of Labor and Workforce Development (EOLWD) is an executive office that provides a wide variety of employment-related programs and services to serve constituents across the Commonwealth, including a network of thirty-seven One-Stop Career Centers and field offices across the Commonwealth.

10. For ease of reference, defendants Executive Office of Administration and Finance, Executive Office of Energy and Environmental Affairs, Executive Office of Education, Executive Office of Housing and Economic Development, Executive Office of Public Safety and Security, Office of the Secretary of Transportation and Public Works (n/k/a Massachusetts Department of Transportation), Executive Office of Health and Human Services, and Executive Office of Labor and Workforce Development collectively are referred to herein as the "Executive Offices."

11. Defendant Office of the Comptroller is an agency within the Executive Branch responsible for ensuring the integrity and accountability of the Commonwealth's fiscal

operations, communicating accurate and timely financial information to decision makers within the government, the financial community and the general public, and providing professional guidance on fiscal policy within the Commonwealth.

12. Defendant Massachusetts Port Authority (Massport) is an authority of the Commonwealth established by the General Court pursuant to Chapter 465 of the Massachusetts Acts of 1956. Massport's facilities include airport properties, such as Boston-Logan International Airport, and various port properties.

13. Intervener The American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO (AFSCME) is an "employee organization" as defined in c. 150E, § 1.

14. Intervener Massachusetts Organization of State Engineers and Scientist (MOSES) is an "employee organization" as defined in c. 150E, § 1.

II. THE GLOBE'S PUBLIC RECORDS REQUESTS TO THE EXECUTIVE OFFICES

15. On December 18, 2009, Wallack sent an email to Kimberly Haberlin, then the Deputy Press Secretary for Governor Deval Patrick (Haberlin). (Jt. Exh. 2.)

16. Wallack's email to Haberlin forwarded a public records request and asked Haberlin to "let me know if you want me to make any changes." (*Id.*)

17. The public records request forwarded to Haberlin by Wallack on December 18, 2009 asked for, in relevant part, "copies of any separation, severance, transition or legal settlement agreements with state employees or contractors issued since January 1, 2005 that includes compensation, payment or benefits valued at more than \$10,000." (*Id.*)

18. On December 28, 2009, Wallack and Haberlin spoke about the public records

request. (Jt. Exh. 3.) Wallack sent an email to Haberlin later that day. (Id.) The email included a revised public records request and stated in part:

Nice chatting with you. Per your suggestion, I've tweaked the public records request to mention a specific cabinet agency. As I mentioned, I'd like to cover the entire executive branch, so it sounds like I would need to file separate requests with the governor's office and each cabinet secretary. Does this approach make sense?

Id.

19. On January 19, 2010, Haberlin sent Wallack an email about the public records request and asked "Do you have time this week to talk to our deputy chief legal counsel about your request? He had some thoughts about how you can tailor it." (Jt. Exh. 4.)

20. As of January 19, 2010, the Governor's Deputy Chief Legal Counsel was Mark Reilly (Reilly). Reilly currently serves as the Governor's Chief Legal Counsel.

21. On or about March 5, 2010, the Globe, through Wallack, made public records requests to each of the Executive Offices seeking copies of all "separation, severance, transition or settlement agreements" made with public employees since January 1, 2005 that required "compensation, benefits or other payments worth more than \$10,000." (Jt. Exh. 5; see also Joint Pretrial Statement at 15-16.)

22. The Executive Offices had in their possession, custody or control documents responsive to the Globe's public records requests.

23. All of the documents responsive to the Globe's public records requests were made or received by an officer or employee of an agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth.

A. The Executive Offices' Responses to the Globe's Public Records Request

1. The Executive Office of Administration and Finance

24. By March 24, 2010, the EOAF determined that it had approximately 7-8 settlement agreements responsive to the Globe's public records request. (Jt. Exh. 6.)

25. On April 20, 2010, Paul Dietl, the Chief Human Resources Officer for the Commonwealth, who serves in the Executive Office of Administration and Finance's Human Resources Division, sent a letter to Wallack responding to the Globe's public records request stating in part:

The Executive Office of Administration and Finance has surveyed its agencies and discovered that the Department of Revenue, Office of Comptroller, Developmental Disabilities Council, Operational Services Division, and Division of Capital Asset Management have records responsive to your request.

Pursuant to 950 CMR 32.06, please accept this correspondence as the Executive Office of Administration and Finance estimate of the costs incurred to comply with the request. The Executive Office of Administration and Finance requests \$92.25 to cover the costs of searching and compiling the information that you seek to obtain. Upon receipt of this amount, the Executive Office of Administration and Finance will process your request.

(Jt. Exh. 7.)

26. On April 22, 2010, Michelle Heffernan, Deputy General Counsel at HRD, sent an email to Wallack enclosing a cost estimate for complying with the Globe's public records request. (Jt. Exh. 8.)

27. On April 23, 2010, Wallack sent a request to Heffernan asking EOAF to waive charges for complying with the Globe's public records request. (Jt. Exh. 9.)

28. On May 4, 2010, Heffernan sent an email to Wallack advising that the Commonwealth would waive the fee for complying with the Globe's public record request and stating that the "documents are being gathered. Upon completion, the records will be forwarded

to you.” (Jt. Exh. 10.)

2. Health and Human Services

29. On March 8, 2010, Paulette Song (Song), the Deputy Communications Director for the Executive Office of Health and Human Services (HHS) notified the Governor’s Press Office of Wallack’s March 5, 2010 public records request to HHS. (Jt. Exh. 5.) Song sent the email to, among others, Kyle Sullivan and Haberlin, id. at 209, respectively then the Director and Deputy Press Secretary, Office of the Governor.

30. Haberlin responded to Song’s notification of Wallack’s request with an email stating “We’ll chat on Wednesday in the staff meeting.” (Id.)

31. On March 12, 2010, Lana Jerome, then the Human Resources Director for the Health Services Cluster, sent an email to Marianne Dill (Dill), the Labor Relations Director for the Health Services Cluster. (Jt. Exh. 11.) The email requested an estimate for responding to Wallack’s public record request. (Id.)

32. The Director of Labor Relations responded by email asking “Is it really legal for them to get settlement agreements? [E]ven if they say in them ‘not for publication[]?’” (Id.)

33. On March 18, 2010, Jeffrey McCue (McCue), then the Director of Human Resources for the Executive Office of Health and Safety (EHS), sent an email to eight members of the EHS senior staff notifying them of a meeting to address, among other things, the Globe’s public records request. (Jt. Exh. 14.)

34. By March 24, 2010, EHS had begun to compile the settlement agreements responsive to the Globe’s public records request. (Jt. Exh. 15.)

35. On or before April 1, 2010, a list had been prepared of 31 HHS settlements

responsive to the Globe's public records request. (Jt. Exh. 12.)

36. On March 30, 2010, Roger Tremblay, then the Human Resources Director for EHS, sent an email to Anna Filosi, then of the Department of Transitional Assistance (a department within EHS) attaching a list of nine settlements responsive to the Globe's public records request. (Jt. Exh. 16.)

37. On April 26, 2010, McCue, the Director of Human Resources for EHS, instructed Jerome to contact former employees whose settlement agreements had been compiled in response to the Globe's public records request. (Jt. Exh. 17.)

38. On or before April 29, 2010, EOHHS had attempted to contact eleven former employees whose settlement agreements were responsive to the Globe's public records request. Marianne Dill, the Director of Labor Relations for the HHS, reported that, of the eleven people, one was deceased, three responded that they were "all set," one "just wanted to know if they need to do anything and I said no," and messages either were left or attempted to be left with the remaining six. (Jt. Exh. 18.)

39. On May 13, 2010, Song sent an email to the Governor's Press office advising of a telephone call she had received from Wallack and asking for an update on the Globe's public record request. (Jt. Exh. 19.)

4. Executive Office of Education

40. On March 8, 2010, Jonathan Palumbo, then the Communications Director of the EOE, notified the Governor's Press Office of Wallack's public record request to the EOE. (Jt. Exh. 13.)

5. Executive Office of Public Safety and Security

41. On March 18, 2010, Terrel Harris, the Communications Director for EOPSS, sent Wallack an email stating that EOPSS was “currently in the process of searching for and reviewing our responses” to the Globe’s public records request.” (Jt. Exh. 20.)

6. Department of Transportation

42. On March 31, 2010, William Sweeney, then the Director of Payroll at DOT sent an email to Joan Makie, then the Director of Human Resources at Massachusetts Turnpike Authority, attaching a list of ten settlements responsive to the Globe’s public records request. (Jt. Exh. 21.)

43. On April 23, 2010, Colin Durant of the DOT provided the Governor’s Press Office with separation agreement information responsive to the Globe’s public records request. (Jt. Exh. 22.)

7. Executive Office of Energy and Environmental Affairs

44. On March 5, 2010, the EOEEA forwarded the Globe’s public records request to the Governor’s Press Office. (Jt. Exh. 5.)

8. Executive Office of Labor & Workforce Development

45. On March 31, 2010, Alison Harris, then the Director of Communications at EOLWD sent an email to members of the Governor’s Press office: Kyle Sullivan, then Director of Communications; Juan Martinez, then Press Secretary; and Haberlin, stating “Re Todd Wallack FOIA - we have 4 separation agreements at EOLWD - and at our Quasi Comm Corp - none.” (Jt. Exh. 23.)

46. On April 23, 2010, Wallack sent a request to Harris asking if documents responsive to the Globe’s public records request were available. (Jt. Exh. 24.) Harris forwarded

Wallack's request to the Governor's Press Office. (Id.)

47. On April 26, 2010, Gerald McDonough, then General Counsel of EOLWD, sent a letter to Richard E. Waring, Esq., counsel to the National Association of Government Employees, informing him of the Globe's public records request and identifying an employee whose settlement agreement was responsive to the request. (See Jt. Exh. 25.)

48. On April 29, 2010, Richard Waring, Esq., wrote to McDonough, General Counsel to EOLWD requesting that a specific settlement agreement be withheld from any materials that might be provided to the Globe. (Jt. Exh. 25.)

49. On May 7, 2010, McDonough sent an email to an unidentified person enclosing a copy of Wallack's March 5, 2010 public records request. (Jt. Exh. 26.)

50. On May 27, 2010, McDonough, General Counsel of the EOLWD, sent an email to an unidentified person stating that EOLWD had decided only to provide redacted versions of the settlement agreements and enclosing a copy of the redacted version of a settlement sent to a former employee. (Jt. Exh. 27.)

B. The Governor's Office Omnibus Response to the Globe's Public Records Request

51. On June 1, 2010, Reilly, Deputy Chief Legal Counsel to the Governor, wrote a letter to Wallack advising that settlement agreements responsive to the Globe's public records request would be produced redacted of employee names pursuant to exemptions (c), (o) and (p) of G. L. c. 4, § 7(26). (Jt. Exh. 28.) Other information that the Executive Offices determined was direct or indirect identifying information was redacted as well.

52. The redacted settlement agreements provided by the Executive Offices indicated

that a total of approximately \$3.2 million had been paid to public employees in settlement agreements from 2005 to 2010. (See Jt. Exh. 29.)

C. Wallack's Supervisor of Public Records Appeal

53. On June 2, 2010, Wallack filed an appeal with the Supervisor of Public Records challenging the redactions of employee names from the settlement agreements provided by the Executive Office. (Jt. Exh. 30.)

54. On October 5, 2010, the Supervisor issued an order on Wallack's appeal determining that the names of public employees who entered into the settlement agreements responsive to the Globe's public records request were public records that were not exempt under G. L. c. 4, § 7(26). (Jt. Exh. 31.)

55. On November 5, 2010, Reilly, Deputy Chief Legal Counsel to the Governor, wrote to the Supervisor of Public Records seeking reconsideration of the order entered on Wallack's appeal. (Jt. Exh. 32.)

56. On November 10, 2010, Richard L. Barry, General Counsel to the National Association of Government Employees, wrote to Reilly, Deputy Legal Counsel to the Governor, concerning the Globe's appeal to the Supervisor of Public Records. (Jt. Exh. 33.)

57. On January 5, 2011, the Supervisor of Public Records issued an order denying the Commonwealth's motion for reconsideration of the October 5, 2010 order on Wallack's appeal. (Jt. Exh. 34.)

58. On February 1, 2011, Reilly, who became Chief Legal Counsel to the Governor in December 2010, wrote a letter to Wallack advising that the Executive Offices would not comply with the Supervisor's order. (Jt. Exh. 35.)

59. On February 9, 2011, Alex Goldstein of the Governor's Press Office emailed Heather Johnson, then the Governor's Deputy Press Secretary, concerning a conversation he had with Wallack. (Jt. Exh. 36.)

60. In February 2011, the Globe made a supplemental request to the Executive Offices seeking separation, severance, transition, or settlement agreements made with executive branch public employees since March 5, 2010 that involved payments of more than \$100,000. (Jt. Exh. 37.)

61. On March 14, 2011, the Governor's Office again responded on behalf of the Executive Offices. (Jt. Exh. 38.)

62. In its response, the Governor's Office maintained and reiterated the position of the Executive Offices that the information previously redacted from the settlement agreements was exempt under the personal privacy and personnel exemptions of the Public Records law. (Id.)

63. On April 13, 2011, Mark Reilly, then Chief Legal Counsel to the Governor, provided a supplemental response to the Globe's two public records requests on behalf of the Executive Offices. The supplemental response included additional redacted settlement agreements. (See Jt. Exh. 1 at 365 et seq.)

64. As with the Executive Offices' earlier responses, the settlement agreements provided in the April 13, 2011 supplemental response were redacted of names and information that the Executive Offices determined was direct or indirect identifying information, which redactions the Executive Offices asserted were based on exemptions (c), (o), and (p) G. L. c. 4, § 7(26). (Id.)

65. On April 20, 2011, the Governor's Office, on behalf of the Executive Offices,

provided a further supplemental response to the Globe's two public records requests. The further supplemental response included additional redacted settlement agreements. (*Id.* at 373 et seq.)

66. As with the Executive Offices' earlier responses, the settlement agreements provided in the April 20, 2011 further supplemental response were redacted of names and other information that the Executive Offices determined was direct or indirect identifying information, which redactions the Executive Offices asserted were based on exemptions (c), (o), and (p) of G. L. c. 4, § 7(26). (*Id.*)

67. On May 14, 2012, the Supervisor issued an order in an appeal of the City of Cambridge's refusal to produce a copy of a settlement agreement with two Cambridge employees. On page 2 of his order, the Supervisor made further comments regarding the public records requests by the Globe that are at issue in the present matter. (Jt. Exh. 74.)

D. The Executive Offices' Notifications to Public Employees

68. In April, 2011, the Executive Offices sent 91 Letters to public employees advising them of the Globe's public records request and this litigation. (Jt. Exh. 39 [providing examples].)

69. In October and November 2011 and January 2012, the Executive Offices sent a second set of 86 letters to public employees updating them on the status of the Globe's public records request and this litigation. (Jt. Exh. 40 [providing examples].)

70. All 181 of the letters advised the public employees of their right to seek to intervene in this action and stated that the Executive Offices would support their request to do so.

71. The Executive Offices received one response to the 181 letters. (Jt. Exh. 41.)

72. All but one of the Executive Offices participated in the October-November 2011

and January 2012 second set of letters referenced in the preceding paragraph. The one Executive Office that did not participate, the Executive Office of Labor and Workforce Development, sent its second set of letters to public employees in November 2012. (Jt. Exh. 72.)

III. THE OFFICE OF THE COMPTROLLER REQUEST

73. On March 18, 2010, Wallack sent a public records request to the Office of Comptroller of the Commonwealth (OSC) asking for “copies of any separation, severance, transition or settlement agreements struck with employees of the Comptroller . . . since Jan. 1, 2005 that includes compensation, benefits or other payments worth more than \$10,000.” (Jt. Exh. 42.)

74. On May 27, 2010, Wallack sent an email to Caroline Henriques of OSC saying Joan Kenney, Public Information Officer for the Supreme Judicial Court, had provided him with a list of settlement payments made to court employees since January 1, 2005. Wallack also stated that the list was missing the names and that Kenney said that the OSC would have the data in an account used for legal settlements. (Jt. Exh. 43.)

75. On June 2, 2010, Wallack sent a follow up letter to the OSC concerning his request for settlement payments to court employees. (Jt. Exh. 44.)

76. On June 4, 2010, Wallack made a public records request to John Newell of the OSC asking for “electronic copy of the log/database of all payments made from the Settlements and Judgments accounts handled or tracked by the Comptroller of the Commonwealth since Jan. 1, 2005, including the date and amount of the payments, the recipient name, the agency/department that authorized the payment and other public data fields maintained in the log/database.” (Jt. Exh. 45.)

77. On June 7, 2010, the OSC advised Wallack that a response to his May 27, 2010 public records request for settlement payments made to court employees would take more than 10 days to process. (Jt. Exh. 46.)

78. On June 7, 2010, Wallack asked the OSC about the status of his March 18, 2010 public records request for settlement payments made to OSC employees. (Jt. Exh. 47.) The OSC responded that it did not have Wallack's March 18, 2010 request and asked him to send it again. (Id.) Wallack re-sent the March 18, 2010 request on June 8, 2010. (Jt. Exh. 48.)

79. On June 17, 2010, the OSC sent an email to Wallack stating its understanding that the Governor's Office's letter of June 1, 2010, was the OSC's response to Wallack's March 18, 2010 public records request. (Jt. Exh. 49.)

80. On June 23, 2010, the OSC sent Wallack a redacted copy of the sole settlement agreement responsive to his March 18, 2010 public records request. (Jt. Exh. 50.)

81. On July 1, 2010, Henriques of OSC sent an email to the OSC chief fiscal officers advising them of Wallack's June 4, 2010 public records request. (Jt. Exh. 51.)

82. On July 9, 2010, the OSC responded to Wallack's June 4, 2010 public records request by providing a spreadsheet of settlement payments that included the agencies that authorized the payments and the amount and date of each payment, but not the employees' names. (Jt. Exh. 52.)

83. The OSC used a pre-existing computer program to create a document listing for the requested period the agencies that authorized the payments and the amount and date of each payment. The Comptroller refused to include the names of the payment recipients in the documents or otherwise, on the grounds that the information was private.

84. On July 9, 2010, Wallack sent an email to Henriques of the OSC acknowledging receipt of the response to his March 18, 2010 public records request and asking for an unredacted version of the settlement agreement. (Jt. Exh. 52.)

85. On July 12, 2010, Wallack filed an appeal with the Supervisor of Public Records concerning the OSC's response to his June 4, 2010 public records request, which included the agencies that authorized the payments and the amount and date of each payment, but not employees' names. (Jt. Exh. 53.)

86. On July 13, 2010, the OSC sent an email to Wallack advising that the Supervisor of Public Records previously had confirmed that the OSC was not authorized to release names of employees who entered into settlement agreements with the Commonwealth because the disclosure would constitute an unwarranted invasion of privacy. (Jt. Exh. 53.)

87. On July 13, 2010, Shawn Williams of the Supervisor of Public Records' Office sent an email to the OSC asking for a clarification of the OSC's position that the Supervisor previously had confirmed that names of claimants could not be disclosed. (Jt. Exh. 54.)

88. On July 16, 2010, Jenny Hedderman, General Counsel of the OSC, sent an email to the Supervisor of Public Records attaching a December 5, 2005 letter to the Supervisor that had been relied on by the OSC as confirmation for not having to provide names (Jt. Exh. 55.)

89. On October 8, 2010, the OSC sent an email to the Supervisor of Public Records asking for meeting before Wallack's appeal was decided. (Jt. Exh. 56.)

90. On October 8, 2010, the Supervisor of Public Records responded to the OSC and agreed to hold Wallack's appeal pending their meeting. (Jt. Exh. 56.)

91. The OSC met with the Supervisor of Public Records on October 14, 2010 to

discuss Wallack's appeal of the OSC's response to his public records request of June 4, 2010.

(Jt. Exh. 57.) No representative of the Globe was invited to or attended the meeting.

92. On December 10, 2010, Martin Benison, the Comptroller, wrote to the Supervisor of Public Records opposing Wallack's appeal. (Jt. Exh. 57.)

93. On January 14, 2011, Wallack made a public records request to the Comptroller asking for records of any settlement or judgment payments made to Cognos since January 1, 2005 exceeding \$50, and records of any payments exceeding \$50 from the account to Gov. Patrick or Comptroller Martin Benison. (Jt. Exh. 58.)

94. On January 19, 2011, Wallack sent a letter to Henriques of the OSC narrowing his June 4, 2010 request to payments exceeding \$1,000. (Jt. Exh. 59.)

95. On February 14, 2011, Wallack sent a follow-up email to the OSC concerning his January 14, 2011 public records request. (Jt. Exh. 60.)

96. On March 11, 2011, the Supervisor of Public Records denied the Globe's appeal of the OSC's response to Wallack's June 4, 2010 public record request. (Jt. Exh. 96.)

97. On March 22, 2011, the OSC responded to Wallack's January 14, 2011 public records request stating that no settlement payments had been made to Comptroller Benison. The letter further advised that the OSC "cannot provide any information related to payments to any specific individual," and therefore could not respond to questions about any settlement payments to the Governor. (Jt. Exh. 61.)

98. On March 22, 2011, Alex Goldstein, then the Governor's Press Secretary, sent an email to Wallack stating that Gov. Patrick had not received any financial settlements from the Commonwealth. (Jt. Exh. 62.)

99. On March 24, 2011, Wallack sent an email to the OSC asking a question about the records concerning a \$100,000 settlement payment made by the Commonwealth to a public employee. (Jt. Exh. 63.)

100. On March 28, 2011, the OSC sent an email responding to Wallack's questions about the settlement. (Jt. Exh. 64.) The OSC's response did not mention the former employee by name, and redacted his name from Wallack's email. (Id.)

101. On April 4, 2011, Wallack emailed Comptroller Benison asking to speak to him about the terms of a \$100,000 severance agreement Benison signed with a staff member in 2007. (Jt. Exh. 65.)

102. On April 5, 2011, Comptroller Benison sent an email to Wallack stating that he could not talk about the settlement with a former employee because of the Globe's pending lawsuit and, given the applicable exemption to the public records law, any such discussion would be limited in any case. (Jt. Exh. 66.)

103. The Commonwealth budgeted and spent \$10 million for settlements and judgments in fiscal year 2012. (Comptroller's FY2013 Q1 Report.)

IV. THE REQUEST TO MASSPORT

104. In or about March 2010, the Globe made a request to Massport pursuant to the Massachusetts Public Records Law, G. L. c. 66, § 10, asking for copies of all separation, severance, transition, or settlement agreements entered into by and between Massport and public employees involving payments of more than \$10,000 since January 1, 2005.

105. In response to the Globe's requests, Massport produced partial copies of the requested documents redacted of the names of Massport public employees who received

payments under the agreements and advised the Globe that it was doing so in accordance with the position stated by the Governor's Office.

V. THE MASSACHUSETTS OPEN CHECKBOOK WEB SITE

106. The Commonwealth maintains a web site called "Massachusetts Open Checkbook." The web site is available to the public at the following URL:

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FHome&Page=page%201.

107. Visitors to the Open Checkbook web site are advised of the following:

The Commonwealth is committed to providing citizens with open and transparent government. Last year the legislature passed and the governor signed into law new transparency and accountability reforms as part of the FY 2011 Budget. As part of this proactive approach to civic engagement, the Executive Office for Administration & Finance, the Office of the Treasurer and the Office of the Comptroller have been working jointly on the Open Checkbook Website. (*Id.*)

108. The Open Checkbook web site makes available the following payroll information to members of the public:

a. The name, corresponding title, department, and current salary of all employees of the Commonwealth. See

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FAdditional%20Spending&Page=Payroll;

b. Details regarding pension recipients including their last job title and last department, along with their pension amount. See

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FPension&Page=Payroll

2Fshared%2FTransparency%2F_portal%2FAdditional%20Spending&Page=Pensions; and

c. Tax Credit recipients for the Tax Credit Program. See

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FAdditional%20Spending&Page=Tax%20Expenditures

109. Open Checkbook Project is a Commonwealth of Massachusetts project that the EOAF, OSC and Office of the Treasurer have worked jointly on. See <http://www.mass.gov/osc/guidance-for-agencies/open-checkbook.html>.

VI. PUBLIC INFORMATION ABOUT PERSONS WHO MAKE CLAIMS AGAINST THE COMMONWEALTH.

110. Tort claims against the Commonwealth “for injury of loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment” must be presented in accordance with the provisions of Massachusetts General Laws Chapter 258, the Massachusetts Tort Claims Act. None of the employee agreements at issue in this case involves a tort claims made under Chapter 258.

111. The official web site of the Office of the Attorney General makes available to the public a Presentment Claim Form to assist in complying with the requirements of c. 258 for tort claims. The web site does not have a comparable form for employment-related claims.

112. The Attorney General’s web site advises members of the public who submit a Presentment Claim Form of the following:

Please also be aware that, under most circumstances, your presentment claim will be considered a public record and will be available to any member of the public upon request.

See <http://www.mass.gov/ago/government-resources/cafa-and-claims.html>.

113. The Presentment Claim Form provided by the Attorney General to members of the public also states:

Read this important notice and sign your presentment claim.

- Under most circumstances, your presentment claim will be considered a public record and will be available to any member of the public upon request.

See <http://www.mass.gov/ago/docs/government/presentment-claim-form.pdf> (emphasis in original).

114. The Supervisor of Public Records publishes a Guide to the Massachusetts Public Records Law available at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>.

115. Pages 13-14 of the Guide state as follows:

Are settlement agreements exempt under the Public Records Law? No. The public interest in the financial information of a public employee outweighs the privacy interest where the financial compensation in question is drawn on an account held by a government entity and comprised of taxpayer funds. Additionally, the disclosure of the settlement amount would assist the public in monitoring government operations. Therefore, exemptions to the Public Records Law will not operate to allow for the withholding of settlement agreements as a whole. However, portions of the agreements, and related responsive records, may be redacted pursuant to the Public Records Law.

(Id.)

VII. STIPULATIONS CONCERNING THE REDACTED SETTLEMENT AGREEMENTS PRODUCED

116. The redacted settlement agreements produced to the Globe appear as Exhibit 1

and have been sequentially bate-stamped. In total, there are eighty-nine (89) redacted settlement agreements, covering 404 pages.

VIII. STIPULATIONS REGARDING EMPLOYMENT-RELATED SETTLEMENT AGREEMENTS⁴

117. Private employers often use settlement agreements as a means of resolving employment-related disputes. (Testimony of Administration HR official on witness list)

118. Settlement agreements are a widely used means of resolving employment-related disputes in both the private and public sectors. (Testimony of Administration HR official on witness list)

119. Settlement agreements allow employers to reduce an employment-related dispute to a sum certain and to avoid the time, expense, and uncertainty of litigation. (Testimony of Administration HR official on witness list)

120. On April 11, 2011, the Globe published an article written by Wallack under the headline "State payouts sealed with a promise of silence." The article is available at: http://www.boston.com/business/articles/2011/04/24/state_payouts_sealed_with_a_promise_of_silence/?page=full. The text of article is as Jt. Exhibit 78.

IX. OFFICE OF THE COMPTROLLER STIPULATIONS

121. The OSC has promulgated regulations at 815 CMR 5.00 governing the payment of settlements and judgments by agencies of the Commonwealth.

122. The OSC's regulations are "applicable to the payment of settlements and judgments for claims against the Commonwealth and its agencies." 815 CMR 5.02.

⁴ The stipulations in this Section VIII are not based upon testimony or evidence admitted at trial.

123. The OSC's regulations state that when litigation involving a monetary claim against the Commonwealth terminates in a final settlement or judgment, the agency attorney or staff person assigned to handle or monitor the claim must prepare a report indicating:

- a. the principal amount of the settlement or judgment;
- b. the amount of any attorney's fee award;
- c. the amount of any interest award or accrued, and whether the interest continues to accrue post-judgment;
- d. a request for payment of the amount;
- e. a description of the basis for the request, (e.g., court order or settlement agreement); and
- f. whether the assigned attorney desires to award the payment check to the Claimant.

815 CMR 5.09(1)(a).

124. The OSC requires the agency then to forward to the General Counsel of the Comptroller the report described above, along with a copy of the settlement agreement or judgment. 815 CMR 5.09(1)(b).

125. The OSC is required to review the report, certify the amount due and payable, review agency accounts related to the claim to determine whether funds are available to pay the claim, and consult with the agency regarding available funds. 815 CMR 5.10(1).

126. In February 2010, the OSC issued a memorandum entitled "Public Information Requests – Data Definitions for Reports Available Regarding State Payroll and State Workforce." (AG Doc. 66-73.)

127. The OSC's memorandum describes the "Comptroller's Media Report" as a "snapshot" report that runs quarterly on a set Pay Date schedule. Id. at 1 (AG Doc. at 66.)

128. The OSC's Media Report includes people paid any gross pay as of the date of the report. It gives prior calendar year earnings and excludes all reimbursement codes as well as settlement and judgment payments. (Id.)

129. The OSC is required under G. L. c. 66A, §2(a) to "identify one individual immediately responsible for [the OSC's] personal data system who shall insure that the requirements of this chapter for preventing access to or dissemination of personal data are followed."

130. The OSC's Media Report "excludes certain employees for the following reasons; as victims of domestic violence in accordance with General Laws (G.L.) c. 66 s.10 (d) as well as human service clients or residents earning nominal wages for rehabilitation services in accordance with G.L. c. 4 s, 4(26) (c) and HIPPA restrictions." (Id.)

131. In addition, the OSC "determined that, under the Family Educational Rights and Privacy Act (FERPA), the work records of students (undergraduate or graduate) who work for the University or other higher education college WHILE A STUDENT are protected from disclosure of their work information (title, salary, hours, name, dept). Therefore, students paid are excluded." (Capitalization in original.) (Id.)

132. The field descriptions included in the OSC's Media Reports include:

- a. Department – 3 letter code of the department employing Employee. If the employee has multiple paid jobs in that pay period, all jobs will be listed
- b. Name – Employee's Last Name, First Name and Middle Initial.

Employees may be known informally by another name or variations of the name. For example, someone may use her legal name for payroll but use maiden name in departmental business.

c. Job Title – Current Position title Description for employee, Human Resource or Department entered field.

d. Std Hours – Standard Hours. For Executive Branch Employees, positions are either a standard 37.5 or 40 hours. Departments enter a standard weekly number of work hours for each employee, either full time (37.5 or 40) or some number of part time hours less than the full time amount.

e. Annual Rate – Calculated field based on standard hours times hourly rate times 52.

f. Earnings – Total of Earnings to the employee for prior calendar year. If the employee worked in multiple jobs during the prior year, all applicable earnings are included. If the employee did not work in the previous calendar year, the field will be blank.

Id.

133. The types of payments are:

- Taxable payments: Base salary, overtime, supplemental pay (shift differentials, longevity, etc.).
- Non-taxable payments: Employee reimbursements (mileage, travel, etc.), Assault Pay, etc.
- Cash: Taxable payments plus non taxable payments.
- Non-cash or Imputed Income: Taxable fringe benefits such as employer provided

parking over the exclusion amount, use of a state vehicle for personal use, health benefits to non-federal eligible spouses, etc.

- Pre-tax deductions: Contributions to Regular Retirement; Dependent Care Assistance Plan and fees; Deferred Compensation under Internal Revenue Code §457(b) for both Voluntary and Mandatory (OBRA 90) contributions; Tax Sheltered Annuities under Internal Revenue Code §403(b); Health Insurance Premiums, Health Care Spending Account contributions and fees; and Transportation expenses

(Id. at 4.)

134. The term “Assault Pay” as used above is as defined in Massachusetts statutes.

135. A true copy of the online version of a March 7, 2011 Globe article by James Vaznis entitled “Public employee unions will pitch plan on health insurance,” with accompanying online commentary by readers as of November 30, 2012, appears as Joint Exhibit 70.

136. A true copy of the online version of a April 7, 2011 Patriot Ledger article by Matt Murphy entitled “Public employee unions resist pension, benefit cuts,” with accompanying online commentary by readers as of November 30, 2012, appears as Joint Exhibit 79.

137. A true copy of a January 14, 2009 “Closing Agreement on Final Determinations Covering Specific Matters” between the Commonwealth of Massachusetts and the United States Commissioner of Internal Revenue, along with true copies of related correspondence and an accompanying check, appears as Joint Exhibit 84.

138. The Massachusetts Port Authority generates its own revenues, accepts no taxpayer funds from the Commonwealth, and does not receive money from the Commonwealth’s general fund. (Jt. Exh. 5; tr. 89: 20-25, 90: 1-7 [Testimony of Todd Wallack].)

SUPPLEMENTAL FINDINGS OF FACT

I. TESTIMONY OF TODD WALLACK

1. Prior to his hire as a reporter for the Globe, Wallack had been employed by the San Francisco Chronicle. He had an interest in reporting stories which involved the field of government responsibility.

2. His work at that newspaper had included reporting on governmental payments made to settle claims, particularly those involving employees in the University of California public educational system. His investigative journalistic efforts focused upon the settlement of claims involving high-level public employees and on whether particular agencies of government had settled an inordinately high number of employee claims. His attempts to secure information about such settlements initially were unsuccessful, as a consequence of a policy of non-disclosure cited by officials responsible for dissemination of public records within that system.

3. Ultimately, it was determined that a policy cited as barring disclosure of the terms of such settlement agreements was in conflict with policies in place under existing law in that state. Materials ultimately released revealed terms of a particular settlement agreement arrived at between the system and a high level employee, which in that case provided for payment to the employee of continued salary while specifically requiring modest or no work requirements.⁵

4. Wallack was hired by the Globe in 2009 where he was first assigned to work as a

⁵ These matters were contained in Wallack's testimony, and they were not the subject of dispute in questioning or argument by counsel for EOAF or the Interveners. Wallack's testimony as to this is credited on the issue of his past experience and journalistic focus, and not for the purpose of any necessary relevance to any of the settlement agreements at issue in the present litigation.

business reporter.

5. While Wallack was making his public record requests as referenced in ¶ 15, et seq., ante, he had directed requests to several specific agencies of the Commonwealth which did respond with particular information. These included the Massachusetts Technology Collaborative and the Massachusetts Commission Against Discrimination, each of which did furnish names of employees who had been paid under settlement agreements. It also included the University of Massachusetts and the Office of the Treasurer, each of which provided some, but not all of the names of employees who had received funds under settlement agreements.⁶

6. When Wallack was told that a basis for EOAF's claim of non-disclosure was that certain of the agreements contained confidentiality provisions, he endeavored to seek to contact an employee who had been a party to an agreement containing such a provision in order to learn, if possible, the origin of its inclusion.

7. He was successful in speaking with one such employee, Daniel Grabauskas, who had held the position of General Manager with the Massachusetts Bay Transportation Authority. Wallack learned that the insertion of that provision had not originated with Grabauskas or any legal representative acting on his behalf and that Grabauskas had discovered its inclusion only when he had reviewed the final draft of the settlement agreement.

II. THE TESTIMONY OF JENNY HEDDERMAN

8. Jenny Hedderman occupies the position of General Counsel to OSC, in which capacity she advises the state Comptroller. OSC's legal office consists of two attorneys

⁶ The University system proffered as its basis for this disparity in treatment that it was disclosing names where the dispute had been the subject of a public lawsuit.

including herself, and OSC has 120 employees overall.

9. OSC is charged with acting as the accounting authority for all income and expenses for each of the roughly 150 separate agencies of the Commonwealth. It is responsible for financial reporting for all of those agencies to the Internal Revenue Service and the Commonwealth's Department of Revenue.

10. Any settlements entered by any of these state agencies is reported to OSC. Those settlements may implicate issues of taxation, and the obligation for accurate reporting of such matters falls to OSC.⁷ Accurate reporting as to the fact of these payments and the identity of their recipients is vital, as any error in that reporting to the federal taxing authority could subject the Commonwealth to financial penalties.

11. OSC focuses strictly on the accounting and tax reporting issues raised by these settlements; factual analysis of the underlying dispute is irrelevant to and beyond its charged responsibilities. OSC does not necessarily receive information which would enable it to determine whether release of the contents of any settlement agreement would implicate the privacy interests of a recipient of settlement proceeds.

12. In its operation of the Comptroller's Media Report referenced in ¶ 126 et seq., ante, OSC bases its exclusion of the few limited categories of state funds recipients exempted from disclosure by state or federal statute upon a code inserted by the reporting agency, so that it is that agency itself, rather than OSC, which has made that determination as to applicability of exclusion.

⁷ Hedderman cited as an illustration a settlement in which a component of the payment might be in the form of fees paid to the recipient's attorney.

13. OSC itself had one settlement of a claim brought by one of its own employees in which that claimant was paid monies by the Commonwealth. That settlement agreement did contain a provision which called for both confidentiality and non-disparagement. It was not determinable from the hearing evidence at whose instance, OSC or its employee or both, those provisions were included in that settlement agreement.⁸

RULINGS OF LAW

“The public records law opens records made or kept by a broad array of governmental entities to public view” (footnote omitted). Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 452-453 (2007), citing Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 382-383 (2002), and Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 436 (1983). “The statute expresses the Legislature’s considered judgment that ‘[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner,’ Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158 (1979), and that ‘[g]reater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government,’ New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Ct. of Bristol, 377 Mass. 404, 417 (1979) (Abrams, J., concurring)” (alterations and omission in original). Id. at 453. “[T]he statute obligates certain government entities to produce all ‘public records’ for inspection, examination, and copying in response to a proper public records request made by any

⁸ While Hedderman initially asserted her belief that the employee who received the settlement funds and his attorney had asked those clauses be inserted, her responses on re-direct and re-cross were characterized by significant uncertainty, and the court does not credit her tentative initial supposition as to the impetus for the inclusion of those clauses.

'person' (footnote omitted). *Id.* at 453-454, citing Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976), and quoting G. L. c. 66, § 10(a).

However, "[n]ot every record or document kept or made by the governmental agency is a 'public record.'" *Id.* at 454. "The statute specifies [certain enumerated] categories of materials or information that fall outside the definition of a 'public record,' either permanently or for a specified duration." *Id.*, citing G. L. c. 4, § 7, and Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. 587, 591-592 & n.14 (2005). "If a dispute over a withheld document is brought to court, the statute establishes a clear 'presumption that the record sought is public' and places the burden on the record's custodian to 'prove with specificity the exemption which applies' to withheld documents." *Id.*, quoting G. L. c. 66, § 10(c). "Given the statutory presumption in favor of disclosure, exemptions must be strictly construed." Attorney Gen. v. Assistant Comm'r of Real Prop. Dep't of Boston, 380 Mass. 623, 625 (1980), citing Attorney Gen. v. Assessors of Woburn, 375 Mass. 430, 432 (1978); Georgiou v. Commissioner of Dep't of Indus. Accidents, 67 Mass. App. Ct. 428, 432 (2006). "To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt 'segregable portion' of the record is subject to public access." Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. at 383, quoting G. L. c. 66, § 10 (a), and citing Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 287-288, 290 (1979).

In this case, the defendants produced copies of the requested agreements redacted both of the names of the public employees who were parties to the agreements and of other information the defendants claimed could permit identification of those individuals. In addition, OSC produced a spreadsheet of the requested settlement payments redacted of the names of the public

employees to whom those payments had been made. The defendants argue that the employees' names and the other withheld information are statutorily exempted from disclosure. In support of this contention, they cite two categories of exemptions contained in the law which governs public records disclosure which they contend are applicable: first, as "personnel . . . files or information;" and second, as "other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy," G. L. c. 4, § 7, Twenty-sixth, (c). The Court addresses these arguments in turn.

I. THE "PERSONNEL FILE OR INFORMATION" EXEMPTION

Under the public records law of the Commonwealth, "personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 438. Although the legislative term "personnel files or information" has not been defined with precision, "it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee." Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. 792, 798 (2000). "These constitute the core categories of personnel information that are 'useful in making employment decisions regarding an employee.'" Id., quoting Oregonian Publ. Co. v. Portland Sch. Dist. No. 1J, 329 Or. 393, 401 (1999).

However, "[n]ot every bit of information which might be found in a personnel . . . file is necessarily personal so as to fall within the exemption's protection." Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 435. For instance, "the legislation does not exempt from disclosure a personnel record wholly unrelated to any individual's privacy interest," Wakefield

Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 800, nor does it permit withholding “[e]mployer records that . . . are properly viewed as payroll records . . . rather than as ‘personnel [file] or information’ as that term is used in G. L. c. 4, § 7, Twenty-sixth (c), even though such data might also be located in an individual employee’s personnel file” (omissions and second alteration in original), *id.* at 801 n.17. Such nonexempt payroll data include the employee’s name, base pay, overtime pay, miscellaneous payments, and gross pay of individual public employees, Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. 812, 817-818 (1978), among other items, see Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 799-802 & n.17. At base, “[t]he scope of the exemption falls on the character of the information sought.” Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 435.

In light of this developed case law, it is reasonably clear that the defendant public entities were not in all cases required under the public records law of Massachusetts to produce unredacted copies of the separation, severance, transition, or settlement agreements which the plaintiff had requested. Certain information contained in the agreements submitted as exhibits at the trial of this case trenches upon the core “personnel information” identified in Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 798. Without routing through the details of each and every one of the eighty-nine agreements at issue, the information that properly was subject to redaction may generally be classified into the following categories: (1) promotion of grade; (2) compensation at a different salary grade; (3) adjustment in compensation; (4) waiver of bumping rights and/or recall rights; (5) entitlement to remain on administrative leave; (6) requirement to tender a letter of resignation; (7) demand of voluntary resignation; (8) reinstatement; (9) layoff; (10) agreement by an agency to remove a letter from a personnel file;

(11) agreement by an agency concerning the providing of references and their contents; (12) the requirement that an employee meet with a supervisor to review progress of assigned matters; (13) adjustment of an agency's records to reflect an employee's status; (14) adjustment or continuation of employee benefits, such as unemployment assistance, COBRA, and retirement benefits, and agreement regarding back wages; (15) recitations concerning grievances, including agreement to withdraw a grievance and acknowledgment by an employee of the absence of a pending grievance; (16) a statement of resolution of all claims concerning termination of employment and prior disciplinary actions, (17) agreement to turn in agency property, (18) global resolution involving the entering of a *nolle prosequi* by a prosecutorial official; (19) language affirming an agency's legitimate concern for discipline and an employee's receipt of a memorandum of verbal discipline; and (20) completion by an employer of harassment training.⁹ The distinguishing characteristic of these categories of information is their manifest "useful[ness] in making employment decisions regarding an employee," *id.* Such portions contained in the agreements which have been submitted as exhibits are entitled to be withheld from mandatory disclosure.

The defendants are not permitted, however, under the principles of governing law to redact from either the agreements or the OSC spreadsheet of settlement payments, the names of public employees who receive public funds in settlements of claims, or other information on the basis simply that it might facilitate identification of those individuals. The redaction of that

⁹ Although perhaps a closer question, legal authority supporting the redacting of information would not appear to extend as far as language contained in the agreements which does not directly involve that specific employee's personnel or discipline matters, but instead refers to generic types of employment law claims and sets forth the categories of those claims, such as age discrimination or hostile work environment, which the employee agrees to waive.

identifying information may have been viewed as an expedient means to meet the defendants' obligation to safeguard personnel information based upon a belief that excised of names, the employee agreements and OSC payments document could not be "of a personal nature and relate to a particular individual," Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 438.¹⁰ But the method used did not satisfy the defendants' obligation to disclose the nonexempt "segregable portion" of the records sought, see Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. at 383. The plaintiff should have been provided the names of the public employees in addition to information reflecting any settlement payments or other financial disbursements.¹¹ See Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818.

The defendants make two arguments citing grounds based upon public policy that the names of employees who have received settlements should not be ordered disclosed. The defendants first argue that withholding the public employees' names from the records which the plaintiff requested furthers the "government's ability to function effectively as an employer,"

¹⁰ The Court is mindful of the defendants' additional concern about compliance with the Fair Information Practices Act (FIPA). That statute bars "[a]gencies" from providing access to "personal data" in their possession, G. L. c. 66A, § 2(c), with potential liability for damages and litigation costs as a consequence of noncompliance, G. L. c. 214, § 3B. See Tivnan v. Registrar of Motor Vehicles, 50 Mass. App. Ct. 96, 100 & n.5 (2000). As the defendants acknowledge, however, "[i]nformation contained in public records is exempted from the definition of 'personal data' contained in FIPA. G. L. c. 66A, § 1." Allen v. Holyoke Hosp. 398 Mass. 372, 379 (1986).

¹¹ To be clear, OSC is not required to produce copies of any agreements forwarded to it by other government entities. On the facts of this case, OSC's obligations extend to producing the spreadsheet of the requested settlement payments with the names of the individuals included and, like the other defendants, to producing copies of the agreements to which OSC itself is a party, subject to redaction. Further, neither OSC nor any agency subject to this ruling will be required to provide the name of any funds recipient the identity of whom is barred from disclosure by state or federal law. See Office of the Comptroller Stipulations, ¶ 130 and 131, and Supplemental Findings of Fact, ¶ 12.

Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 802. They cite the ability to promise confidentiality as a factor which could help to expedite settlement negotiations and possibly allow parties to reach settlements of disputes with employees that might otherwise elude resolution. The defendants argue that public employees will be dissuaded from signing settlement agreements if the facts and terms of those agreements will be made public.

For support, the defendants point to language in Wakefield Teachers Ass'n v. School Comm. of Wakefield, *supra*. In that case, the Supreme Judicial Court did make reference to the benefit of the personnel exemption generally as a means to facilitate the government's ability to function as would a private employer. See 431 Mass. at 802. This observation, however, does not lead to the conclusion that a governmental agency's understandable desire to operate under ground rules analogous to those permissible for a private entity authorizes an unwarranted and legally untenable expansion of the exemptions to the law governing disclosure of public records. Even if it is true that government might function more economically in its role as employer if it could enter into confidential agreements, this would not serve as a basis to override case law which has asserted that the names of public employees simply are not the "kind of private facts that the Legislature intended to exempt from mandatory disclosure" under the personnel information exemption, see Brogan v. School Comm. of Westport, 401 Mass. at 308, quoting Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818. The language cited in Wakefield Teachers Ass'n v. School Comm. of Wakefield, *supra*. does not suggest otherwise.

Further, the great weight of legal authority runs solidly counter to the defendants' contention. Courts which have considered the issue have rejected uniformly the argument that settlement agreements should be kept confidential based upon the risk that disclosure might serve

to chill the prospects for future settlements between employees and public entities. See, e.g., Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989); Denver Publ. Co. v. University of Colo., 812 P.2d 682, 684-685 (Colo. App. 1990); Des Moines Indep. Community Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 669 (Iowa 1992); Tribune-Review Publ. Co. v. Westmoreland County Hous. Auth., 574 Pa. 661, 673 (2003); Yakima Newspapers, Inc. v. City of Yakima, 77 Wash. App. 319, 328 (1995). Particularly in the absence of apposite authority to the contrary, and the defendants cite none, the court finds no basis to determine that Massachusetts law interpreting issues related to public records' disclosure is at variance to the position taken by the very clear majority of courts which have dealt with this issue.

Building on their first policy contention, the defendants advance a second closely-related argument, that an interpretation of the law which has the effect of dissuading public employees from settling claims would “undercut the well-established public policy favoring the private settlement of disputes,” Cabot Corp. v. AVX Corp., 448 Mass. 629, 638 (2007), citing Ismert & Assocs. Inc. v. New England Mut. Life Ins. Co., 801 F.2d 536, 550 (1st Cir. 1986). Courts which have considered this argument have squarely rejected it, concluding to the contrary that the specific provisions of an open records statute “reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement.” Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d at 1193; Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader, 941 S.W.2d 469, 472-473 (Ky. 1997). There is no reason to assume that the law of the Commonwealth should reflect with any less force that same guiding principle. Our public records law manifests a wholly parallel and equally compelling specific interest on the part of the

Commonwealth's citizens to be able to monitor and to evaluate the affairs of their government. See Attorney Gen. v. Collector of Lynn, 377 Mass. at 158. See, e.g., Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. at 592, quoting General Elec. Co. v. Department of Env'tl Protection, 429 Mass. 798, 802 (1999) (citing the policy which favors broad public access to government documents and the presumption of disclosure).

II. THE PERSONAL PRIVACY EXEMPTION

The defendants argue an alternative basis for their contention that the identities of the settling employees are exempt from disclosure under the second clause of G. L. c. 4, § 7, Twenty-Sixth (c), the personal privacy exemption to the public records statute. Analysis of this exemption "requires a balancing between the seriousness of any invasion of privacy and the public right to know." Attorney Gen. v. Collector of Lynn, 377 Mass. at 156, citing Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818-19; Georgiou v. Commissioner of Dep't of Indus. Accidents, 67 Mass. App. Ct. at 432-433. "Where the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield to the public interest." Attorney Gen. v. Collector of Lynn, 377 Mass. at 156, citing Campbell v. United States Civil Serv. Comm'n, 539 F.2d 58, 62 (10th Cir. 1976).

In identifying the existence of privacy interests, the Supreme Judicial Court has suggested that courts should consider whether the public disclosure would "result in personal embarrassment to an individual of normal sensibilities," *id.*, citing cases; whether the materials sought would disclose "facts involving 'intimate details' of a 'highly personal' nature," Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818, quoting Getman v. NLRB, 450

F.2d 670, 675 (D.C. Cir. 1971); and whether “substantially the same information is available from other sources,” Attorney Gen. v. Collector of Lynn, 377 Mass. at 157. See In the Matter of Subpoena Duces Tecum, 445 Mass. 685, 688-689 (2006), quoting Globe Newspaper Co. v. Police Comm’r of Boston, 419 Mass. 852, 858 (1995). The Court has also observed that “the expectations of the data subject are relevant in determining whether disclosure of information might be an invasion of privacy,” and, thus, that “the same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another.” (Citations omitted.) Torres v. Attorney Gen., 391 Mass. 1, 9 (1984); see Georgiou v. Commissioner of Dep’t of Indus. Accidents, 67 Mass. App. Ct. at 434.

In the context of this second cited exemption, the Court agrees that the defendants were not obligated to produce unredacted agreements in response to the plaintiff’s records request. If the various agreements in the record of this case were not subject to redaction based upon the “personnel files or information” grounds as described in the preceding portion of this ruling, then the nature of the content of that information as linked to particular identities might well weigh strongly against disclosure under the personal privacy exemption. See, e.g., Georgiou v. Commissioner of Dep’t of Indus. Accidents, 67 Mass. App. Ct. at 435. However, it is not the disclosure of the employees’ names themselves which brings into play their privacy interests; rather, the privacy exemption would be triggered by exposing their particularized personnel-related information to public view. In effect, the Legislature has established that disclosure of personnel information necessarily constitutes “an unwarranted invasion of personal privacy.” See Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 436; Wakefield Teachers Ass’n v. School Comm. of Wakefield, 431 Mass. at 800-801. Put differently, where

disclosure involves those particular categories of personnel information set forth in the prior section, the exemptions in the first and second clauses of G. L. c. 4, § 7, Twenty-Sixth (c), on the factual circumstances presented here, may be seen as functionally coextensive.

Since, as referenced earlier, the agreements produced must be redacted of all contextual personnel information, there is no basis for redaction of the identities of the public employees from disclosure based upon the privacy exemption. It is a matter of settled law that “[p]ublic employees, by virtue of their public employment, have diminished expectations of privacy.” Pottle v. School Comm. of Braintree, 395 Mass. 861, 866 (1985), citing Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818-819; Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 436 n.15. Disaggregated from the protected personnel information, the identities of the employees and the other information contained in the agreements are “wholly unrelated to any individual’s privacy interest,” Wakefield Teachers Ass’n v. School Comm. of Wakefield, 431 Mass. at 800, and, therefore, are not subject to exemption.¹² Cf. Georgiou v. Commissioner of Dep’t of Indus. Accidents, 67 Mass. App. Ct. at 435.

Essentially what remains after the records are properly redacted are the identities of the public employees, the entities for which they work or had worked, the financial consideration they may have received as part of the agreements, and various formulaic legal provisions which are unrelated to specifics which properly fall within the personnel-related. These sorts of facts and miscellaneous data, as the Supreme Judicial Court consistently has held, do not implicate a

¹² Within the universe of possible provisions contained in future settlement agreements, it is conceivable that one may trench upon a privacy interest which does not directly implicate exemption under the personnel file and information exemption as is the case with the agreements at issue here. The court’s ruling does not suggest that redaction of any such information before disclosure would be impermissible in such circumstances.

right of privacy.¹³ See Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818; Pottle v. School Comm. of Braintree, 395 Mass. at 862; Brogan v. School Comm. of Westport, 401 Mass. at 308-309; Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. at 594-595.

Weighing on the other side of the balance to be considered in determining the scope of the privacy exemption is the public's recognized right to be informed about its government's expenditures, see, e.g., Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818, and its "interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner," Attorney Gen. v. Collector of Lynn, 377 Mass. at 158. See, e.g., Yakima Newspapers, Inc. v. City of Yakima, 77 Wash. App. at 328 (noting public agency's settlement agreement should be able to withstand public scrutiny). That interest unquestionably is one of a compelling nature which warrants recognition. See Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818 (citing the "paramount right of the public to know what its public servants are paid" in the context of public access to municipal payroll records). In sum, once they have been redacted of "personnel information," public disclosure of the contents of the various agreements at issue in this case does not constitute an unwarranted invasion of privacy under the exemption contained in G. L. c. 4 § 7, Twenty-sixth (c).

¹³ The interveners have posited an additional argument against disclosure based upon privacy grounds. They note that stories concerning public employees elicit responses often vitriolic in nature, in the interactive reader/subscriber comments feature which many media entities operate in their internet editions. (Exhibit 79.) The interveners' argument, that many such comments, which are very often posted by persons afforded concealment behind a cloak of anonymity, are unfair and uninformed, may be true. The fact of media publication or transmission of hurtful and even malicious sentiments, however, affords no legal basis for the shading of the interpretation of the public records law in a manner not consistent with its language and with precedential case law.

ORDER FOR ENTRY OF JUDGMENT

It is therefore **ORDERED, ADJUDGED, and DECLARED** that:

1. records of separation, severance, transition, or settlement agreements entered into by and between the defendant government entities and public employees involving payments of more than \$10,000, since January 1, 2005, redacted, where applicable, only of the employee's home address, telephone number, and "personnel information" as described in this decision, are public records subject to mandatory disclosure under G. L. c. 66, § 10; and

2. records of payments made from the Office of the Comptroller's account for settlements and judgments since January 1, 2005, redacted, where applicable, only of the employee's home address, telephone number, and "personnel information" as described in this decision, are public records subject to mandatory disclosure under G. L. c. 66, § 10.

Date: June 14, 2013



Thomas A. Connors
Justice of the Superior Court

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

ESSEX, ss.

PEABODY DISTRICT COURT
C.A. No. 1286 CV 0502

TOWN OF LYNNFIELD,

Plaintiff,

v.

COMMISSIONER OF DIVISION OF
UNEMPLOYMENT ASSISTANCE and
HARTLEY BOUDREAU,

Defendants

DECISION

13 FEB -5 PM 3:48
PEABODY DISTRICT COURT

The Town of Lynnfield ("Plaintiff") appeals the determination by the Department of Unemployment Assistance that Harley Boudreau ("Defendant") is entitled to unemployment compensation.

Procedural History

Defendant filed a claim for unemployment benefits in September 2011. The Department of Unemployment Assistance ("Department") ultimately approved the Defendant's request for benefits.

After an initial hearing, a review examiner determined that the Defendant had been terminated from employment. The Director of the Department of Unemployment Assistance ("Director") found that the decision was not supported by substantial evidence. The Director ordered the matter to be reconsidered. The second examiner affirmed the decision of the first examiner. Plaintiff appealed and requested a further review by the Board of Review. The Board affirmed the decision of the examiner and Plaintiff filed this appeal.

Facts

Defendant retired as a full-time police officer with the Town of Lynnfield in 1998. From 1998 through 2009 the Defendant worked infrequently for the Lynnfield Police Department. The number of road projects in Lynnfield substantially increased in May 2010. As a result, the Defendant began to work more frequently in 2011.

There were, however, some practical limitations to the amount of money the Defendant could earn in 2011.

M.G.L. Ch. 32 §91b, which limits the pay of retirees, reads:

“not more than nine hundred and sixty hours in the aggregate, in any calendar year; provided that the earnings therefrom when added to any pension or retirement allowance he is receiving do not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated.”

In August of 2011, Plaintiff’s accountant requested information from the retirement administrator about the Defendant’s pension to determine if the Defendant was nearing the limit on earnings allowed. Prior to meeting with the town accountant, Defendant had been apparently unaware or unconcerned about any potential financial penalty he would face for going over the allowed post-retirement earnings. If the Defendant was aware, there is no evidence that he sought to stagger his hours to allow for continued part-time employment throughout the year.

On August 18, 2011 Plaintiff’s accountant notified the Defendant that if his earnings exceeded those allowed by statute he would be required to return all wages above the maximum allowed.

On August 22, 2011 Plaintiff’s accountant informed the Defendant of the situation and the calculations that she had made. Defendant then went to the Police Department and told the

supervisor that he could not work any more details until January 2012 because he had reached his earnings cap.

On September 4, 2011 the Defendant filed for unemployment benefits. The Defendant unsuccessfully sought other employment. He returned to work for the Police Department in January 2012.

Legal Analysis

M.G.L. Ch 151A Sec. 25 §24(b) requires that in order to be eligible for unemployment benefits an employee must be "available" for work.

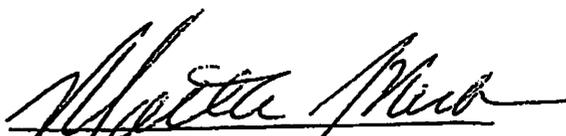
The Defendant in this case could have made himself available for continued work assignments with the Plaintiff. Defendant voluntarily retired and accepted all the benefits and limitations of his pension. One of those limitations was the amount of hours and/or compensation he could receive per year without facing a financial penalty. The Defendant chose to make himself unavailable for work so as not to incur a significant financial penalty.

Defendant has the obligation of understanding his own pension benefits. Plaintiff is not obligated to keep track of when it is beneficial for the Defendant to work and when it is economically advisable for him to stop. To the extent that the Plaintiff provided such advice, the Defendant was free to ignore it.

The law mandates, and common sense dictates, that a retired employee should not be able to get unemployment benefits from his former employer.

Conclusion

The decision of the Division of Unemployment Assistance is reversed. The Defendant is not entitled to any unemployment benefits.


Matthew J. Nestor
Acting Presiding Justice
Peabody District Court

**TOWN OF SALISBURY v. JOYCE TOMASELLI and GRACEMARIE
TOMASELLI**

Tax Lien Case No. 06 TL 133120

MASSACHUSETTS LAND COURT

21 LCR 44; 2013 Mass. LCR LEXIS 16

January 14, 2013, Decided

PRIOR HISTORY: *Tomaselli v. Town of Salisbury*, 57 Mass. App. Ct. 1116, 786 N.E.2d 437, 2003 Mass. App. LEXIS 455 (2003)

HEADNOTES

Tax Title and Liens-Right of Redemption-Sewer Betterment Assessments-Sewer User Fees-Land Court Jurisdiction to Grant Abatements

SYLLABUS

Long delinquent Salisbury landowners could not defend against the municipality's action to foreclose their equity of redemption by claiming in the Land Court that a sewer betterment fee was either an excessive or void tax; nor could they rely on a narrowly crafted judicial exception allowing such defenses where the tax may be found to be wholly void.

COUNSEL: James E. Coppola, Jr., Esq., Judith O. Trufant, Esq. for Plaintiff.

Kimberly J. Raymond, Esq for Defendant.

JUDGES: [**1] Piper, J.

OPINION BY: Piper

OPINION

**[*44] ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

The Plaintiff, Town of Salisbury ("Salisbury"), brought this action on March 14, 2006, under *G. L. c. 60 § 65*, to fore-close the right of redemption of the Defendants, Joyce and Gracemarie Tomaselli ("Tomasellis") whose real property in the Town had been taken by it for nonpayment of taxes and other municipal charges and assessments. On or about March 24, 2009, Salisbury requested that this Court issue a finding in the amount of \$150,950.74 for unpaid taxes, interest on unpaid taxes, and fees on the tax title account. As of April 9, 2010, when Salisbury filed its response to the Tomasellis' motion

for relief, the Tomasellis owed \$160,797.07 according to town tax title account statements, \$14,478.88 for property at 113 North End Boulevard, Salisbury, Massachusetts and \$146,318.19 for 115 North End Boulevard, Salisbury, Massachusetts. The amounts due reflect overdue payments on the Tomasellis' real estate taxes, sewer betterment assessments, and sewer user fees going back to 1993, plus interest accruals. The Tomasellis mount a variety of claims: that they are entitled to judgment in their favor because they are bona fide [**2] purchasers and thus are not liable for the sewer betterment charges; that the sewer betterments are void; and the tax title and tax title accounts are void.

Defendants brought a motion for partial summary judgment that: (1) the subject property is vested in the Tomasellis alone; (2) the Town of Salisbury has no encumbrance and ought be enjoined from asserting a claim for any debts due prior to judgment; (3) mandating that Salisbury properly classify their property, and (4) mandating that Salisbury adjust sewer user fees. Defendants also moved for a partial summary judgment declaring that the sewer user fees were excessive, that they are entitled to reimbursement of the excess charged including interest, and to determine what, if any, amounts remain due and payable at a further hearing.

The Plaintiff Town of Salisbury brought a cross motion for summary judgment. The municipality contends that the Defendants did not exhaust administrative remedies with respect to sewer user fees and sewer betterments, that the Defendants are precluded from raising the validity of betterments because of a prior Superior Court decision¹ and that the town's tax taking instrument and tax title accounts are [**3] valid. In opposition to Salisbury's cross motion for summary judgment, the Tomasellis argue that, in addition to seeking an abatement, they also may request relief from the betterment assessments, which they call an illegal tax, pursuant to *G. L. c. 60, § 98*, which they claim may be raised as a defense to foreclosure proceedings under *G. L. c. 60, § 65*, without having previously paid the challenged tax,

or having filed a separate action in Superior Court. Salisbury counters that this line of defense raised by the Defendants is not applicable here, because the Defendants have property within the town of Salisbury which indisputably is taxable, because they have failed to stay current on their real estate taxes, and because at most the betterment is an excess tax, for which abatement is the exclusive remedy.

1 *Tomaselli v. Family Bank, Essex Superior Court, C.A. No. 97-0481 (August 15, 2001), affirmed 57 Mass. App. Ct. 1116, 786 N.E.2d 437 (2003).*

On February 25, 2009, I held a tax lien hearing and hearing on Salisbury's motion for legal fees, at which I ordered Salisbury to submit a full accounting report detailing the computation of taxes, fees, costs, and charges asserted by the town. A hearing on Salisbury's [**4] motion for legal fees and for a finding then was heard on June 9, 2009; Salisbury was ordered to serve a reply addressing new issues raised by the Tomasellis. At a second hearing on Salisbury's motion for relief on April 13, 2010, I instructed counsel to confer and determine whether issues could be resolved by dispositive motion or whether trial was necessary. The Tomasellis filed a motion for summary judgment and the Town filed a cross motion for summary judgment. Both motions were accompanied by statements of undisputed facts, see *Land Court Rule 4*, and affidavits. I held a hearing on the motions for summary judgment. I now rule on the cross motions and decide the case.

Facts

The following material facts are established by materials properly within the *Mass. R. Civ. P. 56* record, and are undisputed.²

2 See *Land Court Rule 4* (where moving party's statement of material facts has not been countered by opposing party, "the facts described by the moving party as undisputed shall be deemed to have been admitted.")

1. Joyce and Gracemarie Tomaselli, sisters, purchased the property located at 103 and 105 North End Boulevard, Salisbury, Massachusetts, (now 113 and 115 North End Boulevard) ("Property"), [**5] listed as Parcel 33-049 and Parcel 33-050 in the Assessor's Records, from Family Bank on March 7, 1991, in a deed recorded at the Essex (South District) Registry of Deeds [**45] ("Registry") at Book 10726, Page 242 and filed for registration with this court's Essex (South) Land Registration District ("District") as Document No. 260732.³

3 . The Property comprised four parcels at the time the deed was recorded. The parcels whose title has been registered and confirmed by this court are the subject of and described in, the Tomasellis' outstanding transfer certificate of title, dated March 13, 1991, No. 60856.

2. Parcel 33-049 is a vacant lot; Parcel 33-050 contains a mixed use structure with a residential apartment unit and restaurant space, but has been used solely as a single family residence since January 1, 1995.

3. On March 13, 1991 the Town issued a Municipal Lien Certificate ("MLC #36") to Family Bank's closing attorney reflecting that the 1990 and 1991 taxes on 105 North End Boulevard were paid in full; MLC #36 did not reflect any current or pending sewer assessments, betterments, or user fees outstanding.

4. Also on March 13, 1991, a transfer certificate of title (No. 60856) was issued by [**6] the District to Joyce and Gracemarie Tomaselli for two of the parcels (No. 1/lot 50 and 2/lot 51). There were no encumbrances reflected on the certificate of title, with the exception of a mortgage granted to the Family Mutual Savings Bank (registered that same day).

5. On October 30, 1991, the Tomasellis moved into the second floor of the Property. They opened Mangia-a-Cafe' Restaurant, a 28-seat Italian restaurant with a beer and wine license on September 12, 1992. The restaurant occupied the first floor of the Property.

6. The Tomasellis received a sewer bill dated September 2, 1991 which included two additional line item charges "Capital cost recovery/betterment FY91" subtitled "FY91 Parcel Portion @\$171.92" and "Capital cost recovery/betterment FY91" subtitled "FY91 EQR Portion @\$229.23" calculated at 8.6 Equivalent Residential Usages ("EQRs"), up from four EQRs the previous year. The bill also reflected a "User Fee Credit FY91" of \$1,038 and a retroactive reassessment for July 1, 1990 through June 30, 1991 at a rate of \$173.05 for 8.6 EQRs, resulting in a balance of \$450.23. The balance eventually appeared as a sewer user lien on the Tomasellis' 1993 Real Estate Tax bill.

7. The [**7] Salisbury Town Sewer Commissioners and Selectmen voted for a \$7,800,000 betterment on March 16, 1992.

8. The Tomasellis' Fiscal Year 1992 fourth quarter tax bill included special assessments-a sewer

betterment for \$630.46, and their Fiscal Year 1993 third quarter tax bill included a total of \$2,047.73 due for special assessments: \$450.23 for sewer-user charges, \$630.54 for sewer betterment, and \$966.96 for sewer interest.

9. In January 1993, Gracemarie called the Sewer Commissioners' office and after the conversation came to believe that the Tomasellis would be billed for the betterment over a twenty-year period, with interest.

10. On December 3, 1993, Salisbury took title to lot 33-050 by an instrument of tax taking in the name of *Rivera, Carlene Tr./c/o Essex Holdings, Inc.*, for Fiscal Year 1991 taxes for Lot 33-050 in the amount of \$1,862.00. The taking instrument was recorded on January 27, 1994, at the Southern Registry District of Essex County at Book 12401, Page 119. Release of the taking instrument was recorded in June 2009.

11. On January 3, 1994, the day after they paid for their 1994 beer and wine license, the Tomasellis spoke with the Salisbury Tax Collector, Sid Pike. It was [**8] then the Tomasellis' understanding that they owed \$19,424.52 for taxes, including sewer charges.

12. On December 30, 1994, Gracemarie called Mr. Pike to pick up a 1995 beer and wine license. Afterwards the Tomasellis believed they needed pay \$19,016.63 in outstanding taxes by 1pm the same day in order to obtain their license.

13. The Tomasellis did not pay their outstanding taxes in full, and therefore did not receive their 1995 beer and wine license; the Tomasellis closed the restaurant on December 31, 1994, and have not reopened the restaurant since.

14. The Tomasellis requested reconsideration of their withheld license at a Board of Selectmen's Meeting on January 9, 1995; their request was denied.

15. The Tomasellis received a Notice of Advertising dated October 30, 1995, that reflected the Town was intending to take the Property for outstanding Fiscal Years 1993 and 1994 taxes; the taking was never recorded.

16. Family Bank initiated foreclosure proceedings in 1999 because the Tomasellis were not current on their taxes.⁴

4 . Family Bank previously began foreclosure proceedings in January 1995, however on October 6, 1995, Gracemarie filed

Chapter 13 Bankruptcy and the auction was stayed.

17. [**9] On August 5, 1999, the Tomasellis entered into an agreement with Family Bank's attorney that in consideration of Joyce Tomaselli not filing bankruptcy, the bank would drop the current foreclosure action. It was also part of the agreement that the Tomasellis would pay their outstanding 1996-1999 real estate taxes; a payment of \$7,240.58 was later made and applied to real estate taxes only. The bankruptcy was dismissed in 1999.

18. The Tomasellis received two Notices of Advertising (one for each lot) on June 22, 2000, reflecting that the town intended to take the property for unpaid taxes after fourteen days.

19. On October 12, 2000, the Tomasellis sent a letter to the Department of Public Works requesting an abatement; they did not supplement their request with an abatement application.

20. Later in the month, on October 30, 2000, Collector Fran Cloutier proposed an agreement to the Tomasellis to grant an abatement in exchange for their payment of a total of \$5,229.33 for taxes outstanding for fiscal years 1992-2000; the Tomasellis did not enter into the agreement and did not receive an abatement.⁵

5 . Tomasellis believed they were not responsible for the sewer betterment.

[*46] 21. The Tomasellis [**10] filed a complaint in Superior Court challenging Salisbury's denial of their license renewal based on failure to pay sewer betterments. *Tomaselli v. Family Bank*, Essex Superior Court, C.A. No. 97-0481 (August 15, 2001), *affirmed 57 Mass. App. Ct. 1116, 786 N.E.2d 437 (2003)*.

22. The Tomasellis' complaint alleged that the Town:

a. failed properly to record or publicly disclose to all purchasers of property the approved betterment charges;

b. improperly calculated the sewer-user charges and then refused to apply the reduced sewer-user fee for the years prior to 1994 despite a recalculation by the Department of Public Works; and

c. improperly revoked the Alcoholic Beverage license, without notice

or hearing, and then subsequently refused to re-issue the license. *Id.*

23. In 2000, the Superior Court granted a directed verdict in favor of Salisbury and dismissed counts for breach of duty and violation of *G. L. c. 93A*, "because the Tomasellis failed to exhaust their administrative remedies and a municipality is not subject to the provisions of *G. L. c. 93A*." *Id.*

24. The Superior Court also dismissed the count for wrongful termination of the Alcoholic Beverages licenses "on the grounds that *G. L. c. 258, § 10* does [**11] not allow recovery for any claim based on the issuance, denial, suspension or revocation or failure or refusal to issue any license." *Id.*

25. The Tomasellis appealed and the Appeals Court affirmed the Superior Court decision, stating that there was no indication the Tomasellis had exhausted available state remedies, and that the Tomasellis were attempting to assert a new theory on appeal. *Tomaselli v. Salisbury, 57 Mass. App. Ct. 1116, 786 N.E.2d 437* (affirming Superior Court); *Tomaselli v. Salisbury, Mass. App. Ct. No. 01-P-1136, 57 Mass. App. Ct. 1116, 786 N.E.2d 437* (April 7, 2003) (Rule 1: 28 decision).

26. Salisbury sent Notices of Advertising for Lots 33-050 and 33-049 to the Tomasellis on June 2, 2000.

27. On October 30, 2000, the Tomasellis received a letter from the Tax Collector proposing a Final Agreement and indicating authorization by Mr. Pike for an abatement including as to sewer related liens; the Tomasellis did not enter into the agreement.

28. Salisbury published a notice of tax taking against the Property on March 27, 2001, in "The Daily News" in Newburyport, Massachusetts.

29. Fourteen days later, on April 9, 2001, Salisbury commenced tax takings for \$4,351.62 (Lot 33-049) and for \$45,763.28 (Lot 33-050). The tax takings [**12] were recorded on May 7, 2001 in the Registry at Book 17154, Pages 366-69 and registered by the District as Documents numbers 380638 and 380639.

30. The Tomasellis filed their first formal application for abatement of betterment tax on July 31, 2001, stating that the Municipal Lien Certificates they obtained at the time they took title did not show any liens on the Property, that a title search at the Registry of Deeds did not show any liens or encumbrances on the Property, and asserting that

Massachusetts law requires betterments to be recorded. The bottom of the application form read "The filing of this application does not stay the collection of your tax. It should be paid as assessed. Refund will follow if abatement is allowed."

31. On October 17, 2001, the Board of Sewer Commissioners denied the application for failure to file a timely appeal, stating that applications for abatement must be filed within six months of the date of notice of betterment assessment. The denial did not list the date of betterment commitment or the date of expiration for the time to file. The Tomasellis did not appeal the denial decision.

32. The Tomasellis sent an application for adjustment of sewer-user [**13] fees to the Department of Public Works on February 22, 2004, on grounds that the charges were incorrect and excessive taxes, and that the EQR method of assessment was in conflict with the *Salisbury Sewer Rules and Regulations* and in violation of a town vote mandating calculation based on actual water consumption. The Department denied the request on March 27, 2004.

33. The Tomasellis sent a second application for adjustment of sewer-user fees based on actual water usage to Department of Public Works Director, Donald Levesque, on February 22, 2005. Their second request was denied on February 28, 2005.

34. The Tomasellis filed their second application for abatement of betterment tax for Parcels 30-049 and 30-050 on April 22, 2005, arguing that the \$7,800,000.00 betterment was a void tax because it had been paid in full by government funds including, EPA, DEP, and USDA Farmers Home grants, and because it was not recorded. On May 9, 2005, the Tomasellis received notice that their application had been denied for failure to file within 6 months of notice of assessment. The "Betterment Commitment Date" was listed on the notice as July 6, 1991.

35. On May 31, 2005, the Tomasellis filed a petition [**14] under formal procedure with the Appellate Tax Board ("ATB"), pursuant to *G. L. c. 58A, § 7*, appealing Salisbury's refusal to abate the assessed tax and to grant relief of what they characterized as "incorrect and excessive and improperly calculated sewer user charges and also Sewer Special Assessments Betterment" for the fiscal year 2005.

36. The ATB held a hearing on February 1, 2006; on July 17, 2007, the ATB promulgated its Finding of Facts and Report, in which it ruled that it had no jurisdiction over the appeal because:

a. the Board has no jurisdiction over appeals of betterment assessments;

b. any purported appeal of the betterment was filed well beyond the statute of limitations;

c. although the Board has jurisdiction over appeals of sewer-use charges, there is no evidence that the appellants filed a timely appeal of the sewer-use charge with the town.

Tomaselli v. Bd. of Assessors of Salisbury, Appellate Tax Board, No. F278864 (July 17, 2007).

37. Additionally, the ATB found that, "[e]ven if the appellants' April 2005 abatement application could be considered a timely appeal of the sewer-use charge, the assessors produced substantial, [*47] credible evidence . . . to support a finding [**15] that the appellants' sewer-use charge was correct." *Id.*

38. The ATB reasoned it did not have jurisdiction over appeals of abatement of betterment assessments because *G. L. c. 80, § 7* provides that a "person who is aggrieved by the refusal of the board to abate [a betterment] assessment in whole or in part may within thirty days after notice of their decision appeal therefrom by filing a petition for the abatement of such assessment in the superior court for the county in which the land assessed is situated." *Id.* (emphasis added).

39. The ATB further reasoned that the Tomasellis had filed their applications for abatement well after the statutory six-month period provided by *G.L. c. 80, § 5. Id.*

40. The ATB also ruled that appellants failed to comply with *G. L. c. 83, § 16G⁶* and therefore no abatement of the sewer-use charge was warranted. *Id.*

⁶ Application to defer common sewer use charges must be filed with board of assessors "within the time limit established for the filing of an application for exemption under said clause Forty-first A."

41. The Tomasellis appealed the ATB's decision to the Massachusetts Appeals Court. The Appeals Court affirmed in favor of Salisbury on April 9, 2009. [**16] *Tomaselli v. Board of Assessors of Salisbury*, 74 Mass. App. Ct. 1104, 903 N.E.2d 1144 (2009).

42. The Appeals Court upheld the ATB's ruling that "[t]he appellate route from the refusal to abate a betterment assessment is to the Superior Court pursuant to *G. L. c. 80, § 7*, or, pursuant to *§ 10*, to the county commissioners." *Tomaselli v. Board of Assessors of Salisbury*, Mass. App. Ct. No. 07-P-1656, 2009 Mass. App. Unpub. LEXIS 174 (April 9, 2009).

43. The Appeals Court went on to say, "[t]o the extent that the Tomasellis are attempting to assert a separate claim, the remedy for assessment of an illegal tax is through an action at law pursuant to *G. L. c. 60, § 98*, and is subject to the requirements set forth in that section." *Id.*

44. Finally, on the matter of sewer-user charges, the Appeals Court stated, "[t]he Tomasellis' arguments fail on their merits . . . The Tomasellis did not demonstrate that the method used by the town to calculate the charge was unlawful." *Id.*

45. The Tomasellis sought further appellate review from the Supreme Judicial Court ("SJC"), but their request was denied. *Tomaselli v. Board of Assessors of Salisbury*, 455 Mass. 1102, 914 N.E.2d 331 (September 30, 2009). They filed a motion for reconsideration with the SJC; the motion was [**17] denied on October 29, 2009.

46. On March 14, 2006, the Tomasellis received a copy of the town's Complaint to Foreclose Tax Lien dated February 22, 2006.

47. On March 19, 2009 the Salisbury Collector/Treasurer, Christine D. Caron, signed an affidavit that tax title account histories and statements are true copies of the Town of Salisbury records, and that the records accurately recite the amounts billed, payments made, and the application of those payments to tax title accounts.

Standard for Summary Judgment

Summary judgment is appropriate "where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr., Inc. v. Cranney*, 436 Mass. 638, 643-644, 766 N.E.2d 864, (2002); See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734, (1991); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877, (1976); *Mass. R. Civ. P. 56 (c)*. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the nonmoving party. See *Attorney General v. Bailey*, 386 Mass. 367, 371, 436 N.E.2d 139, cert. den. sub nom. *Bailey v. Bellotti*, 459 U.S. 970, 103 S. Ct. 301, 74 L. Ed. 2d 282

(1982). The moving party has the burden of affirmatively [**18] demonstrating the absence of a genuine issue of material fact on every relevant issue, regardless of who would have the burden on that issue at trial. *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 39, 825 N.E.2d 522 (2005). For any claim for which the moving party does not have the burden of proof at trial, the party may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communication Corp.*, 410 Mass. 805, 809, 575 N.E.2d 1107 (1991); *Kourouvacilis*, 410 Mass. at 716.

Analysis

This action was brought by the Town under *G. L. c. 60, § 65*, to foreclose the Tomasellis' right of redemption to the Property. Given the posture of this case, to defeat Salisbury's action for foreclosure, by dispositive motion or otherwise, the Tomasellis must successfully raise at least one of two defenses; the Tomasellis would need to argue that they are and were not responsible for paying the betterment because it is either an excessive tax or a void tax. They have made these arguments. However, because I find that based on the undisputed material [**19] facts, taking all inferences in favor of the Defendants, as matter of law the Tomasellis may not in the current tax foreclosure proceeding raise either defense, it is not necessary to address any of the other claims raised by both the Defendants and the Plaintiff. Summary Judgment is therefore to be granted in favor of the Town of Salisbury.

Remedy under *c. 60, § 98*

Generally, a party may use *G. L. c. 60, § 98* to recover a void or illegal tax, only if the action is commenced within three months after payment of the tax.⁷ Ordinarily, this cause of action, required to be brought in the Superior Court, is to be commenced there as a separate proceeding within the time statutorily prescribed.

⁷ "No action to recover back a tax shall be maintained, except as provided in sections sixty and eighty-five, unless commenced within three months after payment of the tax . . ." *G. L. c. 60, § 98*.

Our Supreme Judicial Court has, however, recognized a limited exception to this otherwise firm principle. In *Norwood v. Norwood Civic Ass'n*, the court found that the remedy provided [**48] for in

G. L. c. 60, § 98, may in certain limited circumstances be asserted as a defense to foreclosure proceedings under *G. L. c. 60, § 65*. [**20] 340 Mass. 518, 524, 165 N.E.2d 124 (1960). Under the exception outlined in *Norwood*, a party who has not paid the tax up front, and who has not already commenced a separate action under *G. L. c. 60, § 98*, may respond to foreclosure proceedings brought by the municipality by raising the defense, "in order to avoid circuitry of action." *Id.* If the party is able to establish facts demonstrating that the tax on which the foreclosure proceeding rests is wholly void, the tax is treated as eliminated from the tax title account, and the action for foreclosure of the resultant tax taking by definition cannot proceed. *Id.*

This judicially created exception, however, is painfully narrow, and strictly applied. It only is available in an instance where the illegality or void nature of the assessment is entire, and so renders the underlying tax wholly void. The *Norwood* exception was applied in that case where it was asserted that the real estate involved was unlawfully taxed because it was by statute fully exempt from taxation. The *Norwood* exception to the need to bring a separate and timely Superior Court action under *section 98* does not exist where some of the tax amounts underlying the foreclosure are due, and others [**21] not. In addition, on similar reasoning, the exception is available only "[w]here a taxpayer owns in the town no real estate subject to taxation. . . ." *Id.* at 523. For if there is some real estate lawfully taxed to some degree in the municipality, the Land Court foreclosure proceeding cannot be used to adjudicate the validity or the amount of less than all the taxes due to the town. If the party assessed owns any taxable real estate in the municipality, or if any part of the tax assessed is legally due, the rule is that the claimed 'illegal tax' is to be treated as merely excessive; the exclusive remedy for an excessive tax is abatement under *G. L. c. 59, § 59*. *Sears, Roebuck and Co. v. Somerville*, 363 Mass. 756, 757-58, 298 N.E.2d 693 (1973); *Norwood*, 340 Mass. at 523; *Harron Communications Corp. v. Bourne*, 40 Mass. App. Ct. 83, 87, 661 N.E.2d 667 (1996). "It is immaterial whether there has been . . . the calculation of the tax upon a wrong or an inapplicable principle, or other invalidity, the statute afford ample means for obtaining relief and securing justice by a complaint for abatement." *Sears, Roebuck and Co.*, 363 Mass. at 757-758, n.3.

The Land Court lacks jurisdiction to grant abatements. This court's power [**22] is only to hear actions for foreclosure, setting the terms for redemption. If this court were enabled to adjust the

amounts of taxes assessed for which tax takings later were made and sought to be foreclosed, the court effectively would become an alternative forum for the abatement of tax and related lienable municipal charges, and the exclusive jurisdiction conferred upon the assessors and the Appellate Tax Board would be undone. While this court cannot permit a foreclosure to go to judgment where the full underlying tax or other lienable amount is wholly void, any other challenge--to the validity of part of the underlying amount, or to the fairness and accuracy of the valuation and method by which it was calculated--lies outside the Land Court's authority to hear and decide.

Here, the Defendants may not raise *G. L. c. 60, § 98* as a defense to foreclosure proceedings because they have neither satisfied the statutory requirements, nor qualified for the *Norwood* exception. The Defendants have not stayed current on their taxes and other committed amounts, and have not paid them, even under protest. The *Norwood* exception, allowing parties to raise the defense even when they have not paid **[**23]** taxes in protest, does not apply here because the Defendants have property in Salisbury which is without dispute subject to real estate taxes. Following the reasoning in both *Norwood* and *Sears, Roebuck and Co.*, the betterment assessment and other charges relating to the sewer system, its installation, and its use, even if wholly void, were only one component the total tax bill, which was rounded out by valid and proper conventional municipal real estate tax amounts. The logic of those cases, which cabin in the availability of the *Norwood* exception, is that for it to be viable there must exist a scenario in which no tax amounts at all are valid and proper underlying the tax title account on which the taking was made. If this condition cannot be demonstrated, then the taxpayer's challenge amounts, in law, to one that the total bill was excessive, rather than void or illegal. The dispute in this case must be treated as about the amount of the tax bill, not its lawful existence, and so the Tomasellis' sole remedy was abatement pursuant to *G. L. c. 59, § 59*, making the *section 98* defense unavailable in this court.

The Tomasellis have argued on summary judgment that although the *Norwood* exception **[**24]** generally applies only when a party has no taxable real estate in the town, the defense is nonetheless available to them because the betterment is an invalid reassessment for a project which previously had been assessed, before the Tomasellis purchased the property, and because they are bona fide purchasers. The Tomasellis do not provide any

support for this proposition, nor is the court aware of any; the decisional law does not identify any exceptions to the requirement that a tax must be "wholly void" for a party to use the remedy in *G. L. c. 60, § 98* as a defense to a tax foreclosure complaint. The court concludes that the Tomasellis cannot employ *G. L. c. 60, § 98* as a defense to the current foreclosure proceeding.

The court in *Sears, Roebuck and Co.* stated, "[t]o allow a civil action to recover an excess tax would transfer to the courts a function which the Legislature has delegated to an administrative body. It would create the possibility of a multiplicity of civil actions to recover illegally assessed taxes, and it is entirely improbable that the Legislature intended any such result. It would allow a taxpayer to defeat the timing requirements of *G. L. c. 59, § 59*, and thereby **[**25]** thwart the intent of the Legislature in establishing them." *363 Mass. at 758-59*. The court said that "requiring a taxpayer to resort to the abatement remedy in no way deprives him of the judicial review of administrative action as provided by the Legislature under *G. L. c. 58A, § 13*." *Id. at 759*. Here, the Tomasellis applied for abatement on two different occasions. The knew that that remedy was available to them. Although the Tomasellis were not successful in their efforts to obtain an abatement, they had the option of appealing to either the Superior Court or the county commissioners. The Tomasellis did not appeal the first denial and then unsuccessfully brought their appeal of the second denial to the ATB, and after that to the Appeals Court. The case before this court exemplifies the judicial concern about the need to adhere to statutory time frames for challenging tax and similar assessments. Allowing the Tomasellis to raise *G. L. c. 60, § 98* as a defense to an **[*49]** excessive tax in this proceeding would undermine the Legislature's intent in establishing timing requirements, as the current action came before the court over four years after the Tomasellis' first application for abatement **[**26]** was denied.

Remedy under G. L. c. 59, § 59

The Tomasellis thus are limited to challenging the betterment assessment as an excessive tax pursuant to *G. L. c. 59, § 59*, which provides, "[a] person upon whom a tax has been assessed ... if aggrieved by such tax, may, except as hereinafter otherwise provided, on or before the last day for payment . . . apply in writing to the assessors, on a form approved by the commissioner, for an abatement thereof" The Tomasellis submitted applications for abatements twice, once on July 31, 2001 and again on

April 22, 2005. The municipal officials denied both applications, stating that the Tomasellis had failed to apply within six months of the date of notice of the betterment assessment. The Tomasellis have argued against the applicability of those timing requirements, contending that they did not have notice of the betterment, and so never had an opportunity to file a timely appeal. Whether or not that is the case, and much in the record suggest that it is not, this court does not have the jurisdiction to determine the merits of that argument.

Here, this court, like the ATB, does not have jurisdiction over the matter of municipally imposed betterment [**27] assessments, and consequently that issue may not be raised as a defense to proceedings under *G. L. c. 60, § 65*. The correct route of appeal for the

Town's refusal to grant an abatement for the betterment was through either the Superior Court or the county commissioners, as outlined in *G. L. c. 80, §§ 7, 10*.⁸ If the Tomasellis believed that Salisbury's denial of their application for abatement was incorrect, they had thirty days to file an appeal with either the superior court or the county commissioners. The Defendants did not pursue either of those options, and this court is powerless to consider the validity of the betterment assessments in the current action to foreclose the Tomasellis' right of redemption.

8 Pursuant to *G. L. c. 80, § 7* any person who is assessed a betterment and "who is aggrieved by the refusal of the board to abate an assessment in whole or in part may within thirty days after notice of their decision appeal therefore by filing a petition for the abatement of such assessment in the superior court for the county in which the land assessed is situated." *G. L. c. 80, § 10* further provides that "a person who is aggrieved by the refusal of a board of officers of a city, [**28] town or district to abate an assessment may, instead of pursuing the remedy provided by section seven, appeal within the time limited therein to the county commissioners of the county in which the land assessed is situated."

Sewer-User Charges

The Tomasellis may not attempt to re-litigate the sewer-user charges in this court because the matter has been determined previously and finally by the ATB, and the Board's decision has been affirmed by the Appeals Court. *Tomaselli, Mass. App. Ct. No. 07-P-1656, 2009 Mass. App. Unpub. LEXIS 174*The

question of the user charges was properly within the jurisdiction of the ATB. It determined, however, that the Tomasellis did not file a timely appeal of those charges, and so the Board lacked jurisdiction to hear the appeal, which it dismissed. *Id.* The ATB also found, and the Appeals Court affirmed, that the town assessors produced "substantial, credible evidence" that the Tomasellis' sewer-user charges were correct. *Id.* Finally, the Appeals Court concluded that the Tomasellis' argument that the sewer-user charges were incorrect, failed on the merits. *Id.*

Conclusion

This court can only decide matters when empowered to do so by the General Court, and is bound to refuse a request to weigh [**29] in where to do so would cause the court to act without jurisdiction. The court concludes that the statutory and decisional law it must follow prevents the court from hearing and deciding the defensive claims advanced by the Tomasellis under *G.L. c. 60, § 98*. Controlling law keeps this court from addressing the Defendants' attack on the underlying sewer betterment assessments, and requires the court to treat the assessed amounts as a given in overseeing the foreclosure of the Tomasellis' rights of redemption from the Town's tax taking.

That is not to say, however, that all of the arguments advanced by the defendants appear without basis. Although as a jurisdictional matter this court cannot make a decision on the merits of the betterment assessments which partially underlie the tax title, in some respects the Tomasellis have cast at least plausible doubt on the propriety of those assessments for betterments. There may be competing views of the chronology that unfolded here, but it does not seem that the Tomasellis are entirely off-base when they say that the Town failed to follow strictly the statutory steps controlling the recording of the order, plan, and estimate for the betterment [**30] within ninety days of adoption of the order, as set out in *G. L. c. 80, § 2*.⁹ It is unclear--and I cannot and specifically do not rule on the issue--whether, under *G. L. c. 80, § 12*,¹⁰ Salisbury failed to record the betterment in a way which might, with a proper and timely challenge, have had the effect of keeping a lien on the Property from arising. I do note however that, in a case presenting similar circumstances, the Appeals Court has dismissed taxpayers' challenges (based on claimed failure to make and record the orders as required by *G.L. c. 80, §§ 1 and 2*) to the collection of assessed betterments. See *California Village Corp. v. East Longmeadow, 4 Mass. App. Ct. 128, 129, 343 N.E.2d*

427 (1976), where the court observed that an assessment made for a betterment, "then committed to a collector of taxes, ... becomes in all respects a tax, and the collector has all of the powers and duties with respect to it that he has in the case of annual taxes on real estate." "Ordinarily the remedy by abatement and by action to recover an unlawful tax afford ample protection to the taxpayer and are the exclusive remedies." *Id.*

9 "An order under section one which states that betterments are to be assessed for [**31] the improvement shall contain a description sufficiently accurate . . . and such order, plan, and estimate shall be recorded, within ninety days from the adoption of the order . . . *No betterments shall be assessed for such improvement unless the order, plan and estimate are recorded as herein provided . . .*" *G. L. c. 80, § 2* (emphasis added).

10 ". . . The lien shall take effect upon the recording of the order stating that betterments are to be assessed for the improvement. . . ." *G. L. c. 80, § 12.*

Ultimately, this court determines that the remedy of challenge by abatement, or by bringing a timely Superior Court action, was [*50] available to the Tomasellis, and was both adequate and required in this case. The Tomasellis had an obligation to follow the statutorily mandated abatement and appeals procedures. The Tomasellis were more than able to discern the basis for challenge so as to have pursued those other remedies, and cannot, as a late

alternative to them, now be heard in this tax foreclosure case. The court is constrained to proceed with the foreclosure. That will require that the court set a new amount required for redemption in light of this Order, and to set appropriate terms for exercise [**32] of the right of redemption. The court will receive written submissions from the parties to enable it do that. It is

ORDERED that the Defendants' motion for partial summary judgment is **DENIED**, and the Plaintiff's motion for summary judgment is **ALLOWED**. It is further

ORDERED that the Town of Salisbury is to prepare, serve, and file within twenty-one days of the date of this Order, a renewed motion for finding, supplemented by a detailed and yet easily-understood final accounting of the amounts due as of the same date. In this submission, the Town also is to provide its views on the timing and other terms of redemption the court ought to direct. It is further

ORDERED that the Tomasellis shall, within fourteen days of service upon them of the Town's filing, file and serve any objection or other response to the accounting supplied by the Town, and the Defendant's view on the timing and other terms of redemption the court ought establish. The court will issue a finding thereafter, without further hearing unless otherwise ordered, see *Land Court Rule 6*.

So Ordered.

By the Court (Piper, J).

Commonwealth of Massachusetts
County of Plymouth
The Superior Court

CIVIL DOCKET#: PLCV2010-01029-B

RE: Valianti et al v Marshfield et al

TO: Robert W. Galvin Jr, Esquire
Galvin & Galvin
10 Enterprise Street, Suite 3
Duxbury, MA 02332-3315

NOTICE OF DOCKET ENTRY

You are hereby notified that on 08/06/2013 the following entry was made on the above referenced docket:

DECLARATORY JUDGMENT : It is Ordered, Adjudged and Declared: That the Town Moderator cannot rule "out of order" a proposed motion from the floor of the town meeting to appropriate community preservation funds in an amount less than the dollar amount recommended by the Community Preservation Committee.(Richard J. Chin, Justice) Copies mailed 8/6/2013
Dated at Plymouth, Massachusetts this 6th day of August,
2013.

Robert S. Creedon, Jr.,
Clerk of the Courts

BY: Adam Baler
Assistant Clerk

Telephone: (508) 747-8565

2
1

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCV2010-01029B

JOHN M. VALIANTI & others¹

vs.

TOWN OF MARSHFIELD & others²

MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff residents of Marshfield filed this action seeking a declaration that the Town Moderator is required to accept a proposed motion from the floor of town meeting seeking to reduce the amount of a community preservation funds appropriation article. This matter is before the court on the parties's cross-motions for judgment on the pleadings. For the reasons discussed below, the Town's motion is DENIED and the plaintiffs's cross-motion is ALLOWED.

BACKGROUND

In accordance with a ruling by the prior motion judge, the parties have styled their cross-motions as seeking judgment on the pleadings. A defendant's motion for judgment on the pleadings is the post-answer equivalent of a Rule 12(b)(6) motion to dismiss which challenges the legal sufficiency of the complaint. Wheatley v. Massachusetts Ins. Insolvency Fund, 456 Mass. 594, 600-

¹Robert W. Tice, Richard W. Reardon, Mary M. Pierson, Joseph A. Peceevich, Robert E. Parkis, Dennis F. McDonald, Pamela J. Keith, Carole E. Hayes, Donald H. Hayes, and Katherine M. Glavin

²Marshfield Board of Selectmen and Marshfield Community Preservation Committee

CS-8/6/13

601 (2010); Jarosz v. Palmer, 436 Mass. 526, 529 (2002).³ In ruling on a motion for judgment on the pleadings, the court can consider only the allegations of the complaint, documents attached to the complaint and incorporated by reference, documents on which the plaintiff relied in framing the complaint, and facts of which the court can take judicial notice. See Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n. 4 (2004); Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). Here, both sides have submitted excerpts from the publication *Town Meeting Time* as well as the Town of Marshfield General ByLaws. See Brodsky v. Fine, 263 Mass. 51, 54 (1928); Russell v. New Bedford, 74 Mass. App. Ct. 715, 722 (2009) (court cannot take judicial notice of local ordinance or bylaw). In addition, the defendants have submitted an affidavit by the Town Moderator, and the plaintiffs have submitted the Town Meeting Rules. Under Rule 12(c), if the parties submit materials outside the pleadings and the court does not exclude them, the court may treat the motion as one for summary judgment. Anzalone v. Administrative Office of the Trial Ct., 457 Mass. 647, 652 (2010). Because both sides have attached materials to their briefs, they are on notice of the possibility of conversion to a Rule 56 motion. Rawan v. Massad, 80 Mass. App. Ct. 826, 828-829 (2011). Accordingly, this Court will consider all the materials and treat the motions as cross-motions for summary judgment.

The record reveals the following undisputed facts. In 2001, the Town of Marshfield adopted the Massachusetts Community Preservation Act, General Laws Chapter 44B ("the CPA"). The Marshfield Community Preservation Committee ("CPC") was appointed by the Board of Selectmen

³Judgment on the pleadings is also the appropriate mechanism for resolving a Chapter 30A or certiorari complaint when the defendant files the administrative record as its answer. See Northboro Inn, LLC v. Treatment Plant Bd. of Westborough, 58 Mass. App. Ct. 670, 673 n. 5 (2003); Superior Ct. Standing Order 1-96. Here, the Town filed a standard answer, not a record of the town meeting proceedings, and both parties filed materials outside the record.

to review projects proposed under the CPA and to approve invoices for project expenditures. Article 78 of the Town of Marshfield General ByLaws is entitled, "Community Preservation Committee" and sets forth the duties of the CPC, stating:

The [CPC] shall make recommendations to the Town Meeting for the acquisition, creation and preservation of open space, for the acquisition and preservation of historic resources, for the acquisition, creation, and preservation of land for recreational use, for the creation, preservation and support of community housing and for rehabilitation or restoration of such open space, historic resources, land for recreational use and community housing that is acquired or created as provided in this section.⁴

Marshfield has an open town meeting which approves all appropriations of general funds as well as CPA funds. James Fitzgerald is the elected Town Moderator. The town warrant which is published and distributed each year before the annual town meeting contains the Town Meeting Rules. Rule 1 states: "The conduct of Marshfield's Town Meeting is dictated by Federal and State law, the Town's Charter and By-laws, local tradition, and then the publication entitled 'Town Meeting Time.'⁵ Rule 2 of the Town Meeting Rules states that the Town Moderator shall preside over the town meeting, decide all questions of order and procedure, and announce the results of all votes. Rules 10, 11 and 12 state:

10. Articles in the Warrant give notice of the subjects to be discussed at Town Meeting and establish the parameters of matters that can be debated and acted upon. Amendments, motions, and/or debate determined by the Moderator, with the advice of Town Counsel, to be "beyond the scope" of the Articles may not be permitted.

⁴This language is almost identical to the language of G.L. c. 44B, § 5(b)(2), which authorizes the creation of community preservation committees.

⁵*Town Meeting Time: A Handbook of Parliamentary Law* (3d ed. 2001) is a book published by the Massachusetts Moderators Association.

11. Only two (2) amendments to a motion may be on the floor at any particular time. Generally, amendments shall be voted on in the order made and prior to the vote on the motion to be amended. Amendments over ten (10) words must be submitted to the Moderator in writing and, if over fifty (50) words, sufficient copies must be available at the entrance of the hall before the start of that particular session.
12. Consideration of differing dollar amounts to be appropriated shall be voted on in descending order, the largest number first, until an amount gains approval.

Under the Town charter, town counsel, who is appointed by the Board of Selectmen, reviews all town meeting warrant articles prior to each town meeting and advises the Board of Selectmen regarding the legality of the articles. Town counsel also attends the annual town meeting and all special town meetings and provides such legal advice as may be requested.

On June 17, 2009, Kathleen Colleary, the Chief of the Massachusetts Department of Revenue ("DOR") Bureau of Municipal Finance Law, wrote a letter to Marshfield resident Pamela Keith which states:

This is in reply to your letter raising several questions about town meeting actions with regard to certain proposed appropriations under the Community Preservation Act (CPA). According to your letter, Marshfield's community preservation committee (CPC) recommended two specific spending authorizations for particular purposes. The town meeting moderator refused to allow discussion of amendments to reduce the amount of the proposed appropriations on the grounds that the town meeting could only accept or reject the CPC's recommendations. . . .
. . . We see nothing in the language of the CPA (especially C.44B § 5) or in its purposes, that suggests a legislative intent to force municipalities to make an all-or-nothing choice in approving the amount of the CPC's spending recommendations. It seems to us that a lesser amount for the same purpose is included within the scope of such a recommendation.

It is therefore the Department of Revenue's official position that

nothing in the Community Preservation Act itself prohibits legislative bodies such as a town meeting from appropriating less than the amount recommended by the CPC. However, there may be special acts of the legislature, charter provisions, bylaws, or procedural rules affecting the conduct of town meeting that also bear on the correctness of the moderator's decision about the proposed reductions in the amounts to be appropriated. We therefore decline to offer an opinion on the propriety of that decision.

In 2009, the Town's Open Space Committee, a body appointed by the Board of Selectmen, filed a proposal with the CPC for an appropriation of CPA funds to construct a public park to be known as South River Park. Following public hearings, the CPC recommended that the South River Park appropriation request be included in the warrant for a special town meeting.

A special town meeting convened on April 26, 2010 in the Marshfield High School gym. The special town meeting warrant included the following article ("Article 9"):

MOTION 9 - Will the Town VOTE to appropriate \$504,465.50 and to fund such appropriation transfer \$262,460 from Community Preservation Open Space reserve and transfer \$242,005.50 from Community Preservation Fund balance to fund the construction of a new park, the South River Greenway Park, located at 2148-2154 Ocean Street, as shown on the Marshfield Assessor's Maps G08-05-03, G08-05-4 and G08-0505. The funds will be used to complete construction drawings, site preparation and construction of the new community park as shown on the design plans prepared by Shadley Associates. The Community Preservation Committee further moves that the Town authorize the Board of Selectmen and/or the Open Space Committee to apply to the appropriate Federal or State agencies seeking reimbursement under the Federal Land and Water Conservation Act, P.L. 88-578, of any funds expended for said purposes and to enter into any contracts or take any other action necessary to secure such reimbursement to the Community Preservation Fund. Further that, upon completion of construction of the park, the above described land shall be dedicated to, and held in trust for, park purposes; in accordance with G.L. Chapter 45, § 3.

Article 9 was seconded and moved for discussion. While the motion was being discussed

and before a final vote was taken, resident John Valianti made a motion to amend Article 9 to reduce the amount of the appropriation. Moderator Fitzgerald refused to entertain the motion to amend, asserting that based on the opinion of town counsel, the main motion could not be amended and had to be accepted or rejected without the possibility of amendment. The town meeting then voted on and approved Article 9 to appropriate \$504,465.50.

Since Fitzgerald's election, it has been a local tradition to vote on CPC appropriation articles on an all or nothing basis. According to Fitzgerald, this tradition is based on town counsel's interpretation of the CPA and the Bylaw that articles submitted to town meeting for approval must be consistent with the CPC's recommendations, which are specific as to the amount of funding sought. According to Fitzgerald, a motion seeking to reduce the amount of money sought by the CPC is "out of order" because it has not first been reviewed and approved by the CPC as required by the CPA.

On August 2, 2010, Valianti and other Marshfield residents filed this action against the Town. Count I of the complaint sought judicial review of the Town Moderator's action under G.L. c. 30A, § 14. Count II of the complaint sought relief under G.L. c. 40, § 53 to restrain an illegal appropriation. In their complaint, the plaintiffs requested that this Court nullify the town meeting vote on Article 9, enjoin the Town from making any expenditures pursuant to Article 9, and instruct the Town Moderator that motions to amend dollar amounts to be funded with CPA funds should be accepted and brought to the floor of future town meetings, subject to debate and a vote. Meanwhile, more than 98% of the appropriated funds were expended and construction of the South River Greenway Park was substantially completed in 2012.

On January 17, 2013, the Town filed a motion for summary judgment, arguing that review

was unavailable pursuant to G.L. c. 30A, § 14 and G.L. c. 40, § 53, and that the expenditure of the appropriated sums was lawfully made and completed, rendering the matter moot. In a margin endorsement, this Court (Muse, J.) wrote:

Allowed in part and Denied in part, without objection. Complaint is amended as a claim pursuant to General Laws c. 231[A sec. 1] on the sole issue of whether Town Moderator should be prospectively required to permit Amendments to Community Preservation Act appropriations when presented at Town Meeting. Judgment on the pleadings shall be served within 45 days.

DISCUSSION

The Town first contends that the plaintiffs lack standing to obtain a declaratory judgment. Chapter 231A, section 2 provides that the declaratory judgment statute:

may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal . . . agency or official which practices or procedures are alleged to be in violation of . . . the laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated . . . For the purpose of this section practices or procedures mean the customary and usual method of conducting municipal, county, state agency or official business.

G.L. c. 231A, § 2. To invoke this provision, one must show that the agency's illegal action extends beyond the plaintiff's individual case and is consistently repeated by the agency. Grady v. Commissioner of Corr., 83 Mass. App. Ct. 126, 137 n.9 (2013). In general, Chapter 231A does not provide an independent basis for standing. Enos v. Secretary of Env't Affairs, 432 Mass. 132, 135 (2000); Pratt v. Boston, 396 Mass. 37, 43 (1985). A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred. Enos v. Secretary of Env't Affairs, 432 Mass. at 135; Professional Fire Fighters of Mass.

v. Commonwealth, 72 Mass. App. Ct. 66, 74, rev. den., 452 Mass. 1105 (2008). The standing requirements of Chapter 231A are to be liberally construed. Enos v. Secretary of Env'tl Affairs, 432 Mass. at 141; Professional Fire Fighters of Mass. v. Commonwealth, 72 Mass. App. Ct. at 74.

Here, the plaintiffs are Town residents and registered voters with the right to vote at town meetings. Valianti attends town meetings and has made at least one motion to reduce the CPC's recommended appropriation which was disallowed by the Town Moderator based on a local tradition of putting CPC appropriations to an all or nothing vote. The denial of proposed motions to reduce CPC appropriations appears to be the customary and usual method of conducting town meeting business. The plaintiffs assert that they have been injured by the Town Moderator's erroneous interpretation of the CPA in excess of his statutory authority. In the view of this Court, the plaintiffs have standing to seek a declaratory judgment in this case.

Judicial Review of "Out of Order" Ruling

The Town contends that the Town Moderator's determination that a motion by a town meeting member to reduce the CPC's recommended appropriation is out of order is a procedural ruling which is immune to judicial review. Pursuant to Chapter 39, § 15, the duties of a Town Moderator are to preside over and regulate town meetings, decide all questions of order, and make public declaration of all votes. G.L. c. 39, § 15.⁶ Section 17 provides:

No person shall address a town meeting without leave of the moderator, and all persons shall, at the request of the moderator, be silent. If a person, after warning from the moderator, persists in disorderly behavior, the moderator may order him to withdraw from

⁶Section 15 also authorizes a town to pass by-laws regulating the proceedings at town meetings. G.L. c. 39, § 15.

the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned.

The office of moderator is an ancient one, and its powers are extensive. Ogden v. Selectmen of Freetown, 258 Mass. 139, 141 (1927). See also Curnin v. Egremont, 510 F.3d 24, 31 (1st Cir. 2007), cert. den., 554 U.S. 903 (2008) (recognizing that measure of discretion is inherent in role of moderator). The moderator has the authority to decide all questions of order, and his good faith judgment on procedural matters, even if mistaken, is not subject to review by the court. MacKeen v. Canton, 379 Mass. 514, 517 (1980) (showing of bad faith is required to challenge moderator's procedural decision); Doggett v. Hooper, 306 Mass. 129, 133 (1940) (moderator not liable for refusing to let citizen speak and requiring him to sit down and be silent or be removed from meeting); Village Houses, Inc. v. Kingston, 2010 Mass. App. Unpub. LEXIS 941 at * 4 (Rule 1:28), rev. den., 458 Mass. 1106 (2010) (whether moderator followed proper voting procedures at town meeting is not reviewable absent evidence of bad faith).

Arguably, the Town Moderator was simply acting pursuant to Town Meeting Rule 10, which authorizes him to prohibit amendments, motions, and debate determined to be "beyond the scope" of the articles on the warrant. The warrant must sufficiently apprise voters of the nature of the subjects to be brought before the town meeting. See Blomquist v. Arlington, 338 Mass. 594, 598 (1959). However, the warrant need not "contain an accurate forecast of the precise action which the meeting will take upon those subjects." Burlington v. Dunn, 318 Mass. 216, 219, cert. den., 326 U.S. 739 (1945). An article in a warrant is a mere abstract of the proposition to be laid before the voters, and matters incidental to and connected with those propositions are proper for consideration and action by the town meeting. Tuckerman v. Moynihan, 282 Mass. 562, 565 (1933); Haven v.

Lowell, 46 Mass. 35, 41 (1842); Wolf v. Mansfield, 67 Mass. App. Ct. 56, 59, rev. den., 442 Mass. 1113 (2006). Here, a proposal to appropriate a reduced dollar amount from the community preservation fund to create the South River Greenway Park would not be beyond the scope of Article 9 as stated in the warrant. Cf. 5 Ops. Mass. Atty. Gen. 519 (1920) (where warrant proposed appropriation of \$3,000 for specific purpose, vote to appropriate \$7,500 for same purpose was beyond scope of warrant and invalid). Accordingly, the Town Moderator's decision in this matter is not a proper procedural ruling under Town Meeting Rule 10.

In the view of this Court, the determination that the town meeting cannot consider an appropriation less than the full amount recommended by the CPC is not merely a ruling on a question of procedure. Rather, it is a substantive ruling which depends on interpretation of the CPA.⁷ See Ellis v. Board of Selectmen of Barnstable, 361 Mass. 794, 799-800 (1972) (moderator's ruling that article on warrant was out of order because town meeting could not vote to amend personnel bylaw to increase police salary where police were governed by collective bargaining agreement was substantive, not procedural); Blomquist v. Arlington, 338 Mass. at 598 (moderator's determination that vote to amend by-law was invalid for lack of majority of entire membership was matter of substance, not procedure); Carter v. Douglas, 2001 Mass. Super. LEXIS 27 at *8-9 (Butler, J.) (moderator's decision to allow vote on motion that arguably violated G.L. c. 39, § 10 involved substantive law, not mere procedure).⁸ A moderator's ruling on a substantive issue of law is subject

⁷Indeed, the Town Moderator's articulated rationale for deeming the motion to be out of order is that the reduced expenditure has not first been reviewed and approved by the CPC as required by the CPA.

⁸This Court rejects the Town's argument, relying on a passage from *Town Meeting Time*, that it is a procedural matter when a moderator rules that a motion is out of order because he is aware that mandatory conditions precedent to the motion have not been met. See Massachusetts

to judicial review. Cronin v. Tewksbury, 401 Mass. 537, 540 (1988); MacKeen v. Canton, 379 Mass. at 517; Blomquist v. Arlington, 338 Mass. at 598-599. Accordingly, this Court may review the validity of the Town Moderator's determination without usurping his role of deciding points of order.

Violation of State and Local Law

The Town contends that a motion by a town meeting member which seeks to reduce the amount of an appropriation recommended by the CPC violates both the CPA and the Town's custom and practice. The CPA authorizes cities and towns at their local option to vote to authorize up to a 3% surcharge on property tax bills to fund housing, historic preservation, and land conservation uses. See G.L. c. 44B, § 3. See also Seideman v. Newton, 452 Mass. 472, 473 (2008) (adoption of CPA allows town to limit growth by physically limiting amount of land available for development). Section 5 of the CPA is entitled, "Community Preservation Committee" and requires a city or town which accepts the CPA to establish a CPC with not fewer than five nor more than nine members. G.L. c. 44B, § 5(a). Section 5 requires that the CPC include one member from each of the following municipal entities: the conservation commission, the historical commission, the planning board, the board of park commissioners, and the housing authority. *Id.*

In addition, Section 5 of the CPA establishes the duties of the CPC, requiring it to study the

Moderators Association, *Town Meeting Time: A Handbook of Parliamentary Law* § 25, at 64-65 (3d ed. 2001) (giving example of planning board's failure to hold G.L. c. 40A, § 5 public hearing before town meeting consideration of zoning articles). Notably, Rule 1 of the Town Meeting Rules, which sets forth a hierarchy of sources of authority governing the conduct of the town meeting, lists *Town Meeting Time* last. That publication cannot trump Supreme Judicial Court precedent with respect to the distinction between procedural and substantive matters.

needs, possibilities and resources of the town regarding community preservation. consult with other existing town entities, and hold one or more public hearings as part of its studies. G.L. c. 44B.

§ 5(b)(1). Section 5 further provides:

The [CPC] shall make recommendations to the legislative body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation, preservation, rehabilitation, and restoration of land for recreational use; for the acquisition, creation, preservation and support of community housing; and for rehabilitation or restoration of open space and community housing that is acquired or created as provided in this section: provided, however, that funds expended pursuant to this chapter shall not be used for maintenance.

G.L. c. 44B, § 5(b)(2). Section 5 then provides that the CPC's recommendations shall include their anticipated costs. G.L. c. 44B, § 5(c). From this statutory scheme of "distinctive CPA appropriations," the Town draws an implied requirement that any town meeting vote on a CPC's recommended expenditure be all or nothing, because any reduction in the amount of the expenditure was not first recommended and approved by the CPC. This Court disagrees.

Section 5(d) of the CPA provides:

After receiving recommendations from the [CPC], the legislative body shall take such action and approve such appropriations from the Community Preservation Fund as set forth in section 7, and such additional non-Community Preservation Fund appropriations as it deems appropriate to carry out the recommendations of the [CPC].

G.L. c. 44B, § 5(d). While the CPA prohibits a town from appropriating community preservation funds without a prior CPC recommendation, nothing in § 5(d) restricts town meeting action to the exact dollar amount recommended by the CPC.

Indeed, DOR has interpreted the CPA as permitting local legislative bodies to appropriate

a lesser amount. DOR has promulgated a regulation explaining its use of public written statements to explain its official positions on various matters. See 830 Code Mass. Regs. § 62C.00. One type of public written statement employed by DOR is the Informational Guideline Release ("IGR"), which is issued "by [DOR]'s Division of Local Services under the authority of M.G.L. c. 58, on matters pertaining to assessment, classification, and administration of local taxes and municipal finance." 830 Code Mass. Regs. § 62C.3.1(8)(b). The purposes of an IGR are "to inform [DOR] personnel, city, town, county and district officers, and the public of [DOR] policy and practice, thereby promoting the uniform application of Massachusetts tax laws by [DOR] and assisting local officials and taxpayers in complying with the Massachusetts tax laws." 830 Code Mass. Regs. § 62C.3.1(8)(c).

In December of 2000, DOR's Property Tax Bureau issued an IGR about the Community Preservation Fund, IGR No.00-209, which states: "This Informational Guideline Release (IGR) explains to local officials the procedures and requirements for establishing a special fund that may be appropriated and spent for certain open space, historic resource and affordable housing purposes."

Section VI.D of the IGR describes the role of the CPC as follows:

The Community Preservation Committee is responsible for evaluating the community preservation needs of the city or town and making recommendations to the community's legislative body as part of the annual budget process. Its role is analogous to that of a capital planning committee in developing a multi-year capital improvement plan for a community and presenting an annual capital budget to its legislative body.

Section VI.D.2 of IGR No. 00-209 states in relevant part: "Each year the committee must make recommendations to the legislative body for funding community preservation acquisitions and initiatives." Section VI.D.3 states: "Throughout the year, the committee may make additional

recommendations on acquisitions and initiatives to the extent funds are available to support them.”

Finally, Section VI.D.4, entitled, “Legislative Body Action on Recommendations,” states:

The legislative body may make appropriations from or reservations of community preservation funds in the amount recommended by the committee or it may reduce or reject any recommended amount. . . . The legislative body may not increase any recommended appropriation or reservation, however. In addition, it may not appropriate or reserve any fund monies on its own initiative without a prior recommendation by the committee.

(emphasis added). Pursuant to DOR’s regulation, an IGR “states the official position of [DOR] . . . [DOR] and city, town, county and district officers will follow [an IGR] unless and until it is revoked or modified. . . .” 830 Code Mass. Regs. § 62C.3.1(8)(d).

Guidelines issued by an agency are entitled to substantial deference, although they do not carry the force of law in the same manner as regulations promulgated under Chapter 30A. Gulchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 227 (2011); Global NAPS, Inc. v. Awiszus, 457 Mass. 489, 496-497 (2010). IGR No. 00-209 represents DOR’s interpretation of the CPA and is persuasive authority entitled to deference. See Global NAPS, Inc. v. Awiszus, 457 Mass. at 497. Cf. G.L. c. 44B, § 17 (authorizing commissioner of revenue to promulgate rules and regulations to effect the purposes of the CPA). The IGR bolsters this Court’s conclusion that nothing in Chapter 44B expresses a legislative intent to make action on a CPC recommendation an all or nothing proposition. The fact that the town meeting’s reduction of a recommended appropriation may, as a practical matter, destroy the viability of a particular project is of no consequence, as the town meeting is free to reject a proposed project in the first instance. Cf. Young v. Westport, 302 Mass. 597, 599 (1939) (purpose of finance committee appointed pursuant to G.L. c. 39, § 16 is to enable citizens to ascertain necessity of contemplated expenditure of funds, and to provide assistance in form of report by

committee which investigated and studied matter so that citizens can vote intelligently at town meeting, but committee is advisory only and citizens are not required to adopt its recommendations). Accordingly, the Town is incorrect that the town meeting is prohibited by the CPA from appropriating less than the full expenditure recommended by the CPC.

Nor does the reduction of the CPC's recommended appropriation violate the Town's ByLaws. Article 78 of the Town of Marshfield General ByLaws is virtually identical to G.L. c. 44B, § 5(b)(2) in describing the duties of the CPC, but is silent on the role of the town meeting. Cf. G.L. c. 44B, § 5(d). Nothing in Article 78 mandates the all or nothing approach taken by the Town. Moreover, Article 56 of the ByLaws is entitled, "Capital Budget." Section 1 requires establishment of a Capital Budget Committee to assist and advise the Town on annual capital project appropriations. Section 6 of Article 56 provides:

No request for funding of a capital project shall appear on the Town Meeting Warrant except in a Capital Budget Article that has been developed in accordance with Sections 2 through 5 above: provided, however that nothing herein shall interfere with the right of any citizen, department, board or committee to seek to modify any Capital Budget Article at Town Meeting or place petition articles on the warrant consistent with the Rules of Town Meeting and consistent with the requirements of the Massachusetts General Laws.

The ByLaws thus acknowledge the right of the town meeting to modify a proposed appropriation in the context of the capital budget." As noted by DOR in Section VI.D of IGR No.00-209, the role of the CPC is "analogous to that of a capital planning committee." Accordingly, permitting a member of town meeting to propose a reduction in the amount of a CPC recommended appropriation does

*Similarly, Rule 12 of the Town Meeting Rules appears to contemplate amendments to appropriation articles, stating that "[c]onsideration of differing dollar amounts to be appropriated shall be voted on in descending order, the largest number first, until an amount gains approval."

not run afoul of the Town's ByLaws.

This Court acknowledges that the Town Moderator, on the advice of town counsel, has customarily and consistently disallowed motions to reduce CPC recommended appropriations, requiring an all or nothing vote on CPA proposals. The Town places great emphasis on this local tradition. However, where the determination that such a motion is "out of order" is based on an erroneous interpretation of a state statute, local tradition cannot prevail. Cf. MacKeen v. Canton, 379 Mass. at 520 (local tradition entitled to great weight in determining scope of local bylaw governing rules of debate at town meeting). The Town is free to amend its Town Meeting Rules and/or ByLaws to require that the town meeting vote on the CPC's recommendation on an all or nothing basis.

ORDER FOR JUDGMENT

For the foregoing reasons, it is hereby **ORDERED** that Defendants's Motion For Judgment On The Pleadings/Summary Judgment is **DENIED** and the Plaintiffs's Motion For Judgment On The Pleadings/Summary Judgment is **ALLOWED**.

It is hereby **DECLARED** and **ADJUDGED** that the Town Moderator cannot rule "out of order" a proposed motion from the floor of the town meeting to appropriate community preservation funds in an amount less than the dollar amount recommended by the Community Preservation Committee.


Richard J. Chin
Justice of the Superior Court

DATED: August 5, 2013