

THE LIMITS OF MUNICIPAL POWER

presented as part of

HANDLING TROUBLESOME ZONING ISSUES

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These materials address the limits of municipal power over land use, in three respects:

- Exemptions from a municipality's zoning authority for religious and educational uses, agricultural uses, and telecommunications.
- Municipal efforts to impose conditions or obtain benefits in the land use permitting process.
- Home Rule and other non-zoning authority.

I. EXEMPTIONS FROM ZONING

The Zoning Act carves out several exceptions to and limitations on municipalities' zoning authority. The statute extends varying degrees of protection to (1) agriculture, horticulture, floriculture and viticulture, (2) religious and certain educational uses, (3) child care facilities, (4) congregate living arrangements, (5) family day care homes, (6) mobile homes, (7) handicapped access ramps, and (8) solar energy systems. G.L. c. 40A, § 3. The first two of these areas are the most widely litigated. In addition, federal law limits zoning authority over telecommunications facilities.

A. Religious and Educational Uses

The Zoning Act provides as follows:

No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

G.L.c. 40A, § 3, second paragraph. This provision is known as the Dover Amendment, because its predecessor was enacted in 1950 in response to a Town of Dover zoning by-law. See The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 27 n. 10 (1979).

The two primary issues that arise under the Dover Amendment are (1) the uses that qualify as religious or educational and (2) the extent to which a municipality can regulate such uses.

1. What is a Religious Use?

In Needham Pastoral Counseling Center v. Board of Appeals of Needham, 29 Mass. App. Ct. 31 (1990), NPCC, a non-profit corporation, sought a building permit to remodel 864 square feet of space in a church for a counseling center. The church was in a residential zoning district that excluded business. The Appeals Court upheld the denial of a building permit because the proposal "resembles a mental health clinic more than religious activity". Id. at 31-32.

NPCC proposed that six counselors, who were independent contractors, would see 120 clients per week for \$35-50 per session. The counselors, ordained clergy or similarly trained, would counsel about a variety of non-religious life problems. However, a "layer of theological content" was folded into the secular psychological techniques. NPCC was open to the general public, without regard to their faith. Id. at 34-36.

The Appeals Court noted that "religious purpose" means "something in aid of a system of faith and worship, usually of a higher unseen power entitled to reverence". "Fidelity to a set of principles or rituals is a central characteristic." Although it defies precision, "what is religious requires a system of belief, concerning more than the earthly and temporal, to which the adherent is faithful". Id. at 33-34.

The court found that NPCC's services resembled those of any mental health center applying standard psychological and psychiatric techniques. It stated that:

Some theological, inspirational or spiritual content does not automatically imbue an activity with religious purpose. An element of religion subsidiary to the dominant secular use does not convert that use to one which is for religious purposes....

Id. at 36. The focus is on the use, rather than the sponsoring organization. Id. Accord, Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, 22 Mass. App. Ct. 83, 87 (1986).

The court concluded that NPCC's use was predominantly secular. The counseling was neither an activity of the church nor designed primarily for its parishioners, specific religious doctrine was subordinated and the faith of the counselors played no role in the sessions, and the counseling was offered to nonbelievers. Id. at 37. See also Worcester County Christian Communications, 22 Mass. App. Ct. at 88-89 (the use of radio facilities to broadcast four hours of devotional and inspirational material out of 18 hours of air time was not a religious purpose).

The court noted that the fee structure for the counseling resembled the charges of a group psychology practice more than a charge to defray institutional expenses. However, it gave "comparatively little weight" to that issue because religious institutions commonly charge for participation in daycare, scouting, sports, and a variety of other activities on their premises. The court also acknowledged that religious activity may involve those activities and other accessory uses. However, in order to qualify as an accessory use, the members and staff of the institution are generally involved in the activity. 29 Mass. App. Ct. at 37. Compare East Side Baptist Church of Denver, Inc. v. Klein, 487 P.2d 549, 550-551 (Colo. 1971) (the parking of two buses on church property in a residential zone was impermissible, because that use was not "incidental, customary to and commonly associated with" church activities, even though the buses were used solely for church and youth activities.).¹

Finally, the court summarily dismissed NPCC's claim that the denial of the building permit violated its Free Exercise rights. Because the counseling was not a religious use, constitutional protection of such uses was "academic". Id. at 38.

In Collins v. Melrose-Wakefield Hospital Ass'n, 4 LCR 178 (Land Court 1996), two churches in a residential zoning district, where commercial parking is prohibited, leased their parking lots to a hospital located a mile away for satellite parking for its personnel and visitors. The hospital leased 120 parking spaces from one church for \$18,000 per year, and 40 parking spaces from the other church for \$6,000 per year. It operated a shuttle bus to and from the churches from 5:50 a.m. to 7:00 p.m. One church treated the payments as rent in its accounting records, though the other called them donations.

The plaintiffs, homeowners abutting the churches, requested zoning enforcement against the hospital's use of the parking lots. After the Building Inspector and the Zoning Board of Appeals denied

¹ The fact that the entity is a non-profit corporation is irrelevant. Diocese of Buffalo v. Buczkowski, 112 Misc. 2d 336, 446 N.Y.S.2d 1015, affirmed, 90 App. Div. 2d 994, 456 N.Y.S.2d 336 (4th Dep't 1982) (handicapped care facility was charitable but not religious use, and was subject to zoning regulations like other charitable organizations).

relief on the ground that the parking was a religious use, the plaintiffs appealed to the Land Court.²

The court granted the plaintiffs summary judgment.³ It held that the parking arrangements do not involve "a system of belief, concerning more than the earthly and temporal, to which the adherent is faithful". 4 LCR at 180, quoting Needham Pastoral Counseling Center, 29 Mass. App. Ct. at 34. The court rejected the argument that the parking was an accessory religious use based on the churches' receipt of income. It concluded that:

Clearly churches and other religious institutions must raise funds to survive, but to endorse every fund raising activity of such institutions with the zoning cloak of "religious purpose" would enable religious groups to freely engage in business enterprises whenever and wherever they chose in derogation of the zoning ordinance.

Id.

The cases on property tax exemption under General Laws Chapter 59, Section 5 are consistent with these zoning cases.⁴ In United Church of Religious Science v. Board of Assessors of Attleboro, 372 Mass. 280 (1977), the court held that a church-owned commercial wire factory was not entitled to a tax abatement because its dominant use was not for religious purposes, even though the factory's net income was used solely for church purposes. Thus, benefit to a religious institution is insufficient to qualify a use as for religious purposes because the focus is on the use itself, not the benefit derived from it. See id.; Needham Pastoral Counseling Center, 29 Mass. App. Ct. at 36-37.

Although a variety of accessory uses can have a religious purpose, such a use cannot interfere with or dominate the religious use. In Assessors of Framingham v. First Parish in Framingham, 329 Mass. 212, 215-216 (1952), the SJC held that the occasional use of rooms in a parish building by secular organizations was primarily religious, because that use was incidental to and did not interfere with the predominate use for religious instruction and meetings of religious clubs. The Court upheld the conclusion of the Appellate Tax Board that a partial tax abatement on a building owned by an adjacent parish was justified to the extent the dominant use of rooms was for religious purposes.

2. What is an Educational Use?

In contrast to the paucity of zoning cases defining religious uses, there are a number of cases delimiting the exemption for educational uses. The courts have construed the term "educational purpose" under the Dover Amendment broadly. In language from an 1887 case, the Appeals Court has held that:

[e]ducation may be particularly directed to either the mental, moral or physical

² The lead author of these materials was counsel for the plaintiffs in the Land Court.

³ Summary judgment is appropriate to resolve whether an activity is a religious use under the Zoning Act because the meaning of the phrase "religious purposes" is a question of law for the court. Needham Counseling Center v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 33 (1990); Kurtz v. Board of Appeals of North Reading, 341 Mass. 110, 112 (1960).

⁴ Chapter 59, § 5 provides a tax exemption for houses of religious worship and structures with religious purposes. Cases addressing that issue provide an analogy for zoning disputes. M. Bobrowski, Handbook of Massachusetts Land Use and Planning Law § 4.6, p. 161 n. 11 (1993 & Supp. 1994); see, e.g., Assessors of Framingham v. First Parish in Framingham, 329 Mass. 212 (1952).

powers and faculties, but in its broadest and best sense it relates to them all.

The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 30 (1979) (citation omitted). Thus, the following cases, among others, have held uses exempt from zoning as educational:

- Watros v. Greater Mental Health and Retardation Association, Inc., 421 Mass. 106 (1995) (renovated barn for shelter and education for up to three mentally handicapped adults);
- Campbell v. City Council of Lynn, 415 Mass. 772 (1993) (group residence for elderly, mentally ill persons);
- Gardner-Athol Area Mental Health Ass'n v. Zoning Board of Appeals, 401 Mass. 12 (1987) (residential care facility operated by mental health association; the Dover Amendment does not require education to be the dominant purpose or primary activity);
- The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 30 (1979) (proposed lights and snack bar at a softball field);
- Caldeira v. Zoning Board of Appeals, 3 LCR 195 (Land Court 1995) (home for adolescent victims of sexual and/or physical abuse operated by non-profit educational corporation);
- Congregation of the Sisters v. Town of Framingham, 2 LCR 125 (Land Court 1994) (Framingham facility combining housing with training for single mothers, AIDS counseling, and assistance to homeless families in recovery from addiction); and
- Lasell College v. City of Newton, 1 LCR 80 (Land Court 1993) ("village" for the elderly, located on a college campus, that included 200 independent living units and an academic curriculum).

Of course, there are limits to the concept of an educational use. See, e.g., Whitinsville Retirement Society v. Northbridge, 394 Mass. 757, 760 (1985) (an "element of education" provided "only informally" and "gleaned from the interplay among residents of the nursing home community, is not within the meaning of 'educational purpose'").

3. How Much Can a Municipality Regulate a Religious or Educational Use?

As quoted above, the Dover Amendment permits a municipality to impose "reasonable regulations" on religious or educational uses concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.⁵

In The Bible Speaks, a religious school applied for special permits to convert three buildings to classrooms and dormitories, and building permits to erect light towers on a softball field and convert a nearby shed to a snack bar. The zoning by-law required a site plan and informational statement, imposed a height limit of two stories or 35 feet, and required a special permit for religious

⁵ It is unsettled whether a municipality may regulate aspects of a school or church besides those listed in the Dover Amendment, such as lighting. In one case, the Land Court held that the list of issues in the statute is exclusive.

and educational uses. 8 Mass. App. Ct. at 21 n. 5, 22 n. 6.

The court noted that:

Lenox may ... regulate the bulk of buildings on the plaintiff's campus and impose dimensional and parking requirements.... But the town may not, through the guise of regulating bulk and dimensional requirements..., proceed to "nullify" the use exemption permitted to an educational institution.

Id. at 30-31 (citation omitted). The court easily upheld the by-law limitations on height and bulk as reasonable regulations. However, it invalidated the requirements for a site plan and informational statement and for a special permit. Those requirements would enable the board to "subordinate the educational use to the board's planning goals", nullifying or seriously diminishing the school's entitlement to reasonable growth. In addition, they would enable the board to "exercise its preferences as to what kind of educational or religious denominations it will welcome", contrary to the basic intent of the Dover Amendment. Id. at 33.

In Trustees of Tufts College v. City of Medford, 415 Mass. 753 (1993), the Court applied setback, loading space, and parking space requirements to a library addition and underground parking garage. The Court described the Dover Amendment as striking a balance between "preventing local discrimination against an educational use" and "honoring legitimate [zoning] concerns". Id. at 757. It described the test as follows:

Because local zoning laws are intended to be uniformly applied, an educational institution ... will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project. The educational institution might do so by showing that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns.

Id. at 759. For example, if the ordinance required Tufts to "pave over significant open areas of the campus", it would be unreasonable because the proposed garage would provide adequate parking. Id. at n. 7. Excessive cost of compliance without significant advancement of municipal concerns might also be unreasonable. However, zoning requirements need not be drafted specifically for application to educational uses. Id. at 759-960.

Applying these standards, the Court upheld the application of the parking and loading space requirements to the library addition. It also upheld the setback requirement to the parking garage because there was "no particularized evidence ... as to the cost and difficulty of compliance". Id. at 762-764.

Finally, regarding future projects, the Court held that site plan and special permit provisions of the ordinance could not be applied to Tufts, though that issue was not raised on appeal. Id. at 765, citing The Bible Speaks. However, the parking, setback and dimensional requirements "do not facially discriminate against educational uses and are presumptively valid". Id.

Judge O'Connor filed a significant partial dissent. In his view, the Dover Amendment prohibits discrimination against religious or educational uses, but cannot be interpreted to favor them. Thus, neutral zoning requirements may be applied to religious and educational uses as long as they do not discriminate against those uses "either by expressed intention or in practical operation". Id. at 770.

The same day as Tufts, the Court also decided Campbell v. City Council of Lynn, 415 Mass. 772 (1993). In that case, landowners sought to renovate an existing non-conforming building on a 3,947 square foot lot for a group home, which is an educational use. The Court rejected the conclusions of the Land Court and the Appeals Court that, because the proviso in the Dover Amendment uses the term "may", zoning officials are free to disregard requirements that would normally apply. It reaffirmed that zoning requirements "are meant to be applied uniformly", and local official may not grant "blanket exemptions" to protected uses. Those officials:

may, however, on an appropriate showing, decide that facially reasonable zoning requirements concerning bulk and dimension cannot be applied to an educational use occupying a particular site because application of the requirements would improperly nullify the protection granted to the use, or because compliance with the requirements would significantly impede an educational use, in either instance without appreciably advancing municipal goals embodied in the local zoning law.

Id. at 778 (footnote omitted). The Court held that the by-law's bulk and dimensional requirements could not be applied to the group home proposal because they would effectively prevent the use. The premises "cannot be made to conform to any applicable bulk or dimensional requirements" because of the small lot size. Id. at 778. As a result, those requirements would "effectively deny the use of the premises for any conceivable educational purpose with no valid goal of municipal zoning regulation being served thereby". Id. at 779.

This time, three judges dissented. Judges Wilkins and O'Connor took the position that the local officials had not adequately analyzed whether the application of the bulk and dimension requirements would be unreasonable. One of the relevant factors was that the applicant had not shown that conforming sites in Lynn were not reasonably available. Id. at 782.

Judge O'Connor reiterated his dissent in Tufts. He would apply the neutral, non-discriminatory zoning provisions even if they would diminish or impede or prevent certain protected uses. Id. at 785.

The case law since Tufts and Campbell is sparse. In Community of Jesus, Inc. v. Cape Cod Commission, Civil Action No. 92-341 (Barnstable Superior Court, February 11, 1993), the Commission denied approval for a 55-foot church with a tower rising to 89 feet. The church would have had an "adverse visual impact on surrounding communities" and would have violated the height limit in the Orleans zoning by-law, among other problems. The applicant argued that the denial violated its Free Exercise rights.⁶

The court analyzed whether "the architecture of the proposed [church] is so 'freighted with religious meaning that it must be considered part and parcel of the [church's] religious worship...". Slip opinion, p. 8 (citation omitted). The court held that it was not. The applicant proffered symbolic and spiritual justifications for the height, but the court found three factors dispositive: (1) the applicant had several different possible designs for the church, including designs with a roof height of 45 feet, (2) its existing church was 29 feet high, and (3) a related organization in Canada

⁶ Because Community of Jesus was not a zoning case, the Dover Amendment was inapplicable. However, the issue is analogous.

In another analogous case, one court upheld the application of a landmarks law to St. Bartholomew's church in mid-town Manhattan, preventing the Church from razing its building and erecting an office building. St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2nd Cir. 1990). See also Flores v. City of Bourne, Texas, discussed in the text.

was planning a church with a similar floor plan but a roof height of only 47.5 feet and no central tower. Id., pp. 9-10.

One other case involved the applicability of a height limit under the Dover Amendment. Caldeira v. Zoning Board of Appeals for the City of Taunton, 2 LCR 195 (Land Court 1995), involved a proposed school in an existing building in a residential district. The building contained two stories and a basement. Because the land sloped, the basement was at ground level in the rear. The zoning ordinance limited height to 35 feet (with which the building complied) and 2 ½ stories.

The court held that the use was permissible, without deciding whether the building was 2 ½ or 3 stories. It looked to the actual use of the interior spaces, finding that "the three levels are necessary for the program to function properly". It saw "no valid goal of municipal zoning which would be served by reducing the useable space of locus and sharply curtailing, if not eliminating, the Program objectives". Moreover, it noted that the determination of whether the building was 2 ½ or 3 stories depended on a foot or so of grade adjacent to the basement floor. Under those circumstances, it found that the educational activities must prevail over the zoning requirement. Id. at 196.

4. The Religious Freedom Restoration Act.

In 1993, Congress enacted the Religious Freedom Restoration Act. RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability", except as the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1.

RFRA was enacted specifically to overturn the decision in Employment Division v. Smith, 494 U.S. 872 (1990), in which the Supreme Court held that the Free Exercise clause permits a state to prohibit sacramental peyote use and to deny unemployment benefits to persons discharged for such use, and to restore the previous compelling state interest test. § 2000bb(a)(4), (b)(1). Congress that restoring that test was necessary "to assure that all Americans are free to follow their faiths free from governmental interference". Flores v. City of Bourne, Texas, 73 F.3d 1352, 1359 (5th Cir.), cert. granted (1996) (application of landmarks regulation to historic church; upholding constitutionality of RFRA).

In Flores, the Fifth Circuit found RFRA constitutional because the statute applies only to laws or decisions that "substantially" burden the exercise of religion. Id. at 1361, 1363.⁷ The applicant has the burden of proof on that issue. Id.

The great majority of RFRA cases involve prison inmates. In the zoning arena, several courts have found no RFRA violation, though the cases are divided. Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F.Supp. 1554 (M.D. Fla. 1995) (granting summary judgment for City regarding food bank and homeless shelter); Germantown Seventh Day Adventist Church v. City of Philadelphia, Civil Action No. 94-1633, 1994 U.S. Dist. LEXIS 12163 (E.D. Pa., August 26, 1994) (granting summary judgment for City regarding application of parking requirement to church construction). As the court stated in Daytona Rescue Mission, the religious adherent must prove that the governmental action:

⁷ The Supreme Court has heard argument in Flores, and a decision is anticipated this summer. If the Court strikes down RFRA under the First Amendment Establishment Clause, that would call the constitutionality of the Dover Amendment into question. The SJC upheld the Dover Amendment against an Establishment Clause challenge long ago. Sisters of the Holy Cross of Mass. v. Brookline, 347 Mass. 486, 497-498 (1964).

burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates.

885 F.Supp. at 1559-1560 (citation omitted). But see Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994) (soup kitchen); Jesus Center v. Farmington Hills Zoning Board of Appeals, 554 N.W.2d 698 (Mich. App. 1996) (homeless shelter).

Though phrased in different terms, it appears that RFRA limits municipal zoning power over religious uses similarly to the Dover Amendment. Even assuming that the Supreme Court upholds RFRA under the Establishment Clause, the statute does not appear to change the zoning landscape in Massachusetts significantly.

B. Agricultural Uses

The Zoning Act provides that:

No zoning ordinance or by-law shall ... prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture.

c. 40A, § 3, first paragraph. This exemption raises two issues parallel to the ones discussed above under the Dover Amendment: (1) what is an agricultural, etc., use and (2) how far can a municipality regulate such a use?⁸

1. What is an Agricultural, Etc. Use?

The statute does not define "agriculture", but courts have looked to the "usual and accepted meaning" of the term and interpreted it to be consistent with the statute. See Building Inspector of Mansfield v. Curvin, 22 Mass. App. Ct. 401, 403 (1986); Steege v. Board of Appeals of Stow, 26 Mass. App. Ct. 970, 971-972 (1988).

Recently, the Appeals Court held that the term "agriculture" includes a slaughterhouse for livestock raised on the premises. Modern Continental Construction Co., Inc. v. Building Inspector of Natick, 42 Mass. App. Ct. 901 (1997) (rescript). The court looked to statutory and dictionary definitions of the term, which included "the activity of preparing animals for market". It decided that, following the "acceptably broad definitions of the word 'agriculture' ... a slaughterhouse used for the butchery of animals raised on the premises is primarily agricultural in purpose." Id. at 902. That conclusion rested on the connection of the slaughterhouse to the other agricultural uses at the premises:

The fact that an activity, such as slaughtering, can become an industrial or business use when removed from an agricultural setting does not mean that activity cannot be primarily agricultural in purpose when it has a reasonable or necessary relation to agricultural activity being conducted on the locus.

Id.

The Land Court has construed the terms agricultural and horticultural broadly to include the sale of Christmas trees and wreaths, in addition to other produce, at a farmstand. Prime v. Zoning Board of Appeals, 4 LCR 43 (Land Court 1996). The terms also have been held to encompass a landscaper's parcel used for holding and nurturing plant stock and general business operations. Viera v. Zoning Board of Appeals, 4 LCR 285 (Land Court 1996).

⁸ Agricultural use was addressed in more detail in Exemptions and Exceptions to the Zoning Act (MCLE, 1996).

By contrast, the agricultural or horticultural use exemption may be inapplicable where the activity did not occur at the site. See Building Inspector of Peabody v. Northeast Nursery, Inc., 418 Mass. 401 (1994) (business that sold trees and bushes nurtured elsewhere and delivered to the premises for sale did not qualify as agricultural or horticultural use). Similarly, in Prime, the Land Court held that certain products could not be sold at a farmstand if the use was to be exempt. For example, it noted that an agricultural/horticultural use does not include sales of garden tools, equipment and supplies, or the sale of bread unless the it contains fruit or produce grown and nurtured at the premises. Prime, 4 LCR at 45.

One of the subsidiary issues that arises under this exemption - again paralleling the issues under the Dover Amendment - is protection of uses ancillary to agriculture. In Henry v. Board of Appeals of Dunstable, 418 Mass. 841 (1994), the SJC held that the proposed removal of 300,000 - 400,000 cubic yards of gravel in order to prepare the parcel for the cultivation of Christmas trees is not incidental to that horticultural use, and therefore not exempt from a zoning earth removal by-law. It held that, in order to be exempt, the earth removal must be both "subordinate and minor in significance" in relation to the proposed agricultural use and "attendant or concomitant" to that use. Id. at 845 (citation omitted). The gravel removal in that case failed both parts of the test, even though the operation clearly was reasonably necessary to the construction of the proposed Christmas tree farm. Id. at 845.

2. How Much Can a Municipality Regulate an Agricultural Use?

Although most of the cases regarding agricultural uses address what constitutes an agricultural use, the Appeals Court addressed reasonable regulation in Tisbury v. Martha's Vineyard Commission, 27 Mass. App. Ct. 1204 (1989) (rescript). In Tisbury, farm owners applied for a permit to erect a greenhouse with a 4,000-gallon fuel tank to grow hydroponic fruits and vegetables year-round. The zoning by-law limited fuel storage tanks in residential districts to 500 gallons. Although the Martha's Vineyard Commission approved the application subject to various conditions, the building inspector refused to issue the permit and, with the planning board, brought suit challenging the Commission's decision. The farm owners farm intervened and claimed the agricultural use exemption under Section 3.

The Appeals Court affirmed a judgment that the zoning by-law would unreasonably regulate the use of the property for agricultural purposes. It concluded that:

While the 500 gallon limitation, applicable to single family dwellings, does not explicitly prohibit the construction of a greenhouse, given the climate in New England and the nature of the agricultural use, its practical effect is a prohibition.

Id. at 1206.

C. Telecommunications

The Telecommunications Act of 1996 permits limited regulation of personal wireless service facilities by state or local government. However, such regulation:

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c). The Act also requires a state or local government to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable

period of time". Id.

The Telecommunications Act overrides zoning if that zoning would prohibit or unreasonably limit the location of communications towers. In response, several Massachusetts towns have adopted moratoriums on towers in order to buy time to consider how to accommodate these facilities. In general, a moratorium is a permissible municipal response to an important development issue. See Collura v. Town of Arlington, 367 Mass. 881 (1975) (upholding a two-year moratorium on construction of apartment buildings). However, the provision of the Telecommunications Act quoted above may invalidate such long moratoriums on communications towers.

The Attorney General has disapproved a one-year moratorium adopted in Wellfleet on the ground that it has the effect of prohibiting such facilities. In reaching that conclusion, the Attorney General distinguished Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036 (1996), in which the court denied a preliminary injunction against the enforcement of a six-month moratorium, based in part on the fact that the ordinance effectively delayed the City's issuance of a permit to Sprint by only three months.

II. HOME RULE POWERS

Until 1966, it was an "elementary principle" that:

a town is merely a subordinate agency of State government created for convenient administration and has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges.

Atherton v. Selectmen of Bourne, 337 Mass. 250, 255-256 (1958). Municipalities had no power to enact bylaws regulating the use of land without explicit legislative authorization in the form of a general or special statute. It was in this context that the Legislature initially delegated zoning power to cities and towns.

Outside of zoning, Chapter 40, Section 21 lists a variety of areas in which cities and towns may enact ordinances and bylaws. That list authorizes certain regulation of land use, such as bylaws regulating earth removal. In addition, some statutes that directly regulate particular activities also authorize supplemental regulation by local bylaw. E.g., Chapter 140, Sections §§ 59-60 (second-hand motor vehicle sales).

In 1966, Massachusetts voters amended the Home Rule provisions of the state Constitution, as follows:

Any city or town may, by the adoption, amendment or repeal of local zoning ordinances or by-laws, exercise any power or function which the general court has the power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court

Mass. Const. Amend. Art. 89, § 6. Arguably, this constitutional amendment rendered some of the statutes authorizing local bylaws superfluous, although most of them, including Chapter 40, Section 21, remain in effect.

The Zoning Act, Chapter 40A, was comprehensively revised in 1975, and it includes important exemptions and limitations on local zoning power. See Section I, above. The statute probably would be considered sufficiently comprehensive that it occupies the field. A municipality's

efforts to exercise traditional zoning powers

under its home rule authority probably would be "inconsistent with" Chapter 40A, and therefore invalid.

However, it can be difficult to distinguish zoning from non-zoning regulation. In Rayco Investment Corp. v. Board of Selectmen of Raynham, 368 Mass. 385 (1975), the SJC rejected the town's attempt to regulate new mobile home parks without complying with the procedural requirements of the Zoning Act. The SJC treated the bylaw as a zoning enactment because (1) the bylaw totally prohibited the use, which ordinarily is done through zoning, and (2) the specific historical context in which the bylaw was adopted (including its inclusion within its printed Zoning Bylaw) suggested that it was intended as such.

Cases involving several different areas of regulation since Rayco limit its holding to the extraordinary facts of that case. In Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979), the plaintiff challenged a wetlands bylaw adopted under the "home rule" amendment to the Massachusetts Constitution, alleging that it conflicted with the Zoning Act. The Court rejected that claim, stating that the bylaw in Rayco:

was to be viewed as a zoning regulation due to the historical context in which it had been enacted. We observed in that case that for a considerable number of years the town had been governed by a zoning by-law which "purported to cover [the] subject [of trailer parks] in a comprehensive fashion," and we thus determined that the challenged by-law was most appropriately viewed as an amendment to that enactment.... In the case presently before us, no evidence has been introduced that there is or ever has been a comprehensive zoning bylaw governing the wetland activities proposed by the plaintiffs. Rayco, moreover, nowhere suggests that municipal regulations that simply overlap with what may be the province of a local zoning authority are to be treated as zoning enactments which must be promulgated in accordance with the requirements of G.L. c. 40A.

Id. at 14. The court refused to apply Rayco to the wetlands protection bylaw, even though similar restrictions might have been incorporated in a zoning enactment. As a result of Lovequist, more than 100 Massachusetts municipalities have adopted non-zoning wetlands protection ordinances and bylaws.

In American Sign & Indicator Corp. v. Framingham, 9 Mass. App. Ct. 66 (1980), the Appeals Court distinguished Rayco similarly. In that case, the plaintiff challenged a general bylaw regulating signs on the ground that Framingham had not followed zoning procedures in its adoption. The court followed Lovequist rather than Rayco, noting that "not all ... bylaws that regulate land use are zoning laws and that only the latter need conform with Zoning Enabling Act." Id. at 68. It stated that:

There is no evidence that there is or ever has been a comprehensive zoning bylaw covering signs in Framingham, and the case at bar is, therefore, distinguishable from [Rayco].

Id. at 69.

The existence of statutory authorization under Chapter 40 or otherwise before 1966 supports the validity of non-zoning bylaws regulating land use. See Serdinski v. Town Manager of Southbridge (Worcester Superior Court), affirmed, 40 Mass. App. Ct. 1124 (1996) (Rule 1:28 order) (upholding application of non-zoning by-law requiring screening of auto junkyard, where such by-laws are authorized by c. 140, § 59). For example, towns have the power to regulate earth removal

under both the Zoning Act (Chapter 40A) and the general enabling statute (Chapter 40, Section 21, Clause (17)). A bylaw adopted under the latter statute can be applied to preexisting, lawful earth removal operations, even though such operations would be grandfathered for zoning purposes. Byrne v. Middleborough, 364 Mass. 331, 334 (1973); Kingston v. Hamilton, 2 Mass. App. Ct. 773, 774 (1975). See also Melville v. Town of Plympton, 1 LCR 172 (Land Court 1993) (protection of cranberry bogs as agricultural use under Zoning Act does not exempt landowner from requirements of non-zoning earth removal by-law). Similarly, towns also may adopt wetlands bylaws as zoning bylaws, Golden v. Board of Selectmen of Falmouth, 358 Mass. 519 (1970), or as non-zoning home rule bylaws. Lovequist, 379 Mass. at 12-15.

A town even may enact earth removal bylaws under both sources of authority, obtaining the benefits of both. Toda v. Board of Appeals of Manchester, 18 Mass. App. Ct. 317, 320 (1984). In such circumstances, the town may use its zoning bylaw to prohibit earth removal in some zoning districts, while using its general bylaw to regulate earth removal operations where they are permitted. McIntyre v. Board of Selectmen of Ashby, 31 Mass. App. Ct. 735, 740-742 (1992).

These cases, including Rayco, all adhere to the principle that a town's zoning bylaw and its general bylaws should be construed together in favor of the validity of each. See, e.g., Jaworski v. Earth Removal Board of Millville, 35 Mass. App. Ct. 795, 798-799 (1994) (failure of zoning bylaw to list earth removal as a permitted use is not interpreted to bar that activity in all districts, where such an interpretation would nullify non-zoning bylaw). Even Rayco can be viewed as harmonizing Raynham's trailer bylaw with its zoning scheme.

How far a town may go in regulating land use outside of its zoning bylaw remains to be seen. Certain kinds of regulations, such as dimensional controls on the siting and size of buildings, or the regulation of uses by district, seem so inextricably connected with the zoning power that it is difficult to imagine the SJC's permitting them as home rule efforts. At the same time, however, zoning enactments themselves have gone farther afield from traditional areas, expanding with site plan review and other mechanisms into such issues as landscaping, lighting, parking, drainage and stormwater control, and wetlands and aquifer protection. In these areas, the zoning and home rule powers overlap significantly, and non-zoning regulation seems generally permissible.⁹

III. CONDITIONS AND EXACTIONS

If a municipal board grants a variance or special permit, it may impose conditions on the project. Certain conditions, such as those requiring the applicant to dedicate or convey land or easements, may raise "takings" issues under the Fifth Amendment. See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994). In brief, Dolan established a two-part test: "whether an essential nexus exists between a permit condition and a legitimate state interest" and, if so, "whether the condition demanded is roughly proportional to the need of the development". Annesse v. Billerica Department of Public Works, Civil Action No. 94-6499 (Middlesex Superior Court, January 8, 1997), printed in 6 Mass. L. Rptr. 493, 495 (April 28, 1997). However, there are several non-constitutional limitations on the power of municipal boards to impose conditions.

First, a board may not grant a permit subject to the resolution of important issues in the future, or by a different entity. For example, in Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 620-622 (1986), the Appeals Court annulled a special permit for an earth removal

⁹ Of course, municipalities' non-zoning authority may be limited by constitutional considerations and other statutes. For example, the Telecommunications Act limits municipal authority to regulate telecommunications facilities on a non-zoning basis, as well as zoning.

operation that included the following condition:

Before commencing any operation, a detailed plan of dust control must be submitted to the Board for approval.

The court noted that the bylaw required a finding that "satisfactory dust control provisions" had been established, and that dust was central to the abutters' opposition to the permit. In that context, it held that:

a permit granting authority in a zoning case (e.g., a board of appeals) may not delegate to another board, or reserve to itself for future decision, the determination of an issue of substance, i.e., one central to the matter before the permit granting authority.

See also Chambers v. Building Inspector of Peabody, 40 Mass. App. Ct. 762 (1996) (unlawful delegation of site plan review to community development department). However, a board may require adherence to standards that are "cognizable and reasonably definite", such as roadway specifications. See Miles v. Planning Board of Millbury, 29 Mass. App. Ct. 951, 952 (1990) (rescript).

Second, a board may not require actions that require the approval of another agency or are otherwise outside the applicant's control. Sullivan v. Planning Board of Acton, 38 Mass. App. Ct. 918, 920 (1995) (rescript), citing V.S.H. Realty, Inc. v. Zoning Board of Appeals of Plymouth, 30 Mass. App. Ct. 530, 534 (1991). In each of these cases, the court held that conditions requiring the applicant to widen a state highway were invalid, because such action requires approval by the Massachusetts Highway Department.

Third, a board may not impose conditions that are not concerned with the land or the protection of the surrounding community. For example, it may not deny a permit or impose conditions to punish the applicant for past violations of the zoning bylaw or to prevent potential future violations. See Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148, 156-157 (1977); Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 565, 571 (1996). In Solar v. Zoning Board of Appeals of Lincoln, 33 Mass. App. Ct. 398, 402 (1992), the Appeals Court held that the board exceeded its authority to insert a "sunset" condition in a special permit allowing the continuation of an accessory apartment in the applicant's home. The court did not rule that such a condition was impermissible per se, only that it was contrary to the terms of the original permit.

The recent decision in Annesse v. Billerica Department of Public Works, Civil Action No. 94-6499 (Middlesex Superior Court, January 8, 1997), printed in 6 Mass. L. Rptr. 493 (April 28, 1997), summarizes several of the raised by a municipal condition on development. In that case, a non-zoning "adequate access by-law" required developers of land abutting unaccepted ways to improve the ways to DPW standards, with a provision for a waiver of those standards if the way met acceptable construction standards. Several developers challenged the by-law as unconstitutional and as exceeding the town's home rule authority.

The court granted summary judgment upholding the by-law. On the constitutional claims, it found an "essential nexus between adequate access and the ability of the town to protect its residents", and it held that the by-law "is roughly proportional to the needs of the plaintiffs' lots". Id. at 495, citing Dolan. The required improvements would improve access to the plaintiffs' lots, a legitimate municipal concern, and the costs of the improvements were calculated using industry-wide standards and qualified engineering opinions.

The court then rejected the plaintiffs' claims that the by-law was preempted by various state statutes and therefore exceeded the town's home rule authority. It held that the by-law was not inconsistent with Chapter 79 (eminent domain), Chapter 79A (relocation assistance), Chapter 80 (betterments), Chapter 80A (judicial proceedings to take property for public purposes), Chapter 82 (town highways), Chapter 84 (rights of proprietors of private ways or bridges to seek contributions for maintenance), or Chapter 40, Section 6N (allowing town to make temporary repairs to private ways).