



Current Developments in Municipal Law

Massachusetts Court Cases Book 2

2015

TABLE OF CONTENTS

Massachusetts Court Cases

Book 2

Massachusetts Appellate Court Cases

	<u>Page</u>
<u>1148 Davol Street LLC v. Mechanic’s Mill One, LLC</u> , 86 Mass. App. Ct. 748 (December 12, 2014) – <i>Municipal Corporations – Real Property – Adverse Possession</i>	1
<u>Bistany v. Civil Service Commission</u> , Mass. App. Ct., No. 14-P-849, Rule 1.28 Unpublished Decision (September 10, 2015) – <i>Police – Injury Line of Duty – Fitness for Duty – Refusal to Undergo Diagnostic Procedure – Civil Service – Termination</i>	7
<u>Cape Cod Shellfish & Seafood Company, Inc. v. City of Boston</u> , 86 Mass. App. Ct. 651 (November 12, 2014) – <i>Taxation – Property Taxation – Exemption – Abatement – Leased Property – Tenancy at Sufferance – Massachusetts Port Authority</i>	9
<u>City of Somerville v. Commonwealth Employment Relations Board</u> , 470 Mass. 563 (February 3, 2015) – <i>Municipal Corporations – School Committee – Public Employment – Retirement Benefits – Group Insurance – Collective Bargaining</i>	15
<u>City of Springfield v. Local Union No. 648, International Association of Firefighters, AFL-CIO</u> , 88 Mass. App. Ct. 1 (August 13, 2015) – <i>Firefighter – Appointment – Authority of Arbitrator – Civil Service – Collective Bargaining</i>	22
<u>City of Worcester v. Civil Service Commission</u> , 87 Mass. App. Ct. 120 (February 26, 2015) – <i>Police – Civil Service – Termination of Employment – Judicial Review</i>	27
<u>Community Involved in Sustaining Agriculture, Inc. v. Board of Assessors of Deerfield</u> , 86 Mass. App. Ct. 1119, Rule 1.28 Unpublished Decision (November 10, 2014) – <i>Property Taxation – Exemption – Charitable Organization</i>	32
<u>DaRosa v. City of New Bedford</u> , 471 Mass. 446 (May 15, 2015) – <i>Municipal Corporations – Public Records – Attorney Work Product – Attorney-Client Relationship – Privileged Communication – Civil Practice – Discovery</i>	34
<u>Doe v. City of Lynn</u> , 472 Mass. 521 (August 28, 2015) – <i>Massachusetts Constitution – Home Rule Amendment – Municipal By-laws and Ordinances – Preemption – Sex Offender</i>	47

	<u>Page</u>
<u>Easthampton Savings Bank v. City of Springfield</u> , 470 Mass. 284 (December 19, 2014) – <i>Massachusetts Constitution – Home Rule Amendment – Municipal By-laws and Ordinances – Preemption – Mortgage Foreclosure – Massachusetts Oil and Hazardous Material Release Prevention Act – State Sanitary Code – Municipal Fees</i>	56
<u>Galenski v. Town of Erving</u> , 471 Mass. 305 (April 17, 2015) – <i>Municipal Corporations – School Committee – Public Employment – Retirement Benefits – Group Insurance Premiums</i>	67
<u>Goduti v. City of Worcester</u> , 87 Mass. App. Ct. 355 (May 13, 2015) – <i>Property Taxation – Assessment – Record Title – Mortgage Foreclosure</i>	74
<u>Groton-Dunstable Regional School Committee v. Groton-Dunstable Educators Association</u> , 87 Mass. App. Ct. 621 (July 20, 2015) – <i>Municipal Corporations – School Committee – Professional Teacher Status – Termination of Employment – Education Reform Act – Arbitration – Collective Bargaining</i>	78
<u>McGrath v. Town of Foxborough</u> , 87 Mass. App. Ct. 1133, Rule 1.28 Unpublished Decision (June 26, 2015) – <i>Police – Student Officer – Wages – Collective Bargaining Agreement</i>	81
<u>Mendonca v. Civil Service Commission</u> , 86 Mass. App. Ct. 757 (December 12, 2014) – <i>Veterans’ Tenure Act – Disabled Veterans’ Act – Civil Service – Provisional Employee – Termination of Employment</i>	84
<u>Murray v. Town of Hudson</u> , 472 Mass. 376 (August 3, 2015) – <i>Municipal Corporations – Parks – Massachusetts Tort Claims Act – Presentment of Claim – Notice to Municipality – Governmental Immunity – Recreational Use Statute – Interscholastic Athletics – Duty of Care – Negligence</i>	91
<u>Ouellette v. Contributory Retirement Appeal Board</u> , 86 Mass. App. Ct. 396 (September 30, 2014) – <i>Municipal Corporations – Public Employment – Superannuation Retirement – Accidental Disability Retirement Allowance – Member in Service – Member Inactive</i>	98
<u>Russell Block Associates v. Board of Assessors of Worcester</u> , 88 Mass. App. Ct. 351 (September 16, 2015) – <i>Real Estate Tax – Classification of Property – Abatement</i>	103
<u>Touher v. Town of Essex</u> , 87 Mass. App. Ct. 837 (August 10, 2015) – <i>Real Property – Lease – Contract – Personal Property – Ownership – Landlord and Tenant – Fixture – Unjust Enrichment</i>	109

	<u>Page</u>
<u>Town of Athol v. Professional Firefighters of Athol, Local 1751, I.A.F.F.</u> , 470 Mass. 1001 (October 23, 2014) – <i>Firefighter – Health Insurance Benefits – Copayments – Collective Bargaining Agreement – Arbitrator’s Authority</i>	115
<u>Town of Brookline v. Leonard Golder</u> , 87 Mass. App. Ct. 1121, Rule 1.28 Unpublished Decision (May 15, 2015) – <i>Tax Taking – Foreclosure of Right of Redemption – Notice – Due Process – Payment Plan</i>	117
<u>Vitali v. Reit Management & Research, LLC.</u> , 88 Mass. App. Ct. 99 (August 21, 2015) – <i>Labor – Employment – Wages – Overtime Compensation</i>	118
<u>Massachusetts Land Court Case</u>	
<u>Higginbottom v. City of Boston</u> , Land Court Misc. No. 271339 (February 17, 2015) – <i>Tax Taking – Foreclosure of Right of Redemption – Adverse Possession – Interruption of Adverse Use</i>	128

1148 DAVOL STREET LLC vs. MECHANIC'S MILL ONE LLC.

No. 13-P-1985.

APPEALS COURT OF MASSACHUSETTS

86 Mass. App. Ct. 748; 21 N.E.3d 547; 2014 Mass. App. LEXIS 165

**September 4, 2014, Argued
December 12, 2014, Decided**

PRIOR HISTORY: [***1]

Bristol. CIVIL ACTION commenced in the Superior Court Department on April 8, 2008.

The case was heard by *Renée P. Dupuis, J.*

HEADNOTES

**MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES**

Adverse Possession and Prescription. Municipal Corporations, Adverse possession. Real Property, Adverse possession.

This court concluded that *G. L. c. 260, § 31*, has no direct application to an action between two private parties involving an adverse possession claim .

Discussion of the common-law rule that prescriptive rights may not be claimed against the sovereign ; discussion both of the statutory abrogation of that rule and of case law holding that a tax taking by itself did not interrupt the continuity of adverse use for purposes of claiming prescriptive rights; finally, discussion of *G. L. c. 260, § 31*, which added a general proviso (to the statutory abrogation of the common-law rule) greatly expanding the categories of public property not subject to any limitations period in land recovery actions brought by the Commonwealth or its subdivisions.

This court concluded that a private record owner of once-public land opposing an adverse possession claim may not invoke *G. L. c. 260, § 31*, as a defense.

COUNSEL: *Arthur D. Frank, Jr.*, for the defendant.

John M. Sahady for the plaintiff.

JUDGES: Present: Cohen, Meade, & Milkey, JJ.

OPINION BY: MILKEY

OPINION

[**548] MILKEY, J. At issue in this appeal is the ownership of a strip of land in Fall River. The defendant was the record owner of the disputed property, which the plaintiff claimed based on adverse possession. The parties agree that the nature and length of the plaintiff's use of the land generally was sufficient to establish title by adverse possession. The only contested issue is one of law: whether the plaintiff may count the time during which title to the land was held by one of the defendant's predecessors-in-title, the city of Fall River (city), toward the requisite twenty-year period [*749] of continuous adverse use. Relying on *G. L. c. 260, § 31*, the defendant argues that the plaintiff's adverse possession claim did not begin to run until the city transferred the property to a private party. In a thoughtful decision issued after a trial on stipulated facts, a Superior Court judge rejected this argument as a matter of law. She ruled that a private record owner of once-public land opposing an adverse possession claim cannot invoke *G. L. c. 260, § 31*, as a defense. We [***2] agree and therefore affirm.

1. *Background.* By 1975, the city of Fall River had acquired a parcel of land located at 1082 Davol Street in Fall River (Mechanic's Mill parcel).¹ The property included "a large building [that] had been used for manufacturing purposes." The record does not reveal what actual use the city itself made of the parcel, but the parties stipulated that the city "held" the property "for a public purpose as defined in Chapter 260, *Section 31* of the General Laws." In 1989, the city sold the Mechanic's Mill parcel to a private corporation. Since then, the property has continued in private ownership, and it is now owned by defendant Mechanic's Mill One LLC (record owner).

1 The facts are drawn from the parties' bare bones stipulation, even though some of the stipulated facts appear somewhat at variance with documents referenced in the stipulation. In any event, the discrepancies are not material.

In 1975, Paul and Albert Berube acquired the property at 1148 Davol Street, which lies adjacent to the Mechanic's Mill parcel. After purchasing that property, the Berubes began to use as their own a strip of the Mechanic's Mill parcel -- totaling approximately 25,000 square feet in [***3] size -- that lies along the boundary of the two properties.² The parties stipulated that the Berubes and their successors-in-title "exercised undisturbed dominion over the [disputed strip] which was actual, open, notorious, and adverse to the claims of all others, and [that it] continued for thirty-two (32) years, namely from 1975 to 2007." After plaintiff 1148 Davol Street LLC acquired the Berubes' parcel in 2007, a dispute over the ownership of the strip ensued. This action followed in 2008.

2 The stipulation does not flesh out what the actual adverse use entailed. The verified complaint alleged that the Berubes paved the area, cordoned it off with a fence and other means, and used it for parking.

2. *Discussion.* "A party claiming title to land through adverse possession must establish actual, open, exclusive, and

nonpermissive use for a continuous period of at least twenty years." *Totman v. Malloy*, 431 Mass. 143, 145, 725 N.E.2d 1045 (2000). As noted, the only issue in dispute is whether the plaintiff can count toward that twenty- [*750] year period the time that title to the Mechanic's Mill parcel was held by the city. If the adverse possession "clock" did not start until the city transferred the property [***4] to a private party in 1989, then it is undisputed that the twenty-year period had not fully run when this action was filed. Therefore, as the parties agree, the [**549] resolution of the legal issue before us is dispositive of the dispute.

To support its argument, the record owner seeks to invoke *G. L. c. 260, § 31*. That section is a statute of limitations that governs "action[s] for the recovery of land ... commenced by or in behalf of the commonwealth."³ As the plaintiff points out, the current action between two private parties indisputably is not an action "commenced by or in behalf of the commonwealth." The statute therefore has no direct application here. Viewed in its best light, the record owner's argument rests not on § 31's direct application, but on the statute's potential interaction with background common-law principles. In order to evaluate the validity of such arguments, we need to examine § 31 in historical context.

3 In its current form, *G. L. c. 260, § 31*, inserted by St. 1987, c. 564, § 54, reads in full as follows:

"No action for the recovery of land shall be commenced by or in behalf of the commonwealth, except within twenty years after its right or title [***5] thereto first accrued, or within twenty years after it or those under whom it claims have been seized or possessed of the premises; but this section shall not apply to the province lands in the town of Provincetown lying north and west of the line fixed by section twenty-five of chapter ninety-one, to the Back Bay lands, so called, in Boston, or to any property, right title or interest of the commonwealth below high water mark or in the great

ponds; provided, further, that this section shall not bar any action by or on behalf of the commonwealth, or any political subdivision thereof, for the recovery of land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose" (emphasis supplied).

a. *The common law rule.* At common law one could not claim prescriptive rights against the sovereign. *Attorney Gen. v. Revere Copper Co.*, 152 Mass. 444, 449-450, 25 N.E. 605 (1890). This principle was embodied in the maxim "nullum tempus occurrit regi." *Id.* at 449. The United States Supreme Court once observed that this "ancient rule of the common law, that time does not run against the State ... has been settled for centuries, and is supported by all courts [***6] in all civilized countries." *Armstrong v. Morrill*, 81 U.S. (14 Wall.) 120, 145, 20 L. Ed. 765 (1872) (*Armstrong*). This axiom raised the question of what rules should apply where the land that is the subject of an adverse possession claim is private land that was formerly held by a State, [*751] and where the adverse use bridged the change in ownership. Under the common law, the party claiming adverse possession could not count toward the applicable limitations period the time he adversely occupied the land while title was held by the State. *Id.* at 144, 145, citing *United States v. Hoar*, 26 F. Cas. 329, F. Cas. No. 15373 (C.C.D. Mass. 1821) (No. 15,373). *Lindsey v. Lessee of Miller*, 31 U.S. (6 Pet.) 666, 673, 8 L. Ed. 538 (1832). Instead, adverse possession began to run only when the land was transferred into private hands. See *id.* at 146.⁴

4 *Armstrong* provides a vivid illustration of this principle. Long after the party claiming title by adverse possession had begun its adverse use, the Commonwealth of Virginia gained title to the property by operation of law when the record owner failed to pay applicable taxes. 81 U.S. at 133. The record owner eventually redeemed title. *Id.* at 137. The adverse use in fact continued throughout, lasting for [***7] an uninterrupted period that far exceeded the fourteen-year limitations

period then applicable in Virginia. *Id.* at 144. Nevertheless, the Court ruled, as a matter of law, that because no adverse possession could run against the State, the State's holding title by itself broke the adverse possessor's "continuity of possession," and the applicable limitations period began to run only when the record owner reclaimed his title. *Id.* at 146, citing *Hall v. Gittings' Lessee*, 2 H. & J. 112 (Md. 1807).

[**550] b. *The 1835 statute.* In Massachusetts, the common-law principle that one cannot obtain title to public lands by adverse possession was superseded by statute enacted in 1835. *Attorney Gen. v. Revere Copper Co.*, 152 Mass. at 450 (citing R.S. c. 119, § 12). Under that enactment, the Commonwealth was held to the same limitations period that applied to real estate recovery actions brought by private parties. As a result, "a title by disseisin [could] be acquired against the Commonwealth as readily as against a private person." *Ibid.* Even though the statute did not include an express reference to the Commonwealth's "subdivisions" until 1987, it has long been interpreted as applying to cities and towns [***8] in addition to the Commonwealth. *Inhabitants of Cohasset v. Moors*, 204 Mass. 173, 178, 90 N.E. 978 (1910).

At least on its face, the 1835 statute applied to all Commonwealth lands without exception. However, the statute underwent modest modifications in 1852, 1854, and 1867, all of which exempted certain limited categories of property from the statute's reach.⁵

5 In 1852, the Legislature expressly repealed the 1835 statute with respect to its application to the Commonwealth's interest in certain "lands or flats" in the Back Bay area of Boston, and it stated that "no adverse possession or occupation [of the Back Bay lands] ... for any period of time, shall be sufficient to defeat or divest the title of the Commonwealth therein." St. 1852, c. 253, §§ 1, 2. In 1854, the statute was amended further to exempt "all the Province lands within the town of Provincetown," through language that declared the specified lands to be free from

claims of adverse possession. St. 1854, c. 261, § 8. These amendments were eventually codified in the general statutes of 1860, G. S. c. 154, § 12. The statute was amended once more in 1867 to exclude from adverse possession the "great ponds" and rights in waterfront property [***9] below the high-water mark. St. 1867, c. 275, § 1.

[*752] With that statutory framework in place, the Supreme Judicial Court eventually had occasion to consider whether a tax taking interrupted a third party's otherwise continuous adverse use. *Harrison v. Dolan*, 172 Mass. 395, 52 N.E. 513 (1899) (*Harrison*). Because Massachusetts generally had abrogated the axiom that time cannot run against the sovereign, the court declined to adhere to the common-law counting rules recognized in *Armstrong*, 81 U.S. at 145, and similar cases, at least in the context in which the case was presented. In *Harrison*, authored by Justice Holmes, the court reasoned that "such cases have no application to this case, if for no other reason, because the statute runs against the Commonwealth as well as against private persons."⁶ Thus, the court held that the tax taking by itself did not interrupt the continuity of the adverse use.

⁶ The court in *Harrison* also distinguished *Armstrong* on the ground that there, Virginia had held title to the land by operation of law, while here, "the commonwealth never had even a momentary title to the land." *Harrison*, 172 Mass. at 396. The court noted that some argument could be made that had the tax taking proceeded [***10] to foreclosure, this would restart the adverse possession clock, but declined to reach this "more subtle argument." *Ibid*. Almost a century later, the court faced the reserved question in a case in which the land at issue had been foreclosed upon but was still held by the municipality. *Sandwich v. Quirk*, 409 Mass. 380, 383, 566 N.E.2d 614 (1991). The court declined to resolve the question of whether a subsequent change in the law exempted the city from being subject to the twenty year limitations period (see note 7, *infra*), but held that "[t]he statute of limitations starts to run against a municipality, if at all, when it takes adversely possessed land for nonpayment of taxes." *Id.* at 385.

c. *The 1987 amendment.* Subject to the minor amendments mentioned above, the 1835 statute eventually was recodified [***551] as *G. L. c. 260, § 31*, and it lay unmodified until 1987. As the record owner accurately highlights, the 1987 amendment was significant. See St. 1987, c. 564, § 54 (inserting the language in *G. L. c. 260, § 31*, highlighted in note 3, *supra*). Specifically, while keeping intact the then-existing statutory language, the Legislature added a general proviso that greatly expanded the categories of public property [***11] not subject to any limitations period in land recovery actions brought by the Commonwealth or its subdivisions. That proviso applies not only to land put to various enumerated environmental [*753] and recreational uses, but also more generally to land held for "other public purpose[s]." We have interpreted the "other public purpose" language broadly. See *Aaron v. Boston Redev. Authy.*, 66 Mass. App. Ct. 804, 808, 850 N.E.2d 1105 (2006) (redevelopment authority not barred from recovering land it held for urban renewal project notwithstanding a private party's having adversely occupied the land for more than twenty years).⁷

⁷ Compare *Sandwich v. Quirk*, 409 Mass. at 382 & n.6, 566 N.E.2d 614 (noting, without resolving, the question whether land obtained by municipality through tax taking is held for "public purpose" within meaning of *G. L. c. 260, § 30*).

d. *Evaluating the record owner's arguments.* In light of the sweeping nature of the 1987 amendment, the record owner argues that the Legislature broadly intended that State or municipal "land put to a 'public purpose' could never be subject to adverse possession." On this basis, it argues that the limitations period cannot run while the property is held by a public [***12] party against whom adverse possession cannot accrue. In effect, the record owner is arguing that the 1987 amendment has brought us full circle back to a legal regime under which, at least as a general matter, time cannot run against the sovereign.

Although characterizing public lands as now being incapable of being subject to adverse possession is in some respects a tempting shorthand, it is not strictly speaking accurate. Nothing in the statutory language immunizes such lands from having an adverse possession claim begin to accrue during the period of public ownership. Nor does the new language manifest a wholesale embrace of the superseded common-law axiom that time cannot run against the sovereign (the doctrinal foundation on which *Armstrong* is based).⁸ Rather, the language signals a Legislative intent that adverse possession claims involving public property be treated merely as a limitations issue governed by statute.⁹

8 Unlike the amendments to the limitations period enacted during the Nineteenth Century, see note 5, *supra*, the 1987 amendment did not repeal the 1835 statute as it applied to the exempted properties, nor did it abrogate the Commonwealth's waiver of sovereign immunity. [***13] Indeed, in form, the new proviso language is stated merely as an exception to the general rule that the Commonwealth is subject to the same twenty-year limitation period as private parties (albeit an exception that may, as a practical matter, "swallow the rule").

9 We acknowledge the interpretive principle that radical departures from the common law are not to be "lightly inferred." See, e.g., *Passatempo v. McMenemy*, 461 Mass. 279, 290, 960 N.E.2d 275 (2012). However, the Legislature unquestionably broke with the common law in 1835. The question here is whether in 1987 the Legislature intended a wholesale re-adoption of the common law, including its corollary counting rules.

With such overarching observations in place, we have little difficulty [754] rejecting the record owner's argument. In interpreting legislative intent, we, of course, look primarily to the language of the relevant statutes. See *Northeast Energy Partners, LLC v. Mahar Regional Sch. Dist.*, 462 Mass. 687, 692, 971 N.E.2d 258 (2012) (citing *Simon v. State Exams. of Electricians*, 395 Mass. 238, 242, 479 N.E.2d 649 [1985]). By its plain terms, *G. L. c. 260, § 31*, as amended,

St. 1987, c. 564, § 54, is limited to addressing when the Commonwealth and its subdivisions [***14] may bring actions to recover land. While the 1987 amendment undeniably added broad protections allowing the Commonwealth and its subdivisions to recover land held for public purposes, nothing in the statute evinces an intent that such protections also benefit a subsequent private owner. Notably, *G. L. c. 260, § 21*, the statute of limitations that applies to private actions to recover land, was left unchanged by the 1987 enactment, and it sets forth no exception involving properties formerly held by the Commonwealth or its subdivisions. See *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 247, 606 N.E.2d 1336 (1993) (related statutes must be construed in harmony with one another "so as to give rise to a consistent body of law").

Nor has the record owner demonstrated that its interpretation is supported by the public policy considerations that animated the 1987 enactment.¹⁰ The doctrine of adverse possession serves to clear titles and to promote economic development. *Sandwich v. Quirk*, 409 Mass. 380, 384, 566 N.E.2d 614 (1991). The addition of the proviso language in 1987 reflects a legislative judgment that such interests are outweighed by those furthered by letting the Commonwealth and its subdivisions bring actions to [***15] recover land held for public purposes. However, the countervailing interests in preserving land held for public purposes no longer come into play once the land in question has been transferred to a private party.¹¹ As [755] the trial judge aptly observed:

"The purposes enumerated in *G. L. c. 260, § 31* concern land uses, which benefit the public at large. Therefore, by preventing the Commonwealth from losing its right of action to recover such lands, the statute facilitates the continued protection of that land in the interest of preserving those public benefits. The statute grants the Commonwealth the ability to recover such lands so that they

may continue to be held for those same purposes, which provide a benefit to the general public. To allow a private corporation the ability to take advantage of a law clearly designed to benefit the State would be inapposite to the purpose of that law."

10 The amendment to § 31 was included as part of a comprehensive environmental measure titled, "An Act Providing for an Environmental Enhancement and Protection Program for the Commonwealth." St. 1987, c. 564. One of the main purposes of the bill was to promote the acquisition and public enjoyment of land [***16] for recreational uses. *Id.* at § 8 (appropriating funding for municipalities' acquisition of land for "municipal park and recreation purposes and for the restoration and rehabilitation of such ... lands").

11 Of course, this means that purchasers will need to exercise diligence in keeping an eye out for potential adverse possession claims regardless of whether there is a public entity in the chain of title. We see no hardship or unfairness in this result.

Finally, we note that our conclusions are supported by case law in other jurisdictions. For example, the Supreme Court of Virginia has long distanced itself from the common-law rule recognized in *Armstrong*, 81 U.S. at 145, even though that case arose under Virginia law. See *Thomas v. Young*, 196 Va. 1166, 1177, 87 S.E.2d 127 (1955) (tax taking under State statute did not as matter of law interrupt the continuity of third party's adverse use, in part because "[t]he Commonwealth's immunity to the running of the statute of limitations cannot be used as a shield to the advantage of [the record owner] 'who alone will [**553] enjoy the benefits'"), quoting from 1 Am. Jur. Adverse Possession § 104. See also *Lovey v. Escambia County*, 141 So. 2d 761, 765 (Fla. Dist. Ct. App. 1962) [***17]

("The right to assert sovereign immunity from the operation of the statute of limitations does not extend, however, to [the government's] assignee or transferee where the suit is brought for the private benefit, and to enforce the rights of a private person").¹²

12 There are other cases, to the same general effect, that arrive at that result through a somewhat different doctrinal framework. For example, California appellate courts have highlighted that even if an adverse possessor cannot gain rights against the government during the period of public ownership, he "may nevertheless adversely possess the land as against others." *Abar v. Rogers*, 23 Cal. App. 3d 506, 512, 100 Cal. Rptr. 344 (1972). Meanwhile, the Connecticut Supreme Court has held that a record owner who obtained title following a tax taking cannot invoke a statute that protected municipalities from adverse possession claims involving land held for public use, on the ground that the land was never put to public use. *Goldman v. Quadrato*, 142 Conn. 398, 402, 403, 114 A.2d 687 (1955).

3. *Conclusion.* Because we agree with the judge that *G. L. c. 260, § 31*, [***18] does not aid a private party in defending an otherwise [*756] valid adverse possession claim, we affirm the judgment.¹³

13 It is not clear on this record whether the city acquired title through purchase, eminent domain, tax foreclosure, or some other means. In any event, the record owner has not argued that the mode through which the municipality acquired title -- as opposed to the fact of its holding title -- mandates a restarting of the adverse possession clock. Compare *Sandwich v. Quirk*, 409 Mass. at 385 (in the tax foreclosure context, adverse possession cannot begin to run against municipality at least until it takes the land).

So ordered.

MARLENE BISTANY vs. CIVIL SERVICE COMMISSION & another.¹

1 City of Lawrence.

14-P-849.

APPEALS COURT OF MASSACHUSETTS

2015 Mass. App. Unpub. LEXIS 906

September 10, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

DISPOSITION: Judgment affirmed.

JUDGES: Cypher, Vuono & Grainger, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Marlene Bistany, a former police officer with the Lawrence police department (department), was injured in the line of duty in 2007. In September, 2011, the mayor of the city of Lawrence (city), as the appointing authority, terminated Bistany's employment with the department after Bistany failed to obey a direct order of the police chief (chief) to undergo a

diagnostic procedure relevant to determining her fitness for duty. Bistany appealed to the Civil Service Commission (commission), which upheld the termination. A judge of the Superior Court affirmed the commission's decision and this appeal followed. We affirm.

1. *Background.* After her injury, Bistany was placed on injured in the line of duty (ILD) status with full pay. See *G. L. c. 41, § 111F*. On September 14, 2007, Bistany had a magnetic resonance imaging (MRI) study completed, which revealed that she had multiple herniated discs in her neck. Under the supervision of her treating physicians, Bistany first treated her neck injury with physical therapy and chronic pain management. When those treatments proved unsatisfactory, Bistany began to [*2] explore surgical options, but ultimately declined to pursue them in favor of more physical therapy.

During this period, in January, 2009, the chief communicated with one of Bistany's physicians, who indicated that Bistany's injuries were not permanent, and that she could return to her duties as a police officer. The chief offered Bistany a return to a patrol assignment the next month, but she did not report for duty. Instead, she provided the department with a copy of a medical report indicating that she remained totally disabled. Also, in February, 2009, Bistany was removed from ILD status. She filed a grievance and, after arbitration, was returned to ILD status on November 18, 2009, pursuant to a settlement agreement with the city.

In March of 2009, one of Bistany's physicians, Dr. Friedberg, recommended that she have a new MRI completed. In July, 2010,

the chief communicated with Dr. Friedberg, seeking an opinion about Bistany's ability to return to active duty. Dr. Friedberg replied that he could not answer the chief's questions without an updated MRI. Thereafter, between August and October, 2010, the chief directly ordered Bistany to undergo an MRI, "based on [his] need to make [*3] informed and reasoned judgments for staffing and operational purposes." Despite multiple appointments and ample opportunity, Bistany never received an updated MRI.

In June, 2011, the city's mayor sent Bistany a notice of contemplated termination. A hearing was held, and by letter dated September 6, 2011, Bistany was informed that her employment had been terminated. She appealed to the commission, which upheld the termination, concluding that the chief's orders were lawful and reasonably related to determining Bistany's fitness for duty. A judge of the Superior Court affirmed the commission's decision.²

2 Bistany filed a motion for reconsideration following the entry of judgment in the Superior Court. The order denying that motion is not before us on appeal.

2. *Discussion.* A tenured civil service employee who is aggrieved by a disciplinary decision of an appointing authority may appeal to the commission. See *G. L. c. 31, § 41*. After finding facts anew, the commission then must determine, by a preponderance of the evidence, whether the appointing authority met its burden of proof that there was just cause for the action taken. See *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 260, 748 N.E.2d 455 (2001); *Falmouth v. Civil Serv. Commn.*, 447 Mass. 814, 823-824, 857 N.E.2d 1052 (2006). We, in turn, need only inquire whether the commission's decision was "legally [*4] tenable," accepting the commission's factual determinations unless they are unsupported by substantial evidence on the record as a whole. *Commissioner of Health & Hosps. of Boston v. Civil Serv. Commn.*, 23 Mass. App. Ct. 410, 411, 502

N.E.2d 956 (1987). See *Andrews v. Civil Serv. Commn.*, 446 Mass. 611, 615-616, 846 N.E.2d 1126 (2006).

We agree with the commission that the chief's order that Bistany obtain an MRI³ was directly related to his need to determine whether she could return to active duty. Such a determination is both reasonable and lawful. See *Nolan v. Police Commr. of Boston*, 383 Mass. 625, 630, 420 N.E.2d 335 (1981) (police department head "has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status"). Here, several years had elapsed between the injury and the order at issue, during which, according to the chief's credible testimony at the hearing before the commission, Bistany's shifts were covered by the other officers in the department at overtime rates because he was unable to hire an additional officer to replace Bistany while she was on ILD status. Given those circumstances, the chief's order was an entirely reasonable step for him to take in seeking a resolution to Bistany's case. In violating the order, Bistany subjected herself to discipline and, ultimately, termination.

3 We agree with the commission that an MRI is a diagnostic tool, and not medical treatment, as [*5] Bistany suggests on appeal.

On appeal, Bistany argues at length that under her settlement agreement with the city, the city forfeited its ability to dictate her medical treatment or to direct her to undergo certain procedures. Regardless of whether an MRI constitutes medical treatment, the terms of the settlement agreement relate only to Bistany's ILD status, and have no bearing on her obligation to follow the direct and lawful orders of her superiors.⁴

4 On appeal, several of Bistany's claims were not raised in her appeal before the commission, nor were they raised in the Superior Court. They are accordingly waived. *Springfield v. Civil Serv. Commn.*, 469 Mass. 370, 382-383, 14 N.E.3d 241 (2014).

Judgment affirmed.

By the Court (Cypher, Vuono & Grainger, JJ.⁵),

5 The panelists are listed in order of seniority.

Entered: September 10, 2015.

CAPE COD SHELLFISH & SEAFOOD COMPANY, INC., & OTHERS¹ vs. CITY OF BOSTON & ANOTHER.²

1 John Mantia & Sons Co., Inc.; Atlantic Coast Seafood, Inc.; New England Marketers, Inc.; and Great Eastern Seafood, Inc.

2 Massachusetts Port Authority (Massport). The plaintiffs and Massport stipulated to dismissal of the plaintiffs' claims against Massport and Massport's counterclaims. Massport has not participated in this appeal.

No. 11-P-1474.

APPEALS COURT OF MASSACHUSETTS

86 Mass. App. Ct. 651; 19 N.E.3d 856; 2014 Mass. App. LEXIS 152

**October 9, 2013, Argued
November 12, 2014, Decided**

PRIOR HISTORY: [***1]

Suffolk. CIVIL ACTION commenced in the Superior Court Department on November 9, 2004.

After review by this court, *74 Mass. App. Ct. 1127 (2009)*, the case was heard by *Elizabeth M. Fahey, J.*, on a motion for summary judgment.

Cape Cod Shellfish & Seafood Co. v. City of Boston, 74 Mass. App. Ct. 1127, 909 N.E.2d 1194, 2009 Mass. App. LEXIS 1032 (2009)

DISPOSITION: Judgment affirmed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Taxation, Exemption, Leased property, Abatement, Real estate tax: exemption, abatement. Contract, Lease of real estate. Landlord and Tenant, Taxation, Tenancy at

sufferance, Lease as contract. Real Property, Lease. Massachusetts Port Authority. Boston.

The plaintiff lessees (fish wholesalers and seafood businesses) of property owned by the Massachusetts Port Authority (authority) and located on the Boston Fish Pier in the Commonwealth Flats area of the South Boston section of Boston failed to establish entitlement to the tax exemption for authority property under St. 1956, c. 465, § 17, as appearing in St. 1978, c. 332, § 2, where the plaintiffs, by holding over after their lease terms expired, continued to remain on the property under the applicable provisions of their leases and accordingly were properly characterized as business lessees for purposes of the statute.

There was no merit to the plaintiffs' contentions challenging, in a civil action seeking declaratory relief concerning their liability for real estate taxes, the amount assessed.

COUNSEL: *Marshall F. Newman* for the plaintiffs.

Adam Cederbaum, Assistant Corporation Counsel, for city of Boston.

JUDGES: Present: Cypher, Katzmann, & Maldonado, JJ.

OPINION BY: MALDONADO

OPINION

[**857] MALDONADO, J. The plaintiffs appeal from a Superior Court judgment in favor of the city of Boston (city) in its effort to tax the [*652] plaintiffs as lessees of property owned by the Massachusetts Port Authority (Massport), on Boston's Fish Pier. Although, pursuant to St. 1956, c. 465, § 17 (§ 17), as appearing in St. 1978, c. 332, § 2, Massport and its lessees are not required to pay real estate taxes on Massport properties, an exception to the exemption applies to business lessees of property in the area known as the Commonwealth Flats. In an earlier decision pursuant to our *rule 1:28*, we determined that the plaintiffs are liable for taxes for their respective lease terms under that exception.³ At issue now is [**858] whether the plaintiffs, all of whom remained on the property after the end of their [***2] lease terms, continue to be liable as lessees for the taxes assessed during the holdover period.

³ See *Cape Cod Shellfish & Seafood Co. v. Boston*, 74 Mass. App. Ct. 1127, 909 N.E.2d 1194 (2009). In that prior appeal, the plaintiffs here argued that they came within the exception to taxation provided for in *G. L. c. 59, § 2B*, third par. We rejected that argument, relying, inter alia, on the clear language of § 17, the case of *Boston v. U.N.A. Corp.*, 11 Mass. App. Ct. 298, 415 N.E.2d 883 (1981) (construing that provision), and the principle of statutory construction that a specific statute, such as § 17, controls over a general statute, such as *G. L. c. 59*. Cf. *Beacon S. Station Assocs., LSE v. Board of Assessors of Boston*, 85 Mass. App. Ct. 301, 9 N.E.3d 334 (2014) (for-profit lessee of Massachusetts Bay Transportation Authority [MBTA] was exempt from real estate taxation pursuant to specific exemption for MBTA property provided in *G. L. c. 161A, § 24*, and

notwithstanding contrary provision in general tax statute, *G. L. c. 59, § 2B*); *id. at 307*, quoting from *TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. 9, 18, 725 N.E.2d 188 (2000) ("It is a basic canon of statutory interpretation that general statutory language must yield to that which is [***3] more specific").

Background. We recount the undisputed facts from the motion judge's May 20, 2011, memorandum of decision and order on the city's motion for summary judgment, supplemented also by the record on appeal as noted. The plaintiffs, Cape Cod Shellfish & Seafood Company, Inc.; John Mantia & Sons Co., Inc.; Atlantic Coast Seafood, Inc.; New England Marketers, Inc.; and Great Eastern Seafood, Inc., operated wholesale fish and seafood businesses on the Boston Fish Pier, which is owned by Massport and situated in the Commonwealth Flats area of the South Boston section of Boston. The plaintiffs originally occupied the property pursuant to written leases with Massport. The relevant leases of the plaintiffs covered the period of January 1, 1998, to December 31, 2004, and were virtually identical. All required the plaintiffs to pay any taxes and fees assessed against the tenant or landlord in relation to the leased premises. The city sporadically billed the plaintiffs for the real estate taxes due on the leased premises for their respective periods of occupancy; except for a single payment [*653] by New England Marketers, Inc., the taxes went unpaid.

Prior to the expiration of their lease terms, the plaintiffs [***4] sought to enter into new leases. Massport refused, citing a lease provision that required a letter from the city indicating that all taxes were current. The plaintiffs filed a declaratory judgment action, as permitted by the leases, seeking a determination that they were not liable for the taxes. Judgment entered in favor of the city for the taxes owing for the period covered by the leases, and, as we have noted, see note 3, *supra*, this court affirmed.

In the interim, the plaintiffs continued to occupy and pay rent for the Massport property

beyond their lease terms. The city supplemented its counterclaims in the declaratory judgment action to recover additional unpaid taxes from the plaintiffs for the time from January 1, 2005, through March 31, 2010, that they had remained on the property after the expiration of the lease term.

The leases contained the following provision concerning the obligations of the tenants in the event of their holding over:⁴

"If Tenant shall, with the consent of the Landlord, hold over after the expiration of the Term, the resulting tenancy shall be treated as a month-to-month tenancy. Tenant shall pay Base Rent, Additional Rent and any other charges due hereunder [***5] and shall be bound by the terms of the Lease. *Any holding over by Tenant after the expiration of the Term of this Lease without Landlord's consent shall be treated as a tenancy at sufferance* at two hundred percent (200%) of the rents and other [**859] charges herein (prorated on a daily basis) *and shall otherwise be on the terms and conditions set forth in this Lease, as far as applicable.* Any holding over, even with the consent of the Landlord, shall not constitute an extension or renewal of this Lease." (Emphasis supplied.)

4 The leases for the relevant period were not included in the record on appeal. We take the text of the holdover provision, for the leases covering the period from January 1, 1998, through December 31, 2004, from Massport's answer and counterclaims, to which the parties refer in their briefs on appeal.

The city moved for summary judgment on its supplemented counterclaims, and the judge allowed the motion.⁵ The judge reasoned that the plaintiffs, as tenants at sufferance following the expiration of the lease term, continued to operate their businesses and pay rent to Massport, and continued to have a leasehold that [*654] was recognized by Massachusetts law for purposes of § 17. [***6] The plaintiffs filed this appeal.

5 We note that the city has not pursued its remaining counterclaims, which, it acknowledges, are time barred.

Discussion. 1. *Applicability of tax exemption after expiration of lease term.* Section 17 is part of Massport's enabling act and provides generally for an exemption from taxation for Massport and its lessees. *Boston v. U.N.A. Corp.*, 11 Mass. App. Ct. 298, 299-300, 415 N.E.2d 883 (1981). The purpose of the exemption is to assist Massport in the performance of its essential governmental functions, which are principally aimed at establishing and maintaining the means of public travel. It was anticipated that Massport properties would be devoted to public use. *Opinion of the Justices*, 334 Mass. 721, 733, 739, 136 N.E.2d 223 (1956).

The exemption in § 17 includes certain qualifications, one of which is for Massport lands located in the Commonwealth Flats, which "shall, if leased for business purposes, be taxed by the city ... to the lessees thereof, respectively, in the same manner as the lands and the buildings thereon would be taxed to such lessees if they were the owners of the fee."⁶ [**860] The plaintiffs maintain that after the lease term expired and they [***7] remained on the property, they could no longer be considered lessees and, therefore, were [*655] no longer subject to taxation under the § 17 exception for business lessees of Massport's Commonwealth Flats properties. At that point, they argue, the property came within Massport's exemption under § 17, despite the plaintiffs' continued occupancy.

6 Section 17, first par., provides more broadly:

"The exercise of the powers granted by this act will be in all respects for the benefit of the people of the commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of the projects by the Authority will constitute the

performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon any project or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom ... and no property of the Authority shall be taxed to a lessee thereof under section three A of chapter fifty-nine of the General Laws; provided, however, that anything herein to the contrary notwithstanding, lands of the Authority, except [***8] lands acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one situated in that part of the city called South Boston and constituting a part of the Commonwealth Flats, and lands acquired by the Authority which were subject to taxation on the assessment date next preceding the acquisition thereof, shall, if leased for business purposes, be taxed by the city or by any city or town in which the said land may be situated to the lessees thereof, respectively, in the same manner as the lands and the buildings thereon would be taxed to such lessees if they were the owners of the fee, except that the payment of the tax shall not be enforced by any lien upon or sale of the lands, but a sale of the leasehold interest therein and of the buildings thereon may be made by the collector of the city in the manner provided by law in case of nonpayment of taxes for selling real estate, for the purpose of enforcing the payment of the taxes by such lessees to the city or town assessed under the provisions hereof."

We do not consider the parties' arguments, raised for the first time in their respective reply and surreply brief, whether [***9] § 17, first par., was amended subsequent to St. 1978, c. 332, § 2 (the version of the statute relied upon by the judge below, the parties,

and by this court in our earlier decision). See *Pasquale v. Casale*, 72 Mass. App. Ct. 729, 738, 893 N.E.2d 1263 (2008), quoting from *Assessors of Boston v. Ogden Suffolk Downs, Inc.*, 398 Mass. 604, 608 n.3, 499 N.E.2d 1200 (1986) ("Any issue raised for the first time in an appellant's reply brief comes too late, and we do not consider it").

The express language of the leases persuades us otherwise. The holdover provision in the leases sets out the conditions of a continued tenancy after expiration of the lease term, and expressly states, as well, that any holding over is subject to the applicable provisions of the lease. When they signed the leases, the plaintiffs thereby agreed that they would continue to be bound by the holdover provision, and other applicable lease provisions, in the event their tenancies extended beyond the lease term.

It has long been held that where, as here, a lease contains a provision governing the conditions of the lessee's occupancy in the event of holding over, the parties' rights continue to be determined by the applicable provisions in the lease, and [***10] indeed, the holding over is said to be under the lease. See *Warren v. Lyons*, 152 Mass. 310, 314-316, 25 N.E. 721 (1890) (distinguishing between holding over under the lease and occupying under a new agreement). See also, e.g., *Edwards v. Hale*, 91 Mass. 462, 9 Allen 462, 464-466 (1864); *Rice v. Loomis*, 139 Mass. 302, 303-304, 1 N.E. 548 (1885). When the parties to a lease "look to the contingency of the lessee's holding over for some purpose," their agreement in that regard is deemed a "contract to have effect, provisionally after the expiration of the term." *Salisbury v. Hale*, 29 Mass. 416, 12 Pick. 416, 422 (1832).

Similarly, in cases addressing the amount of rent owing for occupancy beyond the lease term, we have distinguished between holdovers governed by a provision in the lease, in which case the applicable lease provisions control, and holdovers where the lease lacks such a provision, in which case common-law principles are applied. See, e.g.,

Kobayashi v. Orion Ventures, Inc., 42 Mass. [*656] App. Ct. 492, 502-503, 678 N.E.2d 180 (1997); *Lawrence v. Osuagwu*, 57 Mass. App. Ct. 60, 64-65, 781 N.E.2d 50 (2003) (lease provision establishing rent due for period beyond lease term controlled, rather than reasonable rent, which is usual measure of landlord's damages against holdover [***11] tenant). As such, the holdover provision contained in the plaintiffs' leases, spelling out their obligations in the event of their holding over, took effect upon the expiration of the lease term and governed their tenancies thereafter. See *Salisbury v. Hale*, 12 Pick. at 422.

The case of *Commonwealth v. Goldberg*, 319 Mass. 7, 64 N.E.2d 438 (1946), confirms our view. At issue was whether the landlord in a tenancy at will constituted a "lessor" under *G. L. c. 186, § 14*, providing for prosecution of lessors who interfere with the quiet enjoyment of their premises. In concluding that the Legislature intended for the statute to cover "landlords who have let their premises without a lease in writing," *id.* at 9, the court reasoned that "the words lease, lessor, and lessee are nevertheless sufficiently comprehensive to include in appropriate instances tenancies at will and the parties to such tenancies." *Id.* at 8. The court noted that tenancies [**861] at will "have been referred to as parol 'leases,' and the landlord has been called the 'lessor' and the tenant the 'lessee.' *Ibid.* Given the *Goldberg* court's conclusion that the landlord and tenant in a tenancy at will, with no written lease, could be considered to [***12] be lessor and lessee, we have no hesitation in concluding that here, where the plaintiffs agreed to a holdover provision in a written lease that was to control their tenancies beyond the lease term, they may properly be characterized as lessees occupying the property under a leasehold.

The case of *Corcoran v. Boston*, 193 Mass. 586, 79 N.E. 829 (1907), cited by the plaintiffs, is not to the contrary. That case involved St. 1904, c. 385, an earlier version of the statutory tax exemption for lands of the Commonwealth, prior to the creation of

Massport, and an exception to the exemption indistinguishable from that in § 17 for lands situated in the Commonwealth Flats that were leased for business purposes. See *Boston v. U.N.A. Corp.*, 11 Mass. App. Ct. at 302 & n.4. The question of tax liability arose when a purchaser of property in the Commonwealth Flats took up occupancy, prior to the transfer of ownership, under a contract for a deed. Because the purchaser never actually leased the property, and because the relationship of landlord and tenant never existed between the purchaser and the Commonwealth, the court held that the purchaser was not to be considered a lessee for the period that he occupied [***13] the property pending delivery of the deed. 193 Mass. at 587-588. The present case differs in significant respects -- here, the plaintiffs originally occupied the property pursuant to written leases, agreed at the outset to a holdover provision, and, pursuant to that provision, continued to be governed by the applicable lease terms during the holdover period.

We reject the plaintiffs' suggestion that we are to resolve doubts in interpreting legislative use of the word "lessee" in § 17 in the taxpayer's favor. The plaintiffs rely on a rule of statutory construction that applies in interpreting the tax laws. See, e.g., *Massachusetts Assn. of Tobacco Distribs. v. State Tax Commn.*, 354 Mass. 85, 89, 235 N.E.2d 557 (1968) (construing *G. L. c. 64C*, imposing excise tax on cigarette sales); *Davison v. Commissioner of Rev.*, 18 Mass. App. Ct. 748, 754, 470 N.E.2d 413 (1984) (construing *G. L. c. 65C*, to determine whether decedent's interests in out-of-State gas and oil properties were taxable under estate tax statute); *Commissioner of Rev. v. Destito*, 23 Mass. App. Ct. 977, 978, 503 N.E.2d 986 (1987) (construing *G. L. c. 62*, to determine whether New Hampshire resident's income was taxable under Massachusetts income tax statute).

Section 17, [***14] however, by its express terms formulates an exemption from taxation for Massport properties. *Boston v. U.N.A. Corp.*, 11 Mass. App. Ct. at 299-300.

See *Opinion of the Justices*, 334 Mass. at 730 (court requested to give opinion as to whether it is "constitutionally competent for the General Court to grant the tax exemptions provided [in Massport's enabling act] ... with respect to the physical property of [Massport]"). While the Legislature may permit such "reasonable exemptions based upon various grounds of public policy, ... yet taxation is the general rule." *Animal Rescue League of Boston v. Bourne's Assessors*, 310 Mass. 330, 332, 37 N.E.2d 1019 (1941). "It is for this reason that statutes granting exemptions from taxation are strictly construed. A taxpayer is not entitled to an exemption unless he shows that he comes within either the express words or the necessary implication of some statute conferring this [**862] privilege upon him." *Ibid.* See *Global Cos., LLC v. Commissioner of Rev.*, 459 Mass. 492, 494, 945 N.E.2d 891 (2011) (citation omitted) (exemption is "to be recognized only where the property falls clearly and unmistakably within the express words of a legislative command," and it is taxpayer's burden [***15] to "demonstrate entitlement to the exemption claimed"). [*658] See also *AA Transp. Co. v. Commissioner of Rev.*, 454 Mass. 114, 121, 907 N.E.2d 1090 (2009).

Based on the foregoing, we conclude that the plaintiffs, upon holding over after the lease term expired, continued to remain on the property under the applicable provisions of their leases, and are properly characterized as business lessees, for purposes of § 17. Accordingly, the plaintiffs have not established entitlement to the tax exemption for Massport properties under that section. Our conclusion also comports with the additional principle of statutory construction that we are to follow "a common sense approach in the interpretation and application of all statutes." *State Tax Commn. v. John Hancock Mut. Life Ins. Co.*, 361 Mass. 125, 131, 279 N.E.2d 656 (1972). It defies common sense to permit the plaintiffs in this case, who agreed to the leases' holdover provision and who were statutorily and contractually bound

to pay taxes during the lease term, to be excused from the obligation by virtue of their simply remaining on the leased property, without Massport's consent, after the expiration of the lease term.

2. *Tax amount.* As a final matter, the judge properly dismissed [***16] the plaintiffs' claims that the city calculated their taxes based on inaccurate square footage measurements. In challenging the amount assessed, the plaintiffs did not have the option, as they suggest, to elect to pursue either an administrative remedy or, alternatively, a declaratory judgment action as to that claim. See *Harron Communications Corp. v. Bourne*, 40 Mass. App. Ct. 83, 86, 661 N.E.2d 667 (1996) ("For an excessive tax, the exclusive remedy is application for abatement and petition to the Appellate Tax Board"). Compare *Massachusetts Mut. Life Ins. Co. v. Commissioner of Corps. & Taxation*, 363 Mass. 685, 688-689, 296 N.E.2d 805 (1973) (taxpayer properly pursued both administrative remedy and declaratory relief as to proper construction of taxing statute). Accord *Sydney v. Commissioner of Corps. & Taxation*, 371 Mass. 289, 294 n.10, 356 N.E.2d 460 (1976).

Also unavailing is the plaintiffs' argument that the March 30, 2005, denial of the city's motion to dismiss for failure to exhaust administrative remedies permitted the plaintiffs to also pursue in these proceedings their challenge to the amount of taxes assessed as opposed to only permitting them to proceed on their challenge to the imposition of any tax liability under [***17] § 17. From our review of the appellate record, it appears the issue was neither raised nor decided as part of the motion to dismiss, and we find no support [*659] for the plaintiffs' contention that the law of the case permitted them to forgo the exclusive statutory remedy for tax abatements.⁷

7 The first amended complaint, which was the subject of the city's motion to dismiss, did not allege that the taxes assessed were excessive. The judge's decision on the motion

to dismiss addressed only the issue of the plaintiffs' claimed exemption under § 17, and, because it posed a novel question of law, it was permitted to go forward as a declaratory judgment action. Moreover, the judge here observed that the plaintiffs' claims of excessive taxes were raised for the first time in

opposition to the city's motion for summary judgment, and nothing in the record before us suggests the contrary.

Judgment affirmed.

**CITY OF SOMERVILLE & ANOTHER¹ vs.
COMMONWEALTH EMPLOYMENT RELATIONS BOARD & OTHERS.²**

¹ School Committee of Somerville.

² Somerville Teachers Association, Somerville Police Superior Officers Association, Somerville Administrators Association, and Somerville Municipal Employees Association, interveners.

SJC-11620

SUPREME JUDICIAL COURT OF MASSACHUSETTS

470 Mass. 563; 24 N.E.3d 552; 2015 Mass. LEXIS 16; 202 L.R.R.M. 3328

November 3, 2014, Argued

February 3, 2015, Decided

PRIOR HISTORY: [***1]

Suffolk. APPEAL from a decision of the Division of Labor Relations.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

**MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES**

School and School Committee, Retirement benefits, Group insurance, Collective bargaining. *Municipal Corporations*, Group insurance, Collective bargaining. *Retirement. Public Employment*, Retirement benefits, Collective bargaining. *Insurance*, Group. Labor, Collective bargaining, Public employment.

A city and its school committee did not violate *G. L. c. 150E, § 10 (a) (5)*, or, derivatively, *G. L. c. 150E, § 10 (a) (1)*, when the city unilaterally reduced its percentage contribution to retired employees' group health insurance premiums without engaging in

collective bargaining over the matter with current employees, where, by virtue of *G. L. c. 32B, §§ 9, 9A, and 9E*, the Legislature has conferred authority on municipalities to decide whether and how much to contribute to retirees' health insurance premiums.

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

T. Jane Gabriel for the defendant.

Laurie R. Houle, Ira Fader, Colin R. Confoey, & Jason Powalisz for the interveners, submitted a brief.

JUDGES: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.

OPINION BY: SPINA

OPINION

[**553] SPINA, J. At issue in this case is whether the city of Somerville (city) and the school committee of Somerville (school

committee) violated *G. L. c. 150E, § 10 (a) (5)*, and, derivatively, *G. L. c. 150E, § 10 (a) (1)*, when the city unilaterally reduced its percentage contribution to retired employees' health insurance premiums without engaging in collective bargaining over the matter with current employees.³ We conclude that the city and the school committee did not violate these statutory provisions. Accordingly, [*564] we reverse the decision of the Commonwealth Employment Relations Board (board), which reached a contrary conclusion.

3 A municipality and a school committee are a single entity for purposes of collective bargaining. See *City of Malden*, 23 M.L.C. 181, 183-184 (1997).

1. [***2] *Statutory framework.* Our resolution of the present dispute is based on the interplay between *G. L. c. 150E* and *G. L. c. 32B*. *General Laws c. 150E, § 2*, protects the rights of public employees to self-organization and collective bargaining. Pursuant to *G. L. c. 150E, § 6*, "[t]he employer and the exclusive representative ... shall negotiate in good faith with respect to wages, hours, standards [of] productivity and performance, and any other terms and conditions of employment" *General Laws c. 150E, § 10*, states, in relevant part:

"(a) It shall be a prohibited practice for a public employer or its designated representative to:

"(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

" ...

"(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six"

"Under the Home Rule Amendment, *art. 89, § 6, of the Amendments to the Massachusetts Constitution*, [**554] municipalities of the Commonwealth may choose to provide health insurance coverage to

their employees." *Twomey v. Middleborough*, 468 Mass. 260, 261, 10 N.E.3d 618 (2014). See *Cioch v. Treasurer of Ludlow*, 449 Mass. 690, 695, 871 N.E.2d 469 (2007). *General Laws c. 32B [***3]* is a so-called "local option" statute that governs the provision of health insurance to active and retired employees of a municipality once that entity has voted to accept the terms of the statute.⁴ See *Twomey v. Middleborough*, *supra*; *Yeretsky v. Attleboro*, 424 Mass. 315, 316, 676 N.E.2d 1118 (1997). See generally D.A. Randall & D.E. Franklin, *Municipal Law and Practice* § 10.25 (5th ed. 2006 & Supp. 2014). When enacted, see St. 1956, c. 730, § 1, *G. L. c. 32B, §§ 1 and 3*, authorized municipalities to offer certain eligible persons and their dependents group indemnity health insurance coverage. Beginning in 1971, municipalities were given the option of making available to such individuals the services of a health maintenance organization (HMO) by accepting *G. L. c. 32B, § 16*, inserted by St. 1971, c. 946, § 5.

4 For the sake of simplicity, we use the term "municipality" in this opinion to refer to the counties, cities, towns, and districts covered by *G. L. c. 32B*.

[*565] Pursuant to *G. L. c. 32B, § 9*, retirees bear the full cost of their health insurance premiums unless a municipality has accepted the more generous provisions of *G. L. c. 32B, § 9A* or *§ 9E*. If a municipality accepts *G. L. c. 32B, § 9A*, then it [***4] may elect to pay fifty per cent of a retiree's premium for health insurance coverage. If a municipality accepts *G. L. c. 32B, § 9E*, then it may elect to pay "a subsidiary or additional rate" greater than fifty per cent of a retiree's health insurance premium.

2. *Factual and procedural background.* We summarize the relevant facts as stipulated by the parties in lieu of a hearing before the board. The city is a public employer within the meaning of *G. L. c. 150E, § 1*. The school committee is the collective bargaining agent of the city for the purpose of dealing with school employees. The Somerville Teachers

Association, Somerville Police Superior Officers Association, Somerville Administrators Association, and Somerville Municipal Employees Association (collectively, the unions) are employee organizations within the meaning of *G. L. c. 150E, § 1*,⁵ and they are the exclusive bargaining representatives for various individuals employed by the school committee and the city.

5 *General Laws c. 150E, § 1*, defines an "[e]mployee organization" as "any lawful association, organization, federation, council, or labor union, the membership of which includes public employees, and assists its members to [***5] improve their wages, hours, and conditions of employment."

In 1979, the city accepted *G. L. c. 32B, § 9E*, by a vote of the board of aldermen, thereby authorizing the city to pay more than fifty per cent of a retired employee's monthly premium for an indemnity health insurance plan. From that point forward until August 1, 2009, the city contributed ninety-nine per cent of the premium for a retired employee's health insurance coverage under the indemnity plan offered by the city. Retired employees contributed the remaining one per cent of the premium. In addition, the city offered active and retired employees health insurance coverage through several HMOs. The city paid fixed percentages of the total premium costs, which varied between eighty and ninety per cent, depending on the particular [**555] plan. Employees and retirees paid the remainder of the premium costs.

On or about July 1, 2009, the city had approximately 1,262 retirees who were participating in the city's group health insurance plans. The majority of these individuals had retired from positions in the unions' bargaining units. Effective August 1, 2009, the city decreased the percentage of its contribution for [*566] retired employees' [***6] health insurance coverage under the indemnity plan from ninety-nine per cent to sixty per cent, and it decreased the percentage

of its contribution for retired employees' health insurance coverage under all other insurance plans to seventy-five per cent. These changes were approved by the board of aldermen after a properly noticed public hearing at which the new rates were proposed by the mayor.⁶

6 According to the city of Somerville (city), the board of aldermen voted to amend the city's 1979 acceptance of *G. L. c. 32B, § 9E*, thereby allowing the city to reduce its health insurance contribution rates for retirees.

Neither the city nor the school committee provided the unions with notice of or an opportunity to bargain over the decision to change contribution rates. None of the collective bargaining agreements between the city and the various bargaining units addressed the contribution rates for retired employees' health insurance coverage, and such rates had never been a subject of negotiation between the city and the bargaining units. At all material times, the city has maintained that the authority to set the contribution rates for retirees' health insurance coverage is vested exclusively [***7] with the board of aldermen and the mayor, and that such contribution rates are not a mandatory subject of bargaining with current employees.

On September 10, 2009, the Somerville Teachers Association filed two prohibited practice charges with the division of labor relations (division).⁷ It alleged that the city and, separately, the school committee had violated *G. L. c. 150E, § 10 (a) (5)*, and, derivatively, *G. L. c. 150E, § 10 (a) (1)*, by "failing to provide notice and an opportunity to bargain over the future benefits [on retirement] of active employees when the City announced at the meeting of the Board of Aldermen, on May 28, 2009 that effective August 1, 2009 the percentage contribution rate for all retirees would be increased."⁸ Based on essentially the same grounds, the Somerville Police Superior Officers Association filed a prohibited practice charge with the division on December 21, 2009; the Somerville Administrators Association filed two prohibited practice charges with the division on January 26,

[*567] 2010;⁹ and the Somerville Municipal Employees Association filed a prohibited practice charge with the division on April 13, 2010. The division investigated the allegations and found [***8] probable cause to believe that statutory violations had occurred. The division issued complaints with respect to all six matters, and, on July 30, 2010, they were consolidated for hearing. Pursuant to *G. L. c. 150E, § 11 (f)*, the parties petitioned to have the consolidated complaints heard by the board in the first instance (rather than by a hearing [*556] officer),¹⁰ and the request was granted. The parties then stipulated to the facts.

7 The division of labor relations is now the Department of Labor Relations. See St. 2011, c. 3, § 36.

8 In its prohibited practice charge against the city, the Somerville Teachers Association (association) also alleged that the city had failed to provide certain health insurance information that was reasonable and necessary for the association to fulfil its obligations under the law. It subsequently withdrew this claim on February 18, 2011.

9 One prohibited practice charge was against the city, and the other was against the school committee of Somerville.

10 The Commonwealth Employment Relations Board (board) is the body within the division of labor relations that is charged with reviewing orders from investigators and issuing decisions. See *G. L. c. 23, § 9R*; *G. L. c. 150E, § 11*.

By [***9] decision dated October 19, 2011, the board concluded that the city and the school committee had failed to satisfy their statutory bargaining obligations before unilaterally reducing contributions for retired employees' health insurance premiums. In the board's view, health insurance contributions for municipal retirees are a mandatory subject of bargaining. The board rejected the city's claims that current employees have no right to bargain over such contributions made on behalf of retirees, and that, pursuant to *G. L. c. 32B*, health insurance rates for retirees must be established through the local governmental process, not the collective bargaining process.

The board ordered the city and the school committee to cease and desist from failing and refusing to bargain collectively in good faith with the unions over changes to future retirees' health insurance contribution rates. Further, the board ordered the city and the school committee to restore the terms of the retirement health insurance benefit that was in effect prior to August 1, 2009, for the unions' bargaining unit members who were active employees before that date and retired thereafter. In addition, the board ordered the [***10] city and the school committee to make whole those bargaining unit members who retired after August 1, 2009, for any losses they may have suffered as a result of the unilateral change in retirement health insurance contribution rates, plus interest. The city and the school committee appealed the board's decision, the case was entered in the Appeals Court, and we transferred it to this court on our own motion.

3. *Standard of review.* We review the board's decision in accordance with the standards set forth in *G. L. c. 30A, § 14 (7)*, governing appeals from final administrative agency decisions. See *G. L. c. 150E, § 11 (i)*. See also *Worcester v. Labor Relations Comm'n*, 438 Mass. 177, 180, 779 N.E.2d 630 (2002). The board's decision will be set aside only if it is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *G. L. c. 30A, § 14 (7) (g)*. We defer to the board's specialized knowledge and expertise. See *Worcester v. Labor Relations Comm'n*, *supra*. However, the duty of statutory interpretation rests ultimately with the courts. See *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481, 852 N.E.2d 1061 (2006), citing *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 343-344, 198 N.E.2d 281 (1964).

4. [***11] *Discussion.* The thrust of the arguments made by the city and the school committee is that current public employees do not have the right to bargain collectively over the issue of health insurance contribution rates for retirees. They contend that, pursuant to *G. L. c. 32B*, such contribution rates are to be determined solely by the local government. In

their view, a contrary conclusion would give the unions veto power over decisions made by a municipality acting in accordance with its statutory authority. Therefore, they continue, neither the city nor the school committee violated *G. L. c. 150E, § 10 (a) (5)*, and, derivatively, *G. L. c. 150E, § 10 (a) (1)*, when the city unilaterally reduced its percentage contributions to retirees' health insurance premiums. We agree.

When Congress enacted the National Labor Relations Act in 1935, it exempted public employers -- States and [**557] their political subdivisions -- from the obligation to engage in collective bargaining. See 29 U.S.C. § 152(2) (2012). See also *Brookfield v. Labor Relations Comm'n*, 443 Mass. 315, 326 n.5, 821 N.E.2d 51 (2005). States and their political subdivisions were "free to regulate their labor relationships with their public employees." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007). [***12] However, as was the case in most States, public employees in the Commonwealth "had virtually none of the rights that had been widely guaranteed since the nineteen thirties to employees in private business to organize and bargain collectively and to be protected in the associated activities of asserting and negotiating grievances." *Dedham v. Labor Relations Comm'n*, 365 Mass. 392, 396, 312 N.E.2d 548 (1974). "[T]raditional hostility to organizational rights on the part of public employees gradually diminished in the post-war period, and in 1958 Massachusetts was among the first States ... to [*569] afford a measure of recognition to those rights." *Id.* at 397. See St. 1958, c. 460, inserting *G. L. c. 149, § 178D*. See also St. 1964, c. 637, inserting *G. L. c. 149, § 178F*; St. 1965, c. 763, § 2, inserting *G. L. c. 149, §§ 178G-178N*. In 1973, the public sector collective bargaining law, *G. L. c. 149, §§ 178D, 178F-178N*, was repealed and replaced with *G. L. c. 150E*, see St. 1973, c. 1078, §§ 1, 2, as comprehensive legislation designed to provide organizational and collective bargaining rights to public employees.¹¹ See *Labor Relations Comm'n v. Boston Teachers*

Union, Local 66, 374 Mass. 79, 93-95, 371 N.E.2d 761 (1977); *Gallagher v. Metropolitan Dist. Comm'n*, 371 Mass. 691, 693, 359 N.E.2d 36 (1977). [***13] Thus, the scope of matters for negotiation has been defined, albeit somewhat broadly, by the Legislature.

11 Historically speaking, "the subjects of public sector collective bargaining are more restricted than those in private sector labor relations." *School Comm. of Boston v. Boston Teachers Union, Local 66*, 378 Mass. 65, 70, 389 N.E.2d 970 (1979). See, e.g., *G. L. c. 150E, § 9A (a)* (prohibiting public employees and their organizations from engaging in strikes). "Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither' may limit the ability of a public employer ... to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it." *School Comm. of Boston v. Boston Teachers Union, Local 66, supra*, quoting *School Comm. of Hanover v. Curry*, 369 Mass. 683, 685, 343 N.E.2d 144 (1976). "While this principle may be raised in varied contexts ... the analysis to be utilized is essentially the same in all instances: whether the ingredient of public policy in the issue subject to dispute is so comparatively heavy that collective bargaining ... on the subject is, as a matter of law, to be denied effect." *Id.* at 70-71. "Underlying [***14] this development is the belief that, unless the bargaining relationship is carefully regulated, giving public employees the collective power to negotiate labor contracts poses the substantial danger of distorting the normal political process for controlling public policy." *Id.* at 71.

General Laws c. 150E, § 6, provides that the public employer and the employee organization "shall negotiate in good faith with respect to wages, hours, standards [of] productivity and performance, and any other terms and conditions of employment." These matters, subject to limited exceptions, are deemed to be mandatory subjects of bargaining.¹² See *Local 1652, [**558] Int'l Ass'n of Firefighters v. Framingham*, 442 Mass. 463, 467, 813 N.E.2d 543 (2004). See also *Worcester v. Labor Relations Comm'n*, 438 Mass. at 180-181 [*570] (certain types of

managerial decisions must, as matter of policy, be reserved for public employer's discretion). The failure of a public employer to negotiate in good faith over mandatory subjects of bargaining is a prohibited practice. See *G. L. c. 150E, § 10 (a) (5)*. See also *Commonwealth v. Labor Relations Comm'n*, 404 Mass. 124, 127, 533 N.E.2d 1326 (1989) ("A public employer has a duty to bargain in good faith and, short of impasse, [***15] it may not unilaterally implement changes to a mandatory subject of bargaining without negotiation"); *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. 557, 572, 447 N.E.2d 1201 (1983). The commission of a prohibited practice is remediable through the enforcement procedures set forth in *G. L. c. 150E, § 11*.

12 It has been observed by appellate courts that "[a]ny attempt to define with precision and certainty the subjects about which bargaining is mandated by [c.] 150E is doomed to failure." *Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 177, 681 N.E.2d 1234 (1997), quoting Greenbaum, *The Scope of Mandatory Bargaining Under Massachusetts Public Sector Labor Relations Law*, 72 Mass. L. Rev. 102, 102 (1987). See *Local 2071, Int'l Ass'n of Firefighters v. Bellingham*, 67 Mass. App. Ct. 502, 522, 854 N.E.2d 1005 (2006) (Mills, J., dissenting), *S.C.*, 450 Mass. 1011, 877 N.E.2d 553 (2007).

The issue here is whether the city's contribution rate for retired employees' health insurance coverage is a mandatory subject of bargaining such that its unilateral reduction constitutes a prohibited practice in violation of *G. L. c. 150E, § 10 (a) (5)*. As a general proposition, health insurance coverage for public employees is "an unearned benefit, no different [***16] in concept from holidays, future sick leave, or other similar benefits." *Larson v. School Comm. of Plymouth*, 430 Mass. 719, 724, 723 N.E.2d 497 (2000). "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." *Massachusetts Nurses Ass'n v. Cambridge Pub. Health Comm'n*, 82 Mass. App. Ct. 909,

911, 976 N.E.2d 839 (2012), quoting *School Comm. of Medford v. Labor Relations Comm'n*, 8 Mass. App. Ct. 139, 140, 392 N.E.2d 541 (1979), *S.C.*, 380 Mass. 932, 401 N.E.2d 847 (1980). See *Anderson v. Selectmen of Wrentham*, 406 Mass. 508, 511, 548 N.E.2d 1230 (1990) (municipality's contribution to unionized employees' group health insurance premiums is mandatory subject of collective bargaining). The language of *G. L. c. 150E, § 6*, governs the terms and conditions of the public employee's existing employment. It goes without saying that a retiree cannot bargain over the percentage contributions made by a municipality to the retiree's health insurance premiums, given that the retiree is no longer employed. With respect to current employees, a municipality's contributions to the health insurance premiums of retirees is not a term [***17] or condition of employment that is subject to mandatory collective bargaining where the Legislature expressly has conferred authority over the provision of such a benefit on the municipality.

The Legislature, by way of *G. L. c. 32B, § 9*, has stated that retirees "shall pay the full premium cost" of their health insurance, subject to the provisions of either *G. L. c. 32B, § 9A*, or *G. L. c. 32B, § 9E*, which, if accepted by a municipality, permits the municipality to pay a portion of the retirees' premiums. The authority conferred on a municipality to decide whether and how much to contribute to the monthly health insurance premiums of retired employees (within defined statutory percentages) would be wholly undermined by an obligation to collectively bargain the matter. See, e.g., *Somerville v. Somerville Mun. Employees Ass'n*, 451 Mass. 493, 494, 887 N.E.2d 1033 (2008) (explicit legislative directive of *G. L. c. 115, § 10*, that city's director of veterans' services "shall be appointed ... by the mayor, [**559] with the approval of the city council," precluded challenged appointment from being proper subject of collective bargaining); *National Ass'n of Gov't Employees v. Commonwealth*, 419 Mass. 448, 453, 646 N.E.2d 106, cert.

[**18] denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 858 (1995) (where Legislature reserved for itself in *G. L. c. 32A*, § 8, power to change percentage of Commonwealth's agreed-to contribution to employees' health insurance premiums, such reserved power could not be overridden by collective bargaining); *Watertown Firefighters, Local 1347, I.A.F.F. v. Watertown*, 376 Mass. 706, 714, 383 N.E.2d 494 (1978) (characterization of matter as term or condition of employment does not require its submission to collective bargaining if to do so will "defeat[] a declared legislative purpose"). See generally *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983), quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S. Ct. 529, 52 L. Ed. 828 (1908) ("One whose rights ... are subject to [S]tate restriction, cannot remove them from the power of the State by making a contract about them").

Except as provided in *G. L. c. 150E*, § 7 (d), which we shall discuss next, "[t]here is no obligation to engage in collective bargaining as to matters controlled entirely by statute." *Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 183, 681 N.E.2d 1234 (1997).¹³ See *Commonwealth v. Labor Relations Comm'n*, 404 Mass. at [*572] 126; *National Ass'n of Gov't Employees, Local R1-162 v. Labor Relations Comm'n*, 17 Mass. App. Ct. 542, 544, 460 N.E.2d 619 (1984). [**19] Here, current public employees cannot bargain over how the city should exercise the authority conferred on it by *G. L. c. 32B*, § 9E, because such bargaining effectively would negate the Legislature's purpose in entrusting the matter to the city. See *Lynn v. Labor Relations Comm'n*, *supra* at 184. Cf. *Twomey v. Middleborough*, 468 Mass. at 271 (board of selectmen has statutory authority to establish percentage of total monthly premium for HMO coverage that is to be paid by town's retired employees); *Yeretsky v. Attleboro*, 424 Mass. at 323-324 (municipal contribution rate for HMO premiums for retired nonunionized employees determined at local government

level). In our view, the Legislature conferred authority on municipalities to decide whether and how much to contribute to retirees' health insurance premiums in recognition of the fact that, as public employers, they must balance the needs of their retired workers with the burdens of safeguarding their own fiscal health, thereby ensuring their ability to provide services for all of their citizens.

13 In *Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. at 182, the Appeals Court [**20] cogently explained: "In the range of cases where the governmental employer acts pursuant to broad, general management powers, the danger is presented, as pointed out in *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. [557,] 564-566, 447 N.E.2d 1201 [(1983)]], that to recognize the statutory authority as exclusive would substantially undermine the purpose of *G. L. c. 150E*, § 6, to provide for meaningful collective bargaining as a general rule with respect to compensation and other terms and conditions of employment. That danger simply is not present when the governmental employer acts pursuant to a specific, narrow statutory mandate."

If we were to conclude that the city's percentage contribution to retirees' health insurance premiums is a mandatory subject of bargaining, we would have to confront the import of the so-called "conflicts" statute, *G. L. c. 150E*, § 7 (d). See *Adams v. Boston*, 461 Mass. 602, 607-608, 963 N.E.2d 694 (2012). *General Laws c. 150E*, § 7 (d), [**560] provides that, with respect to matters within the scope of negotiations under *G. L. c. 150E*, § 6, the terms of a collective bargaining agreement prevail over contrary terms in certain enumerated statutes. See *Adams v. Boston*, *supra*; *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6*, 441 Mass. 620, 625-626, 807 N.E.2d 814 (2004). [**21] Generally speaking, those enumerated statutes "contain specific mandates regarding terms and conditions of employment of public employees." *Adams v. Boston*, *supra* at 607 n.11. See *G. L. c. 150E*, § 7 (d); *School Comm. of Newton v. Labor*

Relations Comm'n, 388 Mass. at 566. *General Laws c. 32B, § 9E*, is not among the enumerated statutes. It is well established that "statutes not specifically enumerated in § 7 (d) will prevail over contrary terms in collective bargaining agreements." *Commonwealth v. Labor Relations Comm'n*, 404 Mass. at 126. See *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6*, *supra*; *School Comm. of Natick v. Education Ass'n of Natick*, 423 Mass. 34, 39, 666 N.E.2d 486 (1996). [*573] "There is no duty to bargain over the specific requirements of such statutes." *Commonwealth v. Labor Relations Comm'n*, *supra*. As pertinent to the present case, even if the city's contribution to retirees' health insurance premiums was deemed to be a mandatory subject of collective bargaining, the provisions of *G. L. c. 32B, § 9E*, would prevail, and the city could unilaterally change

the percentage of its contribution in accordance with the statute. See *National Ass'n of Gov't Employees, Local R1-162 v. Labor Relations Comm'n*, 17 Mass. App. Ct. at 544 [***22] (where statute not listed in *G. L. c. 150E, § 7 [d]*, public employer and union cannot amend statute's requirements through collective bargaining).

5. *Conclusion*. The city and the school committee did not violate *G. L. c. 150E, § 10 (a) (5)*, or, derivatively, *G. L. c. 150E, § 10 (a) (1)*, when the city unilaterally reduced its percentage contribution to retired employees' health insurance premiums without engaging in collective bargaining over the matter with current employees. Accordingly, the decision of the board is reversed.

So ordered.

**CITY OF SPRINGFIELD vs. LOCAL UNION NO. 648,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO.**

No. 13-P-1691.

APPEALS COURT OF MASSACHUSETTS

88 Mass. App. Ct. 1; 2015 Mass. App. LEXIS 109

September 11, 2014, Argued

August 13, 2015, Decided

PRIOR HISTORY: [*1] Hampden. Civil action commenced in the Superior Court Department on December 14, 2011. The case was heard by John S. Ferrara, J., on motions for judgment on the pleadings; a motion for reconsideration was heard by him; and entry of a final judgment was ordered by him.

DISPOSITION: Judgment affirmed.

HEADNOTES *Fire Fighter*, Appointment. *Arbitration*, Fire fighters, Authority of arbitrator, Damages. *Labor*, Fire fighters, Arbitration, Civil service, Damages. *Civil Service*, Fire fighters, Appointment. *Contract*,

Collective bargaining contract. *Damages*, Back pay.

COUNSEL: Albert R. Mason for the plaintiff.

Joseph G. Donnellan for the defendant.

JUDGES: Present: Trainor, Rubin, & Sullivan, JJ.

OPINION BY: RUBIN

OPINION

RUBIN, J. The city of Springfield (city) appeals from a judgment of the Superior Court confirming a labor arbitration award issued in favor of a public employee union representing firefighters, Local 648, International Association of Firefighters, AFL-CIO (union). We affirm.

Background. Because the arbitration award incorporated by reference certain legal conclusions of the Civil Service Commission (commission), we first summarize the commission proceedings, followed by the arbitration proceedings. Under the civil service law, *G. L. c. 31*, in order to fill a vacant position, the city may appoint either a "permanent" replacement, or, if the vacancy or the position is temporary, a "temporary" replacement. See *G. L. c. 31*, §§ 6-8. In either event, the appointment must [*2] be made through the detailed procedural steps set out in the civil service law.

As the commission ultimately found, for an extended period of time the city's appointments to vacant positions in the fire department did not comply with the above requirements. Rather, in 2009 and 2010, the city filled certain vacancies in its fire department not by promoting firefighters, but by making extended appointments of firefighters to higher-ranking civil service positions on an "acting" basis. These firefighters were paid additional out-of-grade compensation pursuant to the terms of art. 31 of the collective bargaining agreement (CBA) between the union and the city. Even with this additional out-of-grade amount, their compensation and other benefits fell short of that set forth in the CBA for the positions in which they were serving. The city's justification for this discrepancy was that the firefighters were serving only on an "acting" basis.

On August 20, 2010, the union filed a grievance with the city on behalf of firefighters who had been appointed to fill vacant higher positions purportedly in an "acting" capacity, and who served in such higher positions. The grievance alleged that

the city's [*3] appointment practice violated the terms of the CBA. The union sought a "make whole" award of relief, one that would put the firefighters in the same position as if they had been properly appointed permanently. The union's grievance was denied, and on November 15, 2010, the union timely filed a demand for arbitration in accordance with the provisions of their CBA.¹

1 The city sought to enjoin the arbitration proceedings, but a Superior Court judge denied the motion for a stay.

In the meantime, on September 15, 2010, the same firefighters who were the subject of the union grievance filed two appeals in their individual capacities with the commission under St. 1993, c. 310 (c. 310), contending that their "acting, out of grade" appointments violated the civil service law.² On November 18, 2010, the commission ruled on the appeals filed with it by the individual firefighters. The commission ruled that "nothing in the civil service law and rules recognizes the designation of 'acting' in any civil service position. ... In the current scenario, there can be no question, and it does not appear disputed, that Springfield's use of 'out-of-grade' promotional assignments for extended period[s] of time such [*4] as those that have occurred here, have circumvented, and continue to circumvent the civil service law."

2 *General Laws c. 150E*, § 8, as amended though St. 1989, c. 341, § 80, provides, in part, "Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one." As neither party relies on § 8, we do not address it.

The commission ordered that the city bring its practices "into compliance with all civil service law and rules by eliminating all 'acting' out-of-grade assignments." The order further stated, among other things, "[t]he Commission encourages the parties to agree as to the terms of any other relief that may be appropriate to the Appellants or any other persons, including but not limited to retroactive [*5] seniority dates. The Commission will retain jurisdiction to receive the parties[] joint motion for Chapter 310 relief,³ or, alternatively, any party's motion to reconsider whether to grant Appellants other or further relief, for which the time to so move will be tolled until January 30, 2010." No motions described in that portion of the order were filed prior to that deadline.

3 "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights." St. 1993, c. 310.

On November 21, 2011, the arbitrator, relying on the commission's finding that the city had violated the civil service laws, found that the city had also violated the CBA, which provides that the city "shall recognize and adhere to all Civil Service Laws."⁴ He ordered a make-whole remedy consisting of lost wages and benefits, retroactive [*6] to August 8, 2010.⁵ In December, 2011, the city filed the instant suit to vacate the arbitration award.

4 He found that the grievance was procedurally arbitrable.

5 Although the commission found that the improper acting promotions dated to at least 2009, no grievance was filed until August 20, 2010. The arbitrator limited back pay to August 8, 2010, in accordance with the CBA, which provided that a grievance was only timely as to contract violations going back twelve days before the filing of the grievance.

Subsequently, the city moved jointly with the individual employees before the commission pursuant to c. 310 to grant retroactive seniority to each such firefighter, each to a date prior to August 8, 2010. This motion was allowed by the commission on March 8, 2012.

In October, 2012, a judge of the Superior Court entered judgment in the city's favor, but on reconsideration, in July, 2013, the judge vacated that judgment and affirmed the arbitration award. It is from this judgment that the city now appeals.

Discussion. In challenging the arbitrator's award, the city makes three arguments why it was in excess of the arbitrator's authority. The first two related arguments go to the arbitrator's [*7] authority to order the remedy he did. The third challenges the authority of the arbitrator to hear the matter in the first place.

The city's first argument is that in ordering the city to provide the individual employees back pay, overtime, and vacation pay commensurate with the positions they were required to fill on an unlawful "acting" basis, the arbitrator effectively appointed them to those positions, in violation of the civil service laws. The remedy, according to the city, thus exceeded his authority.

For its argument, the city relies on *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. 594 (1985) (*Somerville*). In that case, the city of Somerville, like the city of Springfield in this matter, attempted to avoid the financial consequences of filling vacant positions through the procedure set out in the civil service law by appointing employees to fill vacant higher positions on an acting basis. The union grieved this practice as a violation of the CBA, and the arbitrator ordered that for the time they had served, and would in the future serve in these acting positions, the employees had to be paid, not at the rate specified for out-of-grade work, but at the salaries provided in the CBA for the higher positions.

We explained there that the [*8] "arbitrator exceeded his authority by making an award which conflicts with the civil service law." *Id. at 595*. First, civil service law vests exclusive power to fill vacancies (either in a temporary or permanent capacity) in the appointing authority, in *Somerville*, the mayor. See *id. at 597* (stating that the appointing authority "retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis"). Civil service law also provides that the appointing authority must "follow the carefully prescribed requirements set forth in c. 31." *Ibid.* The purported appointments in an acting capacity in *Somerville* were made "by the chairman of the board of assessors, who is not the appointing authority," and were not made pursuant to the procedures detailed in the statute. *Id. at 603*. We held that "the arbitrator's award, in effect, promotes [the grievants] to higher positions in violation of the civil service law." *Id. at 599*.

This case, however, is inapposite. In *Somerville*, the arbitrator read the CBA to allow the city to make acting appointments in the future and to require the grievants to be paid as though they had been promoted in compliance with the civil service law. The arbitrator here [*9] has not allowed the city to continue to make "acting" appointments going forward that would effectively amount to permanent or temporary appointments that may only properly be made in compliance with *G. L. c. 31*; indeed, in its order issued prior to the arbitrator's decision, the commission expressly prohibited the city from making any further such acting appointments. Rather, the arbitrator has ordered back pay, overtime, and vacation pay as a remedy for what the commission had already determined was the unlawful placement of employees to serve in acting capacities in higher positions in the past. Rather than allowing these appointments, this solely backward-looking remedy serves, consistent with civil service law, to remedy the violation of the provision of the CBA that requires compliance with that law.

For the same reason, unlike the award in *Somerville* that authorized continued employment of the grievants in the higher positions without compliance with the procedures set out in c. 31, and required paying them as though they had properly been promoted, the remedial payment ordered by the arbitrator here is not "prohibited by §§ 68 and 71 of c. 31, which: (a) require that any 'change in [a civil service [*10] employee's] duties or pay' be reported to the administrator so that a payment roster can be prepared, and (b) prohibit payment to a civil service employee whose name does not appear on the roster as lawfully in his or her position." *Id. at 603*. Again, the award here of back pay under the CBA amounts to compensation for actions found by the arbitrator to have violated the CBA. It does not require ongoing payments for performance of a job to which the employees have not properly been appointed, and on the payment roster for which their names do not appear.

Indeed, although the city in essence argues that public policy as codified in the statutes is violated by the award, were we to accept the city's argument, it would provide a windfall for the city as a reward for its unlawful conduct and would incentivize cities and towns to utilize unlawful acting appointments for as long as they can in order to save money by underpaying those serving in those positions. It has been almost thirty years since we wrote "the administrator and Civil Service Commission are deeply concerned about the use of so-called unauthorized 'out-of-grade' promotional appointments, whether provisional or temporary, to circumvent [*11] the requirements of the civil service law," *id. at 602*, yet the practice apparently continues. We are loath to do anything that might tend to encourage it. Because the arbitrator's award in this case does not effectively appoint individuals to vacant positions without compliance with the civil service law, *Somerville* is not controlling, and the arbitrator's award was not beyond his authority.

The city's second and related argument is that because the commission prohibited appointments without compliance with the civil service laws, the arbitrator's award creates a conflict between the requirements of *G. L. c. 31*, §§ 68 and 71, and the requirements of the CBA. These statutes contain mandatory requirements involving reporting and preparation of rosters attendant upon civil service appointments and promotions.^{6,7} The city notes that *G. L. c. 150E*, § 7, states that in case of a conflict between terms of CBA and the law with respect to certain enumerated statutes, the terms of the CBA will prevail. Since c. 31 is not one of the enumerated statutes, the city's argument goes, the statute (as it claims it was construed by the commission) must trump the CBA as construed by the arbitrator.

6 "G[eneral] L[aws] c. 31, § 68, requires the appointing authority to report [*12] in writing to the administrator 'any appointment or employment, promotion, demotion, transfer, change in duties or pay, reinstatement,' and a host of other employment changes not here relevant. Based upon these reports, *G. L. c. 31*, § 71, requires the administrator to prepare rosters of all civil service positions, and of all persons who are legally employed in such positions, whether on a temporary or a permanent basis. The administrator files a copy of each roster with the municipal officer responsible for paying the salaries of a municipality's civil service employees. *Section 71* expressly provides that this payment officer shall not pay any salary or compensation for service rendered in any civil service position . . . to any person whose name does not appear on the appropriate roster, as amended from time to time, as the person in such position." *Somerville, supra* at 599.

7 The reporting requirements of §§ 68 and 71 are discussed *supra*. The city essentially argues that by ordering back pay, the arbitrator legitimized appointments made in violation of the procedures provided for in §§ 68 and 71. However because the city has retroactively promoted the employees, such argument now fails.

This second argument founders on the same [*13] shoals as the first. The premise of

the argument is that the arbitrator's make-whole remedy amounted to an effective appointment of the firefighters to the jobs they had been filling in an acting capacity. Again, the arbitrator's compensatory award did no such thing.

Next, the city argues that the commission determined that the civil service statute under which the employees brought an appeal to it -- c. 310 -- did not require back pay as a remedy for the violation and that the arbitrator was collaterally estopped from awarding such relief.

The commission, however, did not decline to order a make-whole remedy or construe the statute to prohibit one. Rather, upon issuing its decision it did not announce any remedy other than ordering the city to bring its practices into compliance with the civil service law. It urged the parties to reach an agreement on relief, retaining jurisdiction either to "receive the parties[]" joint motion for Chapter 310 relief or, alternatively, any party's motion to reconsider whether to grant Appellants other or further relief, for which the time to so move will be tolled until January 31, 2010." This is not a determination that back pay is not an appropriate [*14] award.

In the absence of a holding by the commission that the statute affirmatively prohibits a city from including a provision in a CBA that provides for back pay in a case like this, a determination by the arbitrator that the city had nonetheless bound itself contractually in the CBA to provide such a remedy in these circumstances does not create a "conflict" between the statute and the CBA. Indeed, the decision of the commission and that of the arbitrator, who explicitly and exclusively relied upon that decision, are in harmony in finding that the city's actions violated the civil service law.

Finally, the city appears to argue that the commission has exclusive jurisdiction with respect to any remedy for the violation of the civil service laws. That argument also fails. The city cites no authority in support of its contention that where a city binds itself by

contract to comply with the civil service law, it may not be held to have breached the contract by failing to do so. Indeed, *G. L. c. 150E, § 8*, quoted *supra* at note 2, envisions just such circumstances and indicates the availability where they occur of both a remedy before the commission and of one under the CBA.⁸ "When possible, we attempt to [*15] read the civil service law and the collective bargaining law, as well as the agreements that flow from the collective bargaining law, as a 'harmonious whole.'" *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO, 61 Mass. App. Ct. 404, 406 (2004)*, quoting from *Dedham v. Labor Relations Commn., 365 Mass. 392, 402 (1974)*. To the extent the city means to argue that the specific order of the commission in this case meant that only the

commission had jurisdiction to award further relief it is incorrect. By its terms the order merely permitted the filing before the commission of motions for further relief in the event either party chose to do so. It did not provide that the commission's jurisdiction over further relief was to be exclusive of any otherwise available forum.⁹

8 Because the commission's jurisdiction is not exclusive, to the extent the city renews its argument that the grievances were not arbitrable because the commission's jurisdiction is exclusive, that argument also fails.

9 We decline the union's request for appellate attorney's fees. *Judgment affirmed.*

**CITY OF WORCESTER vs.
CIVIL SERVICE COMMISSION & ANOTHER.¹**

1 Leon Dykas.

No. 12-P-1844.

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 120; 26 N.E.3d 196; 2015 Mass. App. LEXIS 17

**December 6, 2013, Argued
February 26, 2015, Decided**

PRIOR HISTORY: [***1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on October 22, 2010.

The case was heard by *Carol S. Ball, J.*, on motions for judgment on the pleadings.

HEADNOTES

**MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES**

Practice, Civil, Review respecting civil service. *Civil Service, Police, Decision of Civil Service Commission, Termination of employment, Judicial review. Administrative Law, Hearing, Judicial review. Municipal*

Corporations, Police. Police, Discharge. Public Employment, Police, Termination. Statute, Construction.

Discussion of the system of review for tenured civil service employees facing suspension or discharge.

The Civil Service Commission properly determined that the defendant city did not have just cause to suspend or terminate a tenured police officer for his failure to testify at a mandatory pretermination hearing pursuant to *G. L. c. 31, § 41*, given that the § 41 hearing is held for the protection of the tenured employee and not the appointing authority.

COUNSEL: *Leo J. Peloquin* for the plaintiff.

Robert L. Quinan, Jr., Assistant Attorney General, for Civil Service Commission.
Meghan C. Cooper for Leon Dykas.

JUDGES: Present: FECTEAU, SULLIVAN, & MALDONADO, JJ.

OPINION BY: MALDONADO

OPINION

[**197] **MALDONADO, J.** The city of Worcester (city) appeals from a judgment of the Superior Court upholding the determination of the Civil Service Commission (commission) that an appointing authority may not suspend or terminate a tenured employee for the employee's failure to testify at a hearing pursuant to *G. L. c. 31, § 41*. The city contends that because § 41 does not explicitly establish a statutory testimonial privilege [**198] and because police department rules and regulations require officers to provide truthful testimony when requested, the commission exceeded its au- [*121] thority and improperly intruded upon the city's right to enforce its rules of conduct. We conclude that the commission's determination that, because the § 41 hearing is held for the protection of the [***2] tenured employee and not the appointing authority, the tenured employee may not be sanctioned for the employee's failure to testify at his § 41 hearing is consistent with the statutory purpose of § 41 and entitled to substantial deference. Therefore, we affirm.

Factual background. The relevant facts drawn from the administrative record are undisputed. Leon Dykas was a tenured civil service employee, working as a police officer for the Worcester police department (department). In 2008, Dykas was purported to have engaged in noncriminal misconduct involving his ex-wife in violation of a "Last Chance Settlement Agreement" into which he had entered with the department.² Dykas

cooperated with the department's internal investigation and attended an investigatory interview at the department's bureau of professional standards (BOPS) as ordered. Following review of the BOPS report and a transcript of Dykas's interview, the chief of police, Gary Gemme, placed Dykas on paid administrative leave pending completion of the investigation.

2 Under the terms of the agreement, Dykas agreed that the city would have "just cause to dismiss him" if he engaged in any further misconduct related to his ex-wife or her friends. [***3]

Several months later, on July 2, 2009, Michael V. O'Brien, the city manager and appointing authority,³ scheduled a mandatory pretermination hearing pursuant to *G. L. c. 31, § 41* (§ 41 hearing). O'Brien provided Dykas with the required statutory notice. He also ordered Dykas to attend and to testify truthfully at the § 41 hearing.⁴ The notice warned Dykas that his failure "to obey this directive in any respect could result in discipline, up to and including dismissal, separate and apart from any discipline imposed as a result of the substantiation of the underlying [misconduct] charge."

3 "The term '[a]ppointing authority' is defined as 'any person, board or commission with power to appoint or employ personnel in civil service positions.' *G. L. c. 31, § 1.*" *Fernandes v. Attleboro Hous. Auth.*, 470 Mass. 117, 123 n.5, 20 N.E.3d 229 (2014).

4 A police officer is required to "truthfully state facts in all reports as well as when ... appear[ing] before or participat[ing] in any judicial, Departmental, or other official investigation, hearing, trial or proceeding. He shall fully cooperate in all phases of such investigations, hearings, trials and proceedings." Worcester police department, Rules and Regulations, Regulation 1402.1.

Dykas appeared for the commencement of the § 41 hearing [*122] with counsel; however, Dykas left before the hearing concluded, failing [***4] to supply the requested testimony and leaving his attorney

behind. The hearing officer advised that he would draw an adverse inference from Dykas's failure to testify.⁵

5 The parties are in agreement that such an inference is allowable in this context.

For Dykas's failure to comply with the order commanding his testimony, Chief Gemme suspended Dykas for five tours of duty without pay. Dykas appealed this sanction. The city scheduled another § 41 hearing to determine whether Dykas's failure to comply with O'Brien's directive to testify at the § 41 hearing constituted a separate ground for dismissal. The hearing officer determined that Dykas's failure to comply with the order to testify constituted just cause for Dykas's suspension [**199] and dismissal. Adopting the hearing officer's report, the city then terminated Dykas for his failure to testify.

Dykas appealed this termination to the commission, which concluded that Dykas could not be compelled to testify at his § 41 hearing. As a result, the commission found that the city lacked just cause to suspend or terminate Dykas on that basis, and it ordered Dykas returned to work without the loss of pay or benefits. The city appealed from the commission's decision [***5] to a judge of the Superior Court, who affirmed the commission's order.⁶ See *G. L. c. 30A, § 14; G. L. c. 31, §§ 43-44*. The city appealed, and we address its challenge below.

6 The parties informed us that after Dykas's termination for refusing to testify, O'Brien separately terminated Dykas for the underlying misconduct and, further, that an arbitrator upheld the discharge. No issue regarding the second termination is before us.

Even though Dykas's employment has been terminated, the current appeal is not moot because, if he prevails, as the commission observes, he may be "entitled to compensation for the period that intervened between his court-ordered restoration to employment in the present case and his subsequent discharge as a result of the

arbitral proceeding." In addition, even if the dispute were technically moot, it is one that has been fully briefed, is of public importance, and the issue could easily recur. See, e.g., *Libertarian Assn. of Mass. v. Secretary of the Comm.*, 462 Mass. 538, 548, 969 N.E.2d 1095 (2012), and cases cited.

Standard of review. When reviewing the commission's interpretation of the civil service law that it is charged with enforcing, "we must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any [***6] reasonable construction be interpreted in harmony with the legislative mandate." *Falmouth v. [*123] Civil Serv. Commn.*, 447 Mass. 814, 821-822, 857 N.E.2d 1052 (2006), quoting from *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 771, 767 N.E.2d 549 (2002). 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. Commn.*, 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).

Statutory scheme. There is a three-tiered system of review for tenured employees facing suspension or discharge. See *G. L. c. 31, §§ 41-44*. Pursuant to this statutory scheme, an appointing authority may not discharge a tenured employee or suspend the tenured employee for more than five days except for just cause; the employee is entitled to an initial hearing pursuant to § 41. See *Fernandes v. Attleboro Hous. Authy.*, 470 Mass. 117, 122-123, 20 N.E.3d 229 (2014); *School Comm. of Brockton v. Civil Serv. Commn.*, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620 (1997).

In connection with this § 41 proceeding, the tenured employee is afforded several procedural protections. These safeguards include the right to written notice of the

action contemplated by the appointing authority, a copy of *G. L. c. 31, §§ 41-45*, and a hearing on whether there is just cause for the proposed action. The employee may be represented by counsel, at his or her election. If, at the conclusion of the § 41 hearing, the appointing authority finds just cause for the tenured employee's termination, the appointing authority must provide the employee with a written notice of its [***7] decision. The employee then may avail himself or herself of the two additional layers of review -- a de novo [**200] adjudicatory hearing before the commission (*G. L. c. 31, § 43*) and subsequent judicial review of that decision in the Superior Court (*G. L. c. 31, § 44*). See *Falmouth v. Civil Serv. Commn., supra at 823*. The appointing authority is also permitted to seek judicial review of the commission's decision.

Testimony at § 41 hearing. The city contends that *G. L. c. 31, § 41*, as inserted by St. 1978, c. 393, § 4, which provides in relevant part that "[t]he person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him," does not explicitly confer upon an employee a testimonial privilege and, therefore, that Dykas was required to testify when ordered to do so by his superiors. "Where, as here, a statute is 'simply silent' on the particular issue, we interpret the provision 'in the context of the [*124] over-all objective the Legislature sought to accomplish.'" *Seller's Case, 452 Mass. 804, 810, 898 N.E.2d 494 (2008)*, quoting from *National Lumber Co. v. LeFrancois Constr. Corp., 430 Mass. 663, 667, 723 N.E.2d 10 (2000)*.

Before the enactment of civil service laws in the Nineteenth Century, public employees served largely at the will of their employers. See Civil Service Act, St. 1884, c. 320. The civil service laws were enacted in order [***8] to protect employees from unjustified removal or suspensions. See *Branche v. Fitchburg, 306 Mass. 613, 614, 29 N.E.2d 131 (1940)*. The civil service

system sought to "assur[e] that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." *Callanan v. Personnel Administrator for the Comm., 400 Mass. 597, 600, 511 N.E.2d 525 (1987)*, quoting from *G. L. c. 31, § 1, fourth par. (f)*. Viewed in this context, it is apparent that § 41 is intended to protect the tenured employee's interest by restricting, not enlarging, the removal powers of an appointing authority. See *Gloucester v. Civil Serv. Commn., 408 Mass. 292, 297, 557 N.E.2d 1141 (1990)*. Section 41 requires that the tenured employee receive notice and an explanation of the charges against him and, towards that end, affords tenured employees substantial procedural protections. That the employee facing discharge may answer to the charges "personally" or "through counsel," see *G. L. c. 31 § 41, fourth par.*, or choose to waive his or her opportunity to be heard, lends further support to the commission's conclusion that the § 41 hearing is geared to the protection of the employee and not the employer. See *Fernandes v. Attleboro Hous. Auth., supra at 123* ("[T]he provisions of *G. L. c. 31, §§ 41-45*, clearly are meant to protect tenured employees' rights"). See generally *Whitney v. Judge of the Dist. Ct. of N. Berkshire, 271 Mass. 448, 461, 171 N.E. 648 (1930)*. Certain protections for tenured civil service employees have been extant in the statute for over 100 years. See St. 1904, [***9] c. 314, § 2, as amended by St. 1905, c. 243, § 1. See also *Tucker v. Boston, 223 Mass. 478, 480, 112 N.E. 90 (1916)* (employee may not be terminated "unless and until he has had an opportunity to be heard, and that right to such hearing is a condition precedent to such removal").

The current iteration of the statute, last amended in 1978, must also be understood in the context of modern constitutional jurisprudence. Tenured civil servants such as Dykas have a property interest in their employment, see *Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-578, 92*

S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and must be afforded basic due process protections in suspension and disciplinary proceedings, including a predeprivation hearing. See [*125] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Cronin v. Amesbury*, 81 F.3d 257, 260 n.2 (1st Cir. 1996). "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, *supra* at 546. This fundamental right to be heard belongs to the employee, not the employer.⁷ *Ibid.* Accord *Tucker v. Boston*, *supra*. The city argues that the commission's ruling nevertheless deprived it of an opportunity to conduct a "full" hearing, as required by § 41. See *G. L. c. 31, § 41* ("[S]uch employee ... shall be given a full hearing concerning [the] reason or reasons before the appointing authority"). The city confounds the hearing's purpose. The statute requires [***10] a "full" hearing so that the employee may be provided with the "reasons or reasons" for his termination - - to which he is entitled. See *Cleveland Bd. of Educ. v. Loudermill*, *supra*. It is not intended to provide the appointing authority with an additional investigative venue once the decision to terminate employment or to sanction the employee has been made.

7 Contrary to the city's assertion, the fact that an employee is not entitled to a hearing before a disinterested hearing officer in lieu of the appointing authority without the appointing authority's consent (see *G. L. c. 31, § 41A*), does not detract from the overarching legislative intent to protect the interest of the employee.

The city has an opportunity, within statutory and constitutional limits, to collect evidence and develop its case via its internal departmental investigations. Once, however, the decision to seek termination was made, Dykas's statutory and due process rights attached. Constitutional safeguards require "oral or written notice of the charges against

[the tenured employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 546. See *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 516, 451 N.E.2d 408 (1983) ("[D]ecision of the commission is not justified if it is [***11] not based on the reasons specified in the charges brought by the appointing authority").

The commission was also reasonable in its determination that department rules and regulations could not serve to undermine the statute's purpose.⁸ See *Maimaron v. Commonwealth*, 449 Mass. 167, 174-175, 865 N.E.2d 1098 (2007) (where State police regulation con- [*126] flicts with statute, statute governs); *Massachusetts Org. of State Engrs. & Scientists v. Commissioner of Admin.*, 29 Mass. App. Ct. 916, 918, 557 N.E.2d 1170 (1990) ("[R]equirements [of c. 31] may not be altered on the appointing authority's own motion or through collective bargaining or arbitration"). In addition, the commission's ruling did not intrude upon the city's management rights. The rule here did not implicate a discretionary employment decision based upon merit, a policy consideration, or any mitigating factors. Contrast *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 305-306, 682 N.E.2d 923 (1997) (vacating commission's decision due to commission's substituted judgment and affirming bypass decision of appointing authority); *Boston Police Dept. v. Collins*, 48 Mass. App. Ct. 408, 413, 721 N.E.2d 928 (2000) (affirming Superior Court judgment reinstating five-day [**202] suspension imposed by employer that had been vacated by commission).

8 The commission's ruling in this case did not foreclose the city from enforcing its rules of conduct had Dykas elected to testify. He still would have been subject to the rule requiring that his testimony be truthful.

Moreover, the commission did not create a testimonial privilege [***12] for which the Legislature had not provided. Unlike a true testimonial privilege, the commission's ruling did not preclude the city from drawing an adverse inference against Dykas for failing to testify. Nor did the commission's ruling preclude the commission from considering such negative inference on appeal. See *Falmouth v. Civil Service Commn.*, 447 Mass at 826-827. The commission is afforded "considerable leeway" in interpreting the statute, and consistent with this authority, the commission simply decided a legal question pertaining to what, if any, obligation Dykas had to testify at his § 41 hearing. *Id.* at 821. The commission did not exceed its authority. Accordingly, we conclude that the

commission's determination that the city did not have just cause to suspend or terminate Dykas for failing to testify at his *G. L. c. 31, § 41*, hearing is not arbitrary, capricious, or otherwise contrary to the law.⁹

9 The commission did not reach, and we do not address, the additional advisory question whether an employee may testify at his § 41 hearing through counsel.

The judgment of the Superior Court is affirmed.¹⁰

10 This affirmance has no effect on the second discharge, which is not before us. See note 6, *supra*.

So ordered.

COMMUNITY INVOLVED IN SUSTAINING AGRICULTURE, INC. vs. BOARD OF ASSESSORS OF DEERFIELD

13-P-1050

APPEALS COURT OF MASSACHUSETTS

86 Mass. App. Ct. 1119; 19 N.E.3d 866; 2014 Mass. App. Unpub. LEXIS 1137

November 10, 2014, 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: Appeal denied by *Cmty. Involved in Sustaining Agric. v. Bd. of Assessors of Deerfield*, 470 Mass. 1108, 2015 Mass. LEXIS 82, 26 N.E.3d 747 (Mass., Jan. 30, 2015)

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

JUDGES: Grasso, Kantrowitz & Meade, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Community Involved in Sustaining Agriculture, Inc. (CISA)¹ appeals the decision of a single member of the Appellate Tax Board (board) that CISA is not exempt from property taxes pursuant to *G. L. c. 59, § 5, Third* (the statute). The board concluded that CISA is not a charitable organization as defined in the statute because its dominant purpose is to benefit farmers, and "any benefit derived by the public [is] incidental." On appeal, CISA argues that the board erred in construing the statute too narrowly. We agree and reverse.

1 CISA is a Massachusetts not-for-profit corporation organized under *G. L. c. 180*. CISA also has tax exempt status from the Internal Revenue Service pursuant to 26 U.S.C. § 501(c)(3) (2006).

"Exemption statutes are strictly construed," and the party seeking an exemption bears the burden of proving its entitlement. *New England Forestry Foundation, Inc. v. Board of Assessors of Hawley*, 468 Mass. 138, 148, 9 N.E.3d 310 (2014). We will not reverse the decision of the board "if it is based on substantial evidence and on a concrete application of the law." *Koch v. Commissioner of Rev.*, 416 Mass. 540, 555, 624 N.E.2d 91 (1993). [*2] Although the board's factual findings are supported by substantial evidence, the board erred in its legal conclusion that CISA is not a charitable organization within the meaning of the statute and thus not entitled to a charitable property tax exemption.²

2 CISA owns real property at 1 Sugarloaf Street in South Deerfield, and occupies seventy percent of the property. CISA concedes that it is not entitled to an exemption from property taxes for the thirty percent of the property that it leases to tenants.

The statute affords an exemption from property taxes where "property is held by a 'charitable organization' and 'occupied by [the organization] ... for the purposes for which it is organized.'" *New England Forestry*

Foundation, Inc., supra, quoting from *G. L. c. 59, § 5, Third*. An organization is "charitable if the dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose." *Massachusetts Med. Soc. v. Assessors of Boston*, 340 Mass. 327, 332, 164 N.E.2d 325 (1960). When considering whether an organization's dominant purpose is charitable, the court considers "a number of nondeterminative factors." *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 732, 889 N.E.2d 414 (2008).³ [*3] "The farther an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant [the *New Habitat, Inc.*] factors will be." *Id. at 733*.

3 These factors include whether the organization (1) "provides low-cost or free services to those unable to pay"; (2) "charges fees for its services"; (3) "offers its services to a large or 'fluid' group of beneficiaries"; (4) "provides its services to those from all segments of society and from all walks of life"; or (5) "limits its services to those who fulfill certain qualifications." *New Habitat, Inc., 451 Mass. at 732-733*.

Unlike the board, we conclude that CISA more closely resembles a traditionally charitable organization than it does a commercial enterprise.⁴ On the facts before it, the board erred in concluding that the primary beneficiaries of CISA's services are its members, and any public benefit is incidental. Rather, the facts establish that CISA's programs benefit an indefinite number of people, many of whom are not members, and any benefit to farmers "is but the means adopted for this purpose." *Id. at 732*. See *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867). Indeed, CISA distributes [*4] a free annual "locally grown farm products guide" to nearly 50,000 households, and helps vulnerable populations such as the elderly, low income citizens, school children, and urban residents receive fresh local food that they would otherwise struggle to access. By increasing food security and developing

sustainable local farming, CISA engages in charitable activities that benefit the general public. Moreover, CISA is traditionally charitable because its programs lessen the burdens of many government agencies "interested in food systems, nutrition, public health, agriculture, and local farmers." See *Assessors of W. Springfield v. Eastern States Exposition*, 326 Mass. 167, 170, 93 N.E.2d 462 (1950) ("Whatever aids agriculture helps to advance the health and prosperity of the Commonwealth").

4 The board's reliance on *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 54 N.E.2d 199 (1944), is misplaced. The Chamber of Commerce is funded by its members, who, in turn, directly benefit from the Chamber of Commerce's programs. *Id.* at 715. CISA, by contrast, is not funded by the farmers that it supports, but primarily by government contracts, grants, and charitable donations.

Even were we to view CISA's dominant [*5] purposes and methods as falling farther on the scale from traditionally charitable purposes and methods, the *New Habitat, Inc.* factors weigh heavily in favor of granting the property tax exemption. First, as the board acknowledged, CISA provides free and low-cost services to vulnerable populations. See *New Habitat, Inc.*, 451 Mass. at 732. For example, in 2010 alone, CISA's Senior FarmShare program provided nearly 350 elderly citizens with fresh food from local farms for ten weeks. CISA also works to facilitate the growth of farmers' markets in low income areas, "the use of SNAP (Food

Stamps) benefits at farmers markets," and "the ability of Springfield area day cares to obtain locally grown food."

Further evidencing its charitable purpose, CISA does not restrict membership to those meeting certain criteria. Cf. *Massachusetts Med. Soc.*, *supra* at 329 (restricting membership to people at least twenty-one years old with medical degrees and medical licenses). Indeed, CISA's members are diverse and come from different segments of society, including "private citizens, community advocates, retailers, institutions, restaurants, farmers, [and] landscape and garden centers." Although members pay [*6] a fee (ranging from \$35 to \$500), CISA's by-laws allow the board of directors to waive the fee in certain instances. Nor is there any suggestion that CISA's membership fees are unreasonable. To the contrary, CISA's membership fees comprise less than six percent of CISA's annual revenue and help advance CISA's charitable purpose by defraying operational costs. See *New Habitat, Inc.*, 451 Mass. at 735 (exempting organization despite "substantial fees" where fees were spent on operational costs).

In sum, CISA is a charitable organization and accordingly, is entitled to an exemption from property taxes under the statute.

Decision of the Appellate Tax Board reversed.

By the Court (Grasso, Kantrowitz & Meade, JJ.),

Entered: November 10, 2014.

**JOHN DAROSA & OTHERS¹ vs. CITY OF NEW BEDFORD;
MONSANTO COMPANY & OTHERS,² THIRD-PARTY DEFENDANTS.**

1 John Day, Diane Cosmo, Luis Barbosa, and Ermelinda Barbosa.

2 Pharmacia Corporation; Solutia, Inc.; Cornell-Dubilier Electronics, Inc.; AVX Corporation (AVX); NSTAR Electric Company; NSTAR Gas Company; Tutor Perini Corporation; ABC Disposal Service, Inc.; Goodyear Tire and Rubber Company; and John Does 1-20. A stipulation of dismissal with prejudice as to third-party defendants Monsanto Company, Pharmacia Corporation, and Solutia, Inc., was entered in the Superior Court in July, 2014.

SJC-11759.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

471 Mass. 446; 30 N.E.3d 790; 2015 Mass. LEXIS 253

January 8, 2015, Argued
May 15, 2015, Decided

PRIOR HISTORY: [***1] Bristol. CIVIL ACTION commenced in the Superior Court Department on October 24, 2008.

A motion to strike privilege and work product objections to certain documents and to compel their production, filed on May 15, 2014, was heard by *Richard T. Moses, J.*

An application for leave to prosecute an interlocutory appeal was allowed by *Judd J. Carhart, J.*, in the Appeals Court, and the case was reported by him to that court. The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Public Records. Municipal Corporations, Public record. Attorney at Law, Work product, Attorney-client relationship. Privileged Communication. Practice, Civil, Discovery.

This court concluded that where an administrative agency is engaged in litigation, decisions regarding litigation strategy and case preparation fall within the rubric of "policy deliberation" as set forth in *G. L. c. 4, § 7, Twenty-sixth (d)*, and therefore, opinion work product sought in discovery from a municipality in anticipation of or during the pendency of litigation is protected from disclosure as "public records," in that such work product is related to policy positions being developed by the agency; further, this court concluded that fact work product sought in discovery that is not contained within a factual study or report, or that is contained in a factual study or report that is not reasonably completed, is protected from disclosure until

the study or report is reasonably completed, and if a factual study or report is reasonably completed but is interwoven with opinions or with analysis leading to opinions, a discussion or analysis section interwoven with facts would be protected from disclosure even if a purely factual section of such a report might not; finally, this court concluded that the administration of justice is better served by requiring a public agency to disclose in discovery any requested fact work product that would be disclosed pursuant to a public records request (even if it would otherwise be protected under *Mass. R. Civ. P. 26 [b] [3]* were it not a public record), rather than requiring a litigant to make a public records request for such documents.

In the circumstances of a civil action brought by property owners from a neighborhood around a site that the defendant city allegedly operated as an unrestricted ash dump for industrial and other waste, a judge hearing a motion to compel production of certain documents prepared for the city by an outside consultant erred in failing to consider whether the documents at issue, which the judge concluded clearly constituted attorney work product, [*447] were protected from disclosure as public records by the "policy deliberation" exemption set forth in *G. L. c. 4, § 7, Twenty-sixth (d)*, and the fact that the documents were the work of an outside consultant was of no account ; however, the documents were not protected from disclosure under a derivative attorney-client privilege.

COUNSEL: *Shephard S. Johnson, Jr.*, for city of New Bedford.

Mary K. Ryan (Cynthia M. Guizzetti with her) for AVX Corporation.

John J. Gushue, for ABC Disposal Service, Inc., was present but did not argue.

Mark P. Dolan & Stanley F. Pupecki, for Tutor Perini Corporation, submitted a brief.

Michael R. Perry & Aaron D. Rosenberg, for NSTAR Electric Company & another, submitted a brief.

John J. Davis & John M. Wilusz, for Massachusetts Municipal Association, amicus curiae, submitted a brief.

Martha Coakley, Attorney General, & *Judy Zeprun Kalman*, for the Commonwealth, amicus curiae, submitted a brief.

Brandon H. Moss, for Massachusetts [***2] Municipal Lawyers Association, Inc., amicus curiae, joined in a brief.

JUDGES: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.

OPINION BY: GANTS

OPINION

[**793] GANTS, C.J. In *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 801, 711 N.E.2d 589 (1999) (*General Electric*), we held that "materials privileged as work product ... are not protected from disclosure under the public records statute unless those materials fall within the scope of an express statutory exemption." We noted that there is not an express statutory exemption for work product and rejected the claim that work product is protected from disclosure by an implied exemption. See *id.* at 801-806. In *General Electric*, the parties were not yet in litigation, so the work product was sought under the public records act rather than in discovery. And in *General Electric* we did not reach the issue whether the work product would be [*448] protected from disclosure under the "policy deliberation" exemption, *G. L. c. 4, § 7, Twenty-sixth (d)*, known as

exemption (*d*). Here, the parties are in litigation, and the work product in the possession of the city of New Bedford (city) was sought in discovery. We now revisit our holding in *General Electric* and explore the scope of the "policy deliberation" exemption in the context of work product sought in discovery [***3] from a municipality during litigation. We conclude that "opinion" work product that, as codified in *Mass. R. Civ. P. 26 (b) (3)*, 365 Mass. 772 (1974), was "prepared in anticipation of litigation or for trial by or for [a] party or ... that ... party's representative" falls within the scope of exemption (*d*) and therefore falls outside the definition of "public records" under *G. L. c. 4, § 7, Twenty-sixth*. [**794] We also conclude that "fact" work product under *Mass. R. Civ. P. 26 (b) (3)* that was prepared in anticipation of litigation or trial falls within the scope of exemption (*d*), and therefore falls outside the definition of "public records," where it is not a reasonably completed study or report or, if it is reasonably completed, where it is interwoven with opinions or analysis leading to opinions. Where work product is exempted from disclosure under the public records act, it is protected from disclosure in discovery to the extent provided by *Mass. R. Civ. P. 26*.³

3 We acknowledge the amicus briefs submitted by the Commonwealth and by the Massachusetts Municipal Association.

Background. The case underlying this appeal concerns liability for the costs of environmental cleanup of widespread soil contamination at and around a site that the city allegedly operated until the 1970s [***4] as an unrestricted ash dump for industrial and other waste (site). In October, 2008, property owners from a neighborhood around the site filed a civil action in the Superior Court against the city bringing common-law claims and a claim under *G. L. c. 21E*⁴ seeking damages arising from the soil contamination. In December, 2009, the city filed a third-party com- [*449] plaint alleging common-law claims and cost recovery claims under *G. L. c. 21E* against various third-party defendants. After the original complaint was filed and

before the city filed its third-party complaint, the city solicitor, on behalf of the city, retained Andrew Smyth, a consultant at TRC Environmental Corporation (TRC), to evaluate the issues related to the claims in the civil action and to identify sources of the contamination that may be legally responsible to pay for the cleanup.⁵ Smyth provided his services directly to the city solicitor in connection with the litigation pending against the city.⁶

4 *General Laws c. 21E*, the so-called Massachusetts "Superfund" law, provides, in relevant part, that "any person who ... caused or is legally responsible for a release or threat of release of oil or hazardous material from a ... site" -- including "any person who at the [***5] time of storage or disposal of any hazardous material owned or operated" the site, and "any person who ... arranged for the transport, disposal, storage or treatment of hazardous material to" the site -- is (subject to statutory exceptions) strictly liable, jointly and severally, "to the commonwealth for all costs of assessment, containment and removal," and "to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release." *G. L. c. 21E, § 5 (a)*.

5 In the course of conducting response actions at the site of the contamination pursuant to *G. L. c. 21E* and *310 Code Mass. Regs. §§ 40.0000*, the city of New Bedford (city) retained other consultants as "Licensed Site Professionals" for the site. The city represents that the data and records of all licensed site professionals it retained in connection with the contaminated site, as well as the data and records that Andrew Smyth evaluated for the city solicitor, were made available during discovery to all parties involved in the present litigation.

6 After the city retained outside legal counsel later in 2009, Smyth provided his services directly to outside counsel.

During the course of discovery, various third-party defendants [***6] moved to strike the city's privilege and work product objections to TRC documents and to compel their production.⁷ The third-party defendants asked, as part of the relief requested, that the

city be compelled to produce [**795] documents that Smyth had prepared for the city, including two letters to the city solicitor and a fifty-two-page "evaluation report," described as a draft, regarding the sources and occurrence of soil contamination in the relevant area of the city (collectively, TRC work product). The city responded that the TRC work product was protected from discovery by the attorney-client privilege and the work product doctrine. The motion judge rejected the city's claim of attorney-client privilege. The judge also rejected the city's contention that the documents were protected from disclosure under the work product doctrine codified in *Mass. R. Civ. P. 26 (b) (3)*, even though he found that the documents contained "information which was intended to assist the city solicitor in advising the [c]ity as to the potential litigation." Citing *General Electric*, the judge concluded that the TRC work product, having been received by the city solicitor, constituted "public records" as defined in *G. L. c. 4, § 7, Twenty- [450] sixth*, and therefore [***7] was subject to discovery unless it fit "within an enumerated exception." Because there is no enumerated exception for work product, and because the documents were not protected by the attorney-client privilege, the judge allowed the third-party defendants' motion, and ordered that the work product be produced. The judge noted that "but for the public records law, said materials would clearly constitute attorney work product, and would be subject to a heightened standard for disclosure as codified in *Mass. R. Civ. P. 26 (b) (3)*."

7 The motion was brought by third-party defendants Monsanto Company, Pharmacia Corporation, and Solutia, Inc., and was joined by AVX. The motion was pursued by AVX after the three third-party defendants who originally brought the motion were dismissed from the case.

Following the ruling, the city moved for a protective order to preclude the third-party defendants from inquiring into the TRC work product at a deposition. The judge construed

the motion as seeking a stay of the court's order, and allowed the motion to give the city an opportunity to file an interlocutory appeal. The city petitioned a single justice of the Appeals Court for interlocutory review, and the single justice allowed [***8] the petition and reported it to a full panel of the Appeals Court. We granted direct appellate review.

On appeal, the city claims that the court should exercise its inherent authority to rule that the TRC work product, even if it consists of "public records," should be protected from discovery during pending litigation by the work product doctrine codified in *Mass. R. Civ. P. 26 (b) (3)*. The city also argues that these documents are not "public records" because they are protected from public disclosure by the "policy deliberation" exemption in *G. L. c. 4, § 7, Twenty-sixth (d)*. Finally, the city argues that the TRC work product is protected from disclosure by the so-called derivative attorney-client privilege.

Discussion. 1. Work product. We begin our analysis by discussing the public records law. Under the public records act, *G. L. c. 66, § 10 (act)*, "[e]very person having custody of any public record, as defined in [*G. L. c. 4, § 7, Twenty-sixth*], shall, ... without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person" *G. L. c. 66, § 10 (a)*. "Public records," as defined in *G. L. c. 4, § 7, Twenty-sixth*, includes "all ... documentary materials or data ... made or received by any officer [***9] or employee" of any agency, office, or authority of State or local government, unless such records fall within one of twenty exemptions. Exemption (*d*), the so-called "policy deliberation" exemption, protects from public disclosure "inter-agency or intra-agency memoranda or letters relating to policy positions [*451] being developed by the agency; but ... shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." *G. L. c. 4, § 7, Twenty-sixth (d)*.

[**796] In *General Electric, 429 Mass. at 799*, we "consider[ed] ... whether a governmental entity subject to the [act] ... may withhold from public disclosure documents and other records on the basis of an implied exemption for materials covered by the work product doctrine." When the Department of Environmental Protection (DEP) withheld a set of documents in response to a public records request, General Electric commenced an action in the Superior Court under *G. L. c. 66, § 10 (b)*, seeking disclosure of the withheld documents, and the parties filed cross motions for summary judgment. See *id. at 799-800*. The judge allowed DEP's motion, "concluding that because the [act] should not be read as an implicit legislative abrogation of well-established legal doctrines, [***10] work product enjoys an implied exemption from disclosure under the statute." *Id. at 800-801*. We disagreed, concluding that work product as defined in *Mass. R. Civ. P. 26 (b) (3)* is "not protected from disclosure under the [act] unless those materials fall within the scope of an express statutory exemption." *Id. at 801*.

In support of this conclusion, we noted the broad scope of the act and its definition of "public records." See *id.* We also noted that the act specifically declares that, in any court proceeding challenging the withholding of a requested document, "there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies." *G. L. c. 66, § 10 (c)*. See *General Electric, 429 Mass. at 801*. We determined that "the statute's clear and unambiguous language mandates disclosure of requested public records limited only by the definition of public record found in *G. L. c. 4, § 7, Twenty-sixth*." *Id. at 802*. In short, we determined that the only exemptions in the act are those identified in the act, and refused to imply any exemption from disclosure.⁸

8 Apart from the "clear and unambiguous language" of the public records act (act), we concluded that the Legislature did not intend to include an implied exemption for work

[**11] product because an exemption (k) that had been included in the bill that became the act when the bill was originally passed by the House of Representatives was excluded from the bill subsequently recommended by the conference committee and was not ultimately enacted. See *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 802-803, 711 N.E.2d 589 (1999) (*General Electric*). Exemption (k) would have shielded from public disclosure all "records pertaining to any civil litigation in which an agency ... is involved, except in response to a subpoena, and only prior to final judicial determination or settlement of such litigation." *Id.* See 1973 House Doc. No. 7433, § 1. We declared, "The express deletion of this provision confirms our conclusion that the Legislature did not intend implicitly to incorporate a work product exemption." *General Electric*, *supra* at 803.

[*452] We further noted that the act was modeled on the Federal Freedom of Information Act, 5 U.S.C. § 552 (2012) (FOIA), which contains an exemption protecting from disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). See *General Electric*, 429 Mass. at 803-804. The comparable exemption in the act, exemption (d), excluded from public disclosure "inter-agency or intra-agency [**12] memoranda or letters relating to policy positions being developed by the agency," and does not expressly exclude internal memoranda or letters that would not be available to a party in litigation with the agency. *G. L. c. 4, § 7, Twenty-sixth (d)*. [**797] We concluded that the "differences between the two statutes reflect a conscious decision by the Legislature to deviate from the standard embodied in the Federal statute concerning the disclosure of [attorney work product]." *General Electric*, *supra* at 804, quoting *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 433, 446 N.E.2d 1051 (1983).

Having concluded that the act includes no implied exemption for documents within the common-law work product doctrine, we

vacated that part of the judgment that allowed the DEP to withhold documents under such an implied exemption, but affirmed that part of the judgment that authorized DEP to withhold documents if they met the requirements of the "policy deliberation" exemption in *G. L. c. 4, § 7, Twenty-sixth (d)*. *General Electric*, 429 Mass. at 807. We did not address the scope of this exemption, or whether it may protect from disclosure all or some of the documents that had been withheld under the common-law work product doctrine.

Today, we revisit the reasoning and holding in *General Electric*. We note that this appeal comes to us in a different posture [**13] from *General Electric*, in that it is not an appeal under the act from a judge's decision regarding a public records request but, rather, an interlocutory appeal from a judge's allowance of dis- [*453] covery of work product in a pending lawsuit.⁹ We also note that the judge appeared to understand *General Electric* to hold that work product otherwise protected from disclosure in litigation under *Mass. R. Civ. P. 26 (b) (3)* is not protected where it is received by a public employee. The judge's decision did not address whether the reports at issue fall within exemption (d) of the act and for that reason are not public records under the act.

9 AVX did additionally file a public records request with the city solicitor's office seeking access to "correspondence and evaluative material created by TRC Companies, Inc." The city solicitor denied AVX's request, and - - instead of challenging the denial by bringing a civil action against the city solicitor pursuant to *G. L. c. 66, § 10 (b)* -- AVX filed an administrative appeal with the supervisor of public records (supervisor), also pursuant to *G. L. c. 66, § 10 (b)*. After we had taken the city's appeal in this case under advisement, the supervisor issued a letter ruling in which the city was "ordered to provide all responsive [**14] records to [AVX] in a manner consistent with this order." Letter Determination of the Supervisor of Public Records, SPR 14/766, Mar. 10, 2015, at 4. The supervisor found that the city had "failed to meet its burden in withholding the

responsive records pursuant to [e]xemption (d)," because its response did "not contain the specificity required for the denial of access to public records." *Id.* at 2. The supervisor also found that the city "had failed to meet[] its burden of specificity to show the [attorney-client] privilege exists." *Id.* at 3. After the supervisor issued this decision, the city requested that the decision be withdrawn pending resolution of the city's appeal to this court and, in the alternative, requested that the supervisor reconsider her decision and schedule a hearing on the matter. The supervisor has yet to rule on the city's request.

We no longer hold to the view declared in *General Electric* that there are no implied exemptions to the public records act, and that all records in the possession of a governmental entity must be disclosed under the act unless they fall within one of the exemptions identified in *G. L. c. 4, § 7, Twenty-sixth*. In *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 445-446, 455-461, 870 N.E.2d 33 (2007), we concluded that communications within the attorney-client privilege [***15] are impliedly exempt from the definition of "public records" and therefore are protected from public disclosure under the act. We declared that "the attorney-client privilege is a fundamental component of the administration of justice," and that withdrawal of [**798] the privilege is "not required by the plain terms of the public records law" and would "severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-à-vis private parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong in- [*454] terest in the fair and effective administration of justice." *Id.* at 446.

Later, in *Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 211-216, 944 N.E.2d 1019 (2011), we determined that documents that had been provided in discovery by a defendant to the Attorney General in an enforcement action and were protected from disclosure to others by a protective order were

not subject to disclosure under the act. In response to the argument that such records, once received by the Attorney General, were not excluded from the act by any exemption, we stated that the argument was "based on the mistaken [***16] premise that all documents in the hands of public officials must, absent an applicable exception, be made public notwithstanding a court order prohibiting their circulation." *Id.* at 215. We noted that the issuance of such protective orders is among the "inherent powers" of a court, and that such orders "serve to shield litigants and third parties from unwarranted disclosures, and, as a practical matter, to facilitate the discovery necessary for a trial." *Id.* at 213-214. We also noted that the act "is silent on the issue of protective orders," and that, "as a matter of statutory construction," we did not believe that "the Legislature would endeavor to effect such a significant change to a long-standing and fundamental power of the judiciary by implication." *Id.* at 215. In essence, we declared an implied exemption for records whose disclosure is limited by a court's protective order.

Before considering whether an implied exemption for work product otherwise protected in discovery under *Mass. R. Civ. P. 26 (b) (3)* might be necessary to preserve the fair administration of justice, we consider whether some or all such work product might be protected from disclosure under the act by the "policy deliberation" exemption in *Twenty-sixth (d)*.¹⁰ [***17] We reject the suggestion that the Legislature, in crafting the exemptions under the act, intended that all such work product would be public [*455] records under the act and therefore would be available to the public upon request. In *General Electric*, we concluded that the Legislature did not intend a separate, implied exemption for work product; we did *not* conclude that all work product would be outside the scope of other express exemptions. In fact, we specifically affirmed "that part of the judgment declaring that [DEP] 'may withhold documents requested under *G. L. c. 66, § 10* ... if they meet the

requirements of *G. L. c. 4, § 7, [Twenty-sixth] (d)*." *General Electric*, 429 Mass. at 807.¹¹ [**799] The holding in *General Electric* was concisely summarized in the *Suffolk Construction* decision: "We concluded, in relevant part, that the [act] and its history expressed the Legislature's intent to abrogate the broad attorney work-product privilege, and instead to provide to attorney work product the narrower, time-limited protection afforded under *G. L. c. 4, § 7, Twenty-sixth (d) ...* ." *Suffolk Constr. Co.*, 449 Mass. at 455, citing *General Electric*, *supra* at 802-804.¹²

10 The third-party defendants claim that the city waived its right to argue on appeal that the work product at issue in this case is within the scope of exemption (d) because the city failed to raise that argument in opposition to the third-party defendants' motion to strike the city's privilege objections and compel production. We reject this claim where, at the hearing on the motion, the city solicitor stated that "the reference in [*General Electric*] to noted exemptions ... would apply to work conducted in anticipation of litigation," and, at the hearing on the city's subsequent motion for a protective order, the judge declared that he had considered the "deliberative process exemption" in allowing the third-party defendants' motion.

11 In *General Electric*, where the Department of Environmental Protection (DEP) had shared documents with the United States Environmental Protection Agency [***18] "as part of coordinated investigative or remedial efforts," we held that DEP was "entitled to assert protection of the shared materials under exemption (d)" even though exemption (d) only protects "inter-agency or intra-agency" documents, and the public records statute defines "agency" to mean "agency of the commonwealth" and does not expressly include Federal agencies within the scope of that definition. *General Electric*, 429 Mass. at 806-807. But we did not reach the question whether any of the documents at issue otherwise met the requirements of exemption (d).

12 We reject any suggestion that we can infer that the Legislature intended that all work product in the possession of a

government agency be publicly available because the Legislature failed to enact exemption (k). The proposed exemption (k) would have shielded much more than work product "prepared in anticipation of litigation or for trial by or for [a] party or ... that ... party's representative," *Mass. R. Civ. P. 26 (b) (3)*, 365 Mass. 772 (1974), because it included all "records pertaining to any civil litigation in which an agency ... is involved." 1973 House Doc. No. 7433, § 1. Although we recognize that we found the failure to enact exemption (k) significant in *General Electric*, 429 Mass. at 802-803, we now conclude that [***19] little can be inferred from the rejection of so broad and ambiguous an exemption.

In discerning legislative intent, we recognize the importance of the difference in language that we identified in *General Electric* between exemption (d) and its Federal FOIA counterpart, 5 U.S.C. § 552(b)(5), but to understand the significance of those differences, we must look to the governing interpretation of FOIA exemption (5) in 1973, when exemption (d) was enacted. In *Environmental Protection Agency v. Mink*, 410 U.S. 73, 85-94, 93 S. Ct. 827, 35 L. Ed. 2d 119 [*456] (1973) (*Mink*), the United States Supreme Court interpreted the rather bare-bones language of exemption (5), which exempts from disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party ... in litigation with the agency." The Court declared that the legislative history of exemption (5) demonstrates that it was "intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions ... are privileged from inspection'" in order to further the public policy of "open, frank discussion between subordinate and chief concerning administrative action." *Id.* at 86-87, quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 141 Ct. Cl. 38, 48-49 (1958). The Court quoted the following passage from the report of the Senate committee that drafted the legislation:

"It was pointed [***20] out in the comments of many of the agencies that

it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted [**800] to delimit the exception as narrowly as consistent with efficient Government operation."

Mink, supra at 87, quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The Court noted the difficulty of attempting to ascertain in the absence of litigation whether documents would be available in discovery, where "we do not know whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant." *Mink, supra at 86*. And, distinguishing "matters of law, policy, or opinion" from "purely factual material," the Court stated that, "in the absence of a claim that disclosure would jeopardize state secrets, ... memoranda consisting only of compiled factual material or purely factual [***21] material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government" and would not be protected by exemption (5) (citation omitted). *Id. at 87-89, 91*.

Later that year, when the Massachusetts Legislature was crafting the act, it made clear from the language of exemption (d) that it protected documents "relating to policy positions being devel- [*457] oped by the agency," but did not protect "reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." *G. L. c. 4, § 7, Twenty-sixth (d)*. In short, although the legislative history is silent on this point, the

Legislature avoided the difficulty of ascertaining in the absence of litigation what might be discoverable by omitting the litigation language in FOIA exemption (5), and the Legislature added language clarifying the focus on the formulation of policy that was only implied by the language in FOIA exemption (5), and expressly incorporated the understanding stated in *Mink* regarding purely factual material.¹³

13 We note that it was not until 1975, almost one and one-half years after the act was signed into law, that [***22] the United States Supreme Court explicitly stated that the work product doctrine is incorporated in exemption (5) of the Freedom of Information Act. See *National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154-155, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975).

The word "policy" is not defined in the act, but we discern from the language of exemption (d) of the act and from the historical context of its enactment that the word was intended to be defined broadly to accomplish the purpose it shares with exemption (5) of FOIA: the protection of open, frank inter-agency and intra-agency deliberations regarding government decisions.¹⁴ Compare *General Electric*, 429 *Mass. at 807* ("The purpose of exemption [d] is to foster independent discussions between those responsible for a governmental decision in order to secure the quality of the decision"), with *National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966) ("the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and ... the 'decisions' and 'policies [...] formulated' would be the poorer as a result"). And where FOIA incorporates within its scope the Federal common-law "deliberative process privilege," we think that a parallel protection from disclosure under the public records statute was codified by [**801]

the [***23] "policy deliberation" exemption in *Twenty-sixth (d)*. See, e.g., *National Council of La Raza v. Department of Justice*, 411 F.3d 350, 356 (2d Cir. 2005), quoting *Grand Cent. Partnership v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) ("An inter- [*458] or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) 'predecisional,' i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision,' and (2) 'deliberative,' i.e., 'actually ... related to the process by which policies are formulated'").

14 Cf. Webster's New World Dictionary 1045 (3d ed. 1988) (broadly defining "policy" in relevant part as "a principle, plan, or course of action, as pursued by a government").

Where an agency, as here, is engaged in litigation, decisions regarding litigation strategy and case preparation fall within the rubric of "policy deliberation." A decision made in anticipation of litigation or during litigation is no less a "policy" decision and is no less in need of the protection from disclosure provided by exemption (d) simply because it is made in the context of litigation. See *Bobkoski v. Board of Educ. of Cary Consol. Sch. Dist.* 26, 141 F.R.D. 88, 92-93 (N.D. Ill. 1992) ("trial related strategy discussions necessarily involve a governmental entity's deliberative process whereby the entity's members review and select among various options presented," and "the value of such strategic discussions [***24] depends upon the open and frank recommendations and opinions that the deliberative process privilege attempts to foster").¹⁵ If anything, the need for nondisclosure of materials relating to the government's preparation for litigation is even greater than the need for nondisclosure of deliberative materials in other contexts, because litigation is an adversarial process, where the disclosure of these materials might be used to the detriment of the government by its litigation adversary. See *National Council of La Raza*, 411 F.3d at 356, quoting *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9, 121

S. Ct. 1060, 149 L. Ed. 2d 87 (2001) (*Klamath*) ("deliberative process privilege ... is based on 'the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery'").

15 See also *Heggstad v. United States Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000) ("Documents covered by the deliberative process privilege are often also protected by the attorney work-product privilege").

In describing the scope of exemption (d) as it applies to litigation-related work product, it makes sense to apply the work product terminology we apply in discovery during civil litigation under *Mass. R. Civ. P.* 26. We have recognized that there are two categories of work product under *rule 26*: fact work product and opinion work product. See *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293, 314, 901 N.E.2d 1185 (2009) (*Comcast*). Under *rule 26 (b) (3)*, "[t]he protection [for work product] [***25] is qualified, and can be overcome if the party seeking discovery demonstrates 'substantial need [*459] of the materials' and that it is 'unable without undue hardship to obtain the substantial equivalent of the materials by other means.'" *Id.*, quoting *Mass. R. Civ. P. 26 (b) (3)*. Opinion work product, which is described in *rule 26 (b) (3)* as "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," is "afforded greater protection than 'fact' work product." *Comcast, supra*. We have yet to decide whether the protection of opinion work product is absolute, see *id. at 315*, "but at a minimum ... a highly persuasive showing" is needed to justify the disclosure of opinion work product. *United States v. Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998). See [**802] *Comcast, supra*, quoting Reporters' Notes to *Rule 26*, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 545 (LexisNexis 2008) (disclosure of opinion work product might be appropriate "only in rare or 'extremely unusual' circumstances").

Opinion work product sought in anticipation of or during the pendency of litigation is related to "policy positions being developed by the agency" and therefore is protected from disclosure by exemption (d). Therefore, a litigant should not [***26] succeed in obtaining opinion work product that would be protected from discovery by rule 26 (b) (3) by seeking the opinion work product through a public records request.¹⁶ Fact work product is not protected from disclosure under exemption (d), even if related to policy positions being developed by the agency, if it is a "reasonably completed factual stud[y] or report[] on which the development of such policy positions has been or may be based." *G. L. c. 4, § 7, Twenty-sixth (d)*. Where fact work product is not contained within a "factual study or report," or where it is contained in a "factual study or report" that is not "reasonably completed," then it, too, is protected from disclosure, at least until the study or report is [*460] reasonably completed. Moreover, where a factual study or report is reasonably completed but is interwoven with opinions or with analysis leading to opinions, a purely factual section of the report might fall outside exemption (d), but a discussion or analysis section interwoven with facts would be protected from disclosure.¹⁷

16 We recognize that exemption (d) protects documents from disclosure "only while policy is 'being developed,' that is, while the deliberative process is ongoing and incomplete." *Babets v. Secretary of the Executive Office of Human Servs.*, 403 Mass. 230, 237 n.8, 526 N.E.2d 1261 (1988). But [***27] we also recognize that the deliberative process is always ongoing and incomplete during the course of litigation, because every decision relevant to litigation may be revisited and revised as circumstances change. We leave for another day the question whether opinion work product might no longer be protected once the litigation is concluded. That issue is not presented here, and may depend on the particular circumstances, such as the risk of similar litigation. It suffices here to conclude that opinion work product is protected from

disclosure under exemption (d) prior to and through the pendency of the litigation.

17 Cf. *Judicial Watch, Inc. v. Department of Justice*, 432 F.3d 366, 372, 369 U.S. App. D.C. 49 (D.C. Cir. 2005), quoting *In re Sealed Case*, 121 F.3d 729, 737, 326 U.S. App. D.C. 276 (D.C. Cir. 1997) ("Factual material is not protected under the deliberative process privilege unless it is 'inextricably intertwined' with the deliberative material"); *Mapother v. Department of Justice*, 3 F.3d 1533, 1537-1538, 303 U.S. App. D.C. 249 (D.C. Cir. 1993), quoting *Wolfe v. Department of Health & Human Servs.*, 839 F.2d 768, 774, 268 U.S. App. D.C. 89 (D.C. Cir. 1988) ("Where an agency claims that disclosing factual material will reveal its deliberative processes, 'we must examine the information requested in light of the policies and goals that underlie the deliberative process privilege'").

Under this analysis, exemption (d) would permit a litigant to obtain more documents through a public records request, at least with respect to fact work product, than would [***28] be subject to discovery under rule 26. See *Suffolk Constr. Co.*, 449 Mass. at 455. See also *Judicial Watch, Inc. v. Department of Justice*, 432 F.3d 366, 372, 369 U.S. App. D.C. 49 (D.C. Cir. 2005) ("the [deliberative process] privilege and the [attorney work product] doctrine are not coterminous in their sweep"). We do not believe that this result is so inconsistent with the administration of justice that we should imply an exemption for work product under the act coterminous with the sweep of *Mass. R. Civ. P. 26 (b) (3)*, and depart from our refusal to do so in *General Electric*. Where opinion work product and some fact work product are already protected under exemption (d), where fact [***803] work product receives only qualified protection under rule 26 (b) (3), and where the Legislature specifically excluded from the scope of exemption (d) "reasonably completed factual studies or reports," the disclosure of fact work product that falls outside the scope of exemption (d) does not so interfere with the inherent power of the judiciary to ensure the fair disposition of cases that we must imply such an exemption.

Cf. *Fremont Inv. & Loan*, 459 Mass. at 213-214. Nor does it so interfere with the fair administration of justice that we can reasonably infer that the Legislature did not intend to require such disclosure. Cf. *Suffolk Constr. Co.*, 449 Mass. at 457-461.

Finally, we conclude that the administration of justice is better served by requiring a public agency [***29] to disclose in discovery any requested fact work product that would be disclosed pursuant to a public records act request -- even if it would otherwise be [*461] protected under *rule 26 (b) (3)* were it not a public record -- rather than requiring the litigant to make a public records act request for these same documents. See *Babets v. Secretary of the Executive Office of Human Servs.*, 403 Mass. 230, 237 n.8, 526 N.E.2d 1261 (1988), citing *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64, 354 N.E.2d 872 (1976) ("It arguably would be anomalous if access to [public records], intended to be available even to the merely 'idly curious,' should be denied to those who, like the plaintiffs here, have a specific and demonstrable need for them"); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344, 238 U.S. App. D.C. 190 (D.C. Cir. 1984) (FOIA "acts as a 'floor' when discovery of government documents is sought in the course of civil litigation," such that "information available under the FOIA is likely to be available through discovery"). We recognize that this might require the judge in the underlying litigation to determine the scope of exemption (*d*) in resolving a discovery dispute, but a judge might have been asked to make the same determination if a litigant who made a public records act request appealed the denial of that request by a custodian of public records under *G. L. c. 66, § 10 (b)*. The difference is that it would likely take far longer to resolve the appeal of the public records request [***30] denial than it would to resolve a discovery dispute, and the appeal might not be decided before the underlying litigation is concluded. Where work product is protected from disclosure under the act by

exemption (*d*), it must be treated like any other work product under *rule 26 (b) (3)*, and would be subject to disclosure only upon the showing of need set forth in that rule.

In the case on appeal, the judge concluded that the documents at issue "clearly constitute attorney work product" under *rule 26 (b) (3)*, and would be "public records" unless they fit within one of the enumerated exemptions, but did not address whether the work product is protected from disclosure by exemption (*d*). We conclude that the judge erred in failing to consider whether the documents at issue are protected from disclosure by exemption (*d*).

We also consider the third-party defendants' argument that the documents could not be protected by exemption (*d*) because reports, letters, or memoranda written by an outside consultant to the city cannot be "inter-agency or intra-agency memoranda or letters" as required by exemption (*d*). Where a memorandum or letter received by the government was prepared at the government's request by a consultant hired [***31] by the government to assist [*462] it in the performance of its own functions, it is both "textually possible" and "in accord with the purpose" of exemption (*d*) [**804] to regard the document as an "intra-agency" memorandum or letter. *Klamath*, 532 U.S. at 9-10, quoting *Department of Justice v. Julian*, 486 U.S. 1, 18 n.1, 108 S. Ct. 1606, 100 L. Ed. 2d 1 (1988) (Scalia, J., dissenting) (interpreting language in exemption [5] of FOIA). There is no reason to require the disclosure of such documents simply because they were prepared by an outside consultant temporarily hired by the government rather than by a public employee. See *Soucie v. David*, 448 F.2d 1067, 1077-1078 & n.44, 145 U.S. App. D.C. 144 (D.C. Cir. 1971) (report prepared for government by consultant was not necessarily outside scope of FOIA exemption for "inter-agency or intra-agency memorand[a] or letters," because "[t]he [g]overnment may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without

fear of publicity"); *Xerox Corp. v. Webster*, 65 N.Y.2d 131, 133, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985) ("It would make little sense to protect the deliberative process when ... reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies"). Accordingly, we conclude that the work product in this case is not outside the scope of exemption (d)'s protection of "inter-agency [***32] or intra-agency memoranda or letters" simply because Smyth was an outside consultant.

The practical consequence of our holding today, stated simply, is that opinion work product that was prepared in anticipation of litigation or for trial by or for a party or party representative is protected from discovery to the extent provided under *Mass. R. Civ. P. 26 (b) (3)*, even where the opinion work product has been made or received by a State or local government employee. So is fact work product that is prepared in anticipation of litigation or for trial where it is not a reasonably completed study or report, or, if it is reasonably completed, is interwoven with opinions or analysis leading to opinions. Other fact work product that has been made or received by a State or local government employee must be disclosed in discovery, even if it would be protected from discovery under *rule 26 (b) (3)* were it not a public record.

2. *Derivative attorney-client privilege.* We also consider the city's argument that, regardless of whether the documents are protected from disclosure by exemption (d), they are protected from disclosure under the derivative attorney-client privilege because Smyth "translated" for the city solicitor "technical information [***33] [*463] contained in laboratory data and field observations" relating to the site, and such assistance was necessary for the city solicitor to provide legal advice to the city. Generally, the attorney-client privilege protects only "confidential communications between a client and its attorney undertaken for the

purpose of obtaining legal advice." *Suffolk Constr. Co.*, 449 Mass. at 448. See *Comcast*, 453 Mass. at 303 (indorsing Wigmore's "classic formulation" of attorney-client privilege). However, we have recognized that the derivative attorney-client privilege "can shield communications of a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client." *Id.* at 306, citing *United States v. Kovel*, 296 F.2d 918, 921-922 (2d Cir. 1961).

The derivative attorney-client privilege is sharply limited in scope. It attaches "only when the [third party's] role is to clarify or facilitate communications between attorney and client," *Comcast*, 453 Mass. at 308, as where "the [third party] functions as a 'translator' between the client and the attorney," [**805] *In re G-I Holdings Inc.*, 218 F.R.D. 428, 434 (D.N.J. 2003), and is therefore "nearly indispensable or serve[s] some specialized purpose in facilitating the attorney-client communications." *Comcast*, *supra* at 307, quoting *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002). The privilege does not apply simply because "an attorney's ability [***34] to represent a client is improved, even substantially, by the assistance" of an expert. *Comcast*, *supra*. In short, the derivative attorney-client privilege protects otherwise privileged communications between an attorney and client despite the presence of a third party where, without the assistance of the third party, what the client says would be "Greek" to the attorney, either because the client is actually speaking in Greek or because the information provided by the client is so technical in nature that it might as well be spoken in Greek if there were not an expert to interpret it for the attorney. See *id.* at 306 (derivative privilege is exception to rule that "[d]isclosing attorney-client communications to a third party ... undermines the privilege").

The communications at issue fail to meet this test. Even if Smyth's analysis were critical to the city solicitor's ability to effectively represent the city because the

technical data would otherwise have been difficult to understand, Smyth was "translating" public record technical data relating to the site, *not* confidential communications from the client. The purpose of the derivative attorney-client privilege is to maintain the privilege for [*464] communications [***35] between the attorney and the client in circumstances where a third party's presence would otherwise constitute a waiver of the privilege, and that purpose would not be fulfilled by shielding Smyth's analysis of technical data from disclosure. See *Comcast*, 453 Mass. at 307-310, and cases cited (reviewing Federal cases rejecting claim that similar communications from outside experts retained by client's attorney are within derivative attorney-client privilege). Consequently, if the TRC work product is to be shielded from disclosure, that shield must rest on the work product doctrine, not the derivative attorney-client privilege.¹⁸

18 Because we conclude that the TRC work product is not privileged, we need not address the third-party defendants' additional claim that the city waived its right to assert the privilege by failing to take reasonable steps to maintain the confidentiality of the TRC work

product after it had been inadvertently produced by TRC in February, 2013, in response to a keeper of records subpoena served on TRC by third-party defendants.

Conclusion. For the reasons stated above, we vacate the judge's order allowing the third-party defendants' motion to compel production of the work product at issue in [***36] this case, and remand the matter to the motion judge so that he may determine whether the work product, in whole or in part, is protected from disclosure under the act because it is exempted from the definition of "public records," under *G. L. c. 4, § 7, Twenty-sixth (d)*. Any work product that is a "public record" because it does not fall within exemption (d) (or any other exemption) shall be ordered to be produced in discovery by the city. If any work product is not a "public record" because it falls within exemption (d) (or any another exemption), the work product may not be ordered to be produced in discovery unless the third-party defendants have made the required showing of need to justify disclosure of this work product under *Mass. R. Civ. P. 26 (b) (3)*.

So ordered.

JOHN DOE¹ & others² vs. CITY OF LYNN.

1 A pseudonym.

2 Charles Coe and Paul Poe, also pseudonyms. The named plaintiffs are registered sex offenders suing on behalf of themselves and other persons similarly situated.

SJC-11822

SUPREME JUDICIAL COURT OF MASSACHUSETTS

472 Mass. 521; 2015 Mass. LEXIS 620

**April 9, 2015, Argued
August 28, 2015, Decided**

NOTICE: THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE MASSACHUSETTS REPORTER USERS ARE REQUESTED TO NOTIFY THE CLERK OF THE COURT OF ANY

FORMAL ERRORS SO THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

PRIOR HISTORY: [*1] Essex. CIVIL ACTION commenced in the Superior Court Department on April 12, 2012.

The case was heard by *Timothy Q. Feeley, J.*, on a motion for partial summary judgment, and entry of final judgment was ordered by him.

The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES *Sex Offender. Municipal Corporations, By-laws and ordinances, Home rule. Constitutional Law, Home Rule Amendment.*

COUNSEL: *John A. Kiernan (Robert E. Koosa with him)* for the defendant.

John Reinstein (Benjamin H. Keehn, Committee for Public Counsel Services, & Jessie J. Rossman with him) for the plaintiffs.

Amy M. Belger, Andrew S. Crouch, & Jennifer J. Cox, for Jacob Wetterling Resource Center & others, amici curiae, submitted a brief.

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

OPINION BY: HINES

OPINION

HINES, J. In this appeal, we determine whether an ordinance imposing restrictions on the right of sex offenders to reside in the city of Lynn (city) is prohibited by the Home Rule Amendment, *art. 89, § 6, of the Amendments to the Massachusetts Constitution*, and the Home Rule Procedures Act, *G. L. c. 43B, § 13*. The plaintiffs, who represent a certified class of sex offenders subject to the ordinance, challenged the constitutionality of the ordinance on various grounds.³ A judge in the Superior Court invalidated the ordinance under the Home Rule Amendment. The city appealed and we granted [*2] the plaintiffs' application for direct appellate review. We affirm the Superior Court judgment based on our conclusion that the ordinance is

inconsistent with the comprehensive statutory scheme governing the oversight of convicted sex offenders, and therefore, it fails to pass muster under the Home Rule Amendment and the Home Rule Procedures Act.⁴ *Background.* We summarize the undisputed facts as drawn from the summary judgment record.

3 The complaint alleged the following claims under the United States and Massachusetts Constitutions: (1) violation of the Home Rule Amendment (Massachusetts Constitution); (2) violation of the clauses prohibiting ex post facto laws; (3) violation of the right to substantive due process; (4) violation of the right to familial association; (5) violation of the right to be protected from cruel and unusual punishment under the *Eighth* and *Fourteenth Amendments to the United States Constitution* and cruel or unusual punishment under *art. 26 of the Massachusetts Declaration of Rights*; and (6) violation of the right to travel.

4 We acknowledge the amicus brief filed by Jacob Wetterling Resource Center, Association for the Treatment of Sexual Abusers, Massachusetts Association for the Treatment of Sexual Abusers, Inc., Reform Sex Offender Laws, Inc., and Florida Action Committee.

1. *The ordinance.* The city adopted an "Ordinance Pertaining to Sex Offender Residency [*3] Restrictions in the [city]" (ordinance) on January 12, 2011. The stated purpose of the ordinance is to "reduce the potential risk of harm to children of the community by impacting the ability of registered sex offenders to be in contact with unsuspecting children in locations that are primarily designed for use by, or are primarily used by children." Observing that "[r]egistered sex offenders continue to reside in close proximity to public and private schools, parks and playgrounds," and that "registered sex offenders will continue to move to buildings, apartments, domiciles or residences in close proximity to schools, parks and playgrounds," the city council enacted the ordinance to "add location restrictions to such offenders where the [S]tate law is silent." The ordinance imposes broad restrictions, with only narrow

exceptions, on the ability of level two and level three registered sex offenders to reside in the city.⁵ The ordinance establishes the area within 1,000 feet of a school or park as a residential exclusion zone for level two and level three sex offenders, and includes in its description of "school" all public, private, and church schools, and any other business permitted as a school. The [*4] ordinance also applies to all temporary and permanent residences except a "residence at a hospital or other healthcare or medical facility for less than fourteen consecutive days or fourteen (14) days in the aggregate during any calendar year." The geographical and temporal reach of the ordinance effectively prohibits all level two and level three sex offenders from establishing residence, or even spending the night in a shelter, in ninety-five per cent of the residential properties in Lynn.⁶ The ordinance would affect, at least in some degree, all 212 registered level two and level three sex offenders residing in the city, as of April 22, 2014. A sex offender required by the ordinance to move from his or her residence could encounter similar restrictions in attempting to relocate to nearby cities and towns. At least forty municipalities have adopted sex offender residency restrictions.⁷ The expansive coverage of the ordinance is mitigated by narrow exceptions to the residency restrictions applicable to those who (1) have established, prior to the effective date of the ordinance, a permanent residence within a restricted area by purchasing real property or by being the lessee of an unexpired [*5] lease or rental agreement; (2) are a "minor"; (3) are "residing with a person related by blood or marriage within the first degree of kindred"; or (4) have been residing at a permanent residence before the school or park creating the applicable restricted area was established.

5 The "Ordinance Pertaining to Sex Offender Residency Restrictions in the City of Lynn" (ordinance) also creates "Child Safety Zones," wherein level two and level three sex offenders are prohibited from entering a school, park, or recreational facility except in certain circumstances and from "loiter[ing]" within 1,000 feet of such facilities. The

parties, however, focused their arguments on the residency provision of the ordinance. The plaintiffs' motion for partial summary judgment sought invalidation of the entire ordinance. The city of Lynn (city) did not present any argument, and the court entered a judgment declaring that the "Residency Ordinance" violates the Home Rule Amendment. Thus, we know of no compelling reason to uphold any provision of the ordinance in light of the comprehensive State law discussed herein. Accordingly, we affirm the grant of partial summary judgment in favor of the plaintiffs, which invalidated the entire ordinance. [*6]

6 We note here the undisputed record evidence that of the 19,320 real estate parcels zoned as residential, 18,421 are located within 1,000 feet of a school or park.

7 According to an affidavit dated February 20, 2014, submitted as part of the summary judgment record and not disputed by the city, the following list of forty municipalities have enacted residency restrictions on certain sex offenders: Ashland; Ayer; Barre; Barnstable; Braintree; Charlemont; Charlton; Chelsea; Colrain; Dedham; Dudley; Fall River; Fitchburg; Framingham; Hanover; Hanson; Hopkinton; Hubbardston; Leominster; Lynn; Marlborough; Mendon; Natick; Norwood; Oxford; Pembroke; Revere; Rockland; Shirley; Somerset; Southborough; Spencer; Springfield; Swansea; Townsend; Waltham; Warren; Webster; West Boylston; and Weymouth. The plaintiffs note that the Attorney General's office has continued to approve similar regulations, citing a letter from the Attorney General to North Reading, sent under *G. L. c. 40, § 32*, which approved North Reading's residency restriction bylaw on January 20, 2015.

Failure to comply with the ordinance results in a penalty of \$300 for each day that a sex offender subject to the ordinance remains in a restricted area [*7] thirty days after receiving a notice to move from the city, or if such sex offender moves within the city into a restricted area. Additionally, if there is a "subsequent offense," the sex offender's "landlord, parole officer and/or probation officer, and the ... Sex Offender Registry Board" (board) shall be notified that the offender has violated a municipal ordinance.

2. *Procedural history.* The plaintiffs, who represent a certified class of "all registered [I]level [two] and [I]level [three] sex offenders who are now or who may in the future be prohibited from living at various places in the [city] by the city's ordinance pertaining to sex offender residency restrictions," commenced this action after receiving the notices to move, as authorized under the ordinance. The city sent letters notifying each that he lives within a restricted area under the ordinance and that he has thirty days from the date of the letter "to relocate to another address which is in compliance with the [o]rdinance" or be subject to a fine of \$300 for each day of residing in a restricted area.⁸ The plaintiffs filed a motion for partial summary judgment on the counts in the complaint asserting that the ordinance (1) violates the Home Rule Amendment; (2) [*8] is an ex post facto law under the Federal and State Constitutions; and (3) violates the plaintiffs' right to travel under the Massachusetts Constitution.⁹ The city defended the ordinance by arguing, with regard to the Home Rule Amendment, that the residency restriction is not inconsistent with State law, and that the shared purpose -- the protection of children from sexual predators -- supports and supplements the law governing the oversight of sex offenders.

8 The letters state that the city is "unaware of any statutory exceptions" that may apply.

9 During the course of litigation, the parties argued repeatedly over the scope of discovery. The judge limited the subjects allowed in discovery and impounded identification of the plaintiffs' names. The judge also denied the city's motions to compel the criminal records and Sex Offender Registry Board (board) classification recommendation files for the members of the plaintiff class. Although the city argues that there are numerous material disputes of fact deriving from the limited discovery, the information that was sought is not relevant to the issue of whether the ordinance violates the Home Rule provisions. See *art. 89, § 6, of the Amendments to the Massachusetts Constitution; G. L. c. 43B, § 13.*

In a thorough and well-reasoned memorandum of [*9] decision, the judge granted partial summary judgment to the plaintiffs and invalidated the ordinance under the Home Rule Amendment, concluding that that "the totality of the circumstances support an express legislative intent to forbid local activity in the area of the civil regulation and management of the post-incarceration lives of convicted sex offenders." In particular, the judge determined that the ordinance is inconsistent with *G. L. c. 6, §§ 178C-178Q*, the Sex Offender Registry Law (registry law); and *G. L. c. 123A*, the law providing for the "Care, Treatment and Rehabilitation of Sexually Dangerous Persons" (SDP law). In light of this disposition, however, the judge declined to review the remaining constitutional claims.

Discussion. The city argues on appeal that the ordinance was adopted as a valid exercise of its police power, that there is no evidence of legislative intent to occupy the field governing the management of postincarceration sex offenders, and the ordinance does not conflict with State law. The plaintiffs counter that the judge correctly determined that the ordinance is unconstitutional and urges this court to affirm the judge on the broader constitutional grounds asserted in their motion for partial summary judgment. [*10] We decline to reach the broader constitutional grounds but we agree that the judge properly invalidated the ordinance as unconstitutional under the Home Rule Amendment.

A local regulation is unconstitutional under the Home Rule Amendment if it is "inconsistent" with the constitution or laws of the Commonwealth. *Connors v. Boston*, 430 *Mass. 31, 35, 714 N.E.2d 335 (1999)*. This principle is derived from the language of the Home Rule Amendment that provides:

"Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon

it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter, whether or not it has adopted a charter pursuant to section three."

Art. 89, § 6, of the Amendments to the Massachusetts Constitution. "[T]he touchstone of the analysis [of whether a local ordinance is inconsistent with State law] is whether the State Legislature intended to preempt the city's authority to act." *Connors, supra*, citing *Bloom v. Worcester*, 363 Mass. 136, 155, 293 N.E.2d 268 (1973). Review of a local ordinance is focused on the Legislature's preemption prerogative because, as the title suggests, the Home Rule Amendment was enacted to restore to municipalities [*11] the "right of self-government in local matters." *Art. 89, § 1, of the Amendments to the Massachusetts Constitution.* The genesis of the Home Rule Amendment as a means to expand municipal legislative authority¹⁰ thus informs the analytical directive that in reviewing a local ordinance, the "question is not whether the Legislature intended to grant authority to municipalities to act ... , but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." *Wendell v. Attorney Gen.*, 394 Mass. 518, 524, 476 N.E.2d 585 (1985). "Municipalities enjoy 'considerable latitude' in this regard," and a local regulation will not be invalidated unless the court finds a "sharp conflict" between the local and State provisions. *Easthampton Sav. Bank v. Springfield*, 470 Mass. 284, 289, 21 N.E.3d 922 (2014), quoting *Bloom*, 363 Mass. at 154. A sharp "conflict 'appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the legislation cannot be achieved in the face of the local by-law.'" *Easthampton Sav. Bank, supra*, quoting *Grace v. Brookline*, 379 Mass. 43, 54, 399 N.E.2d 1038 (1979). Where, as here, the Legislature

is silent on the issue of local regulation, we also may infer an intent to forbid local regulation if "legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field." *Easthampton Sav. Bank, supra*, quoting [*12] *Wendell*, 394 Mass. at 524. The burden is on the challenger to establish that the local enactment is "inconsistent" with the Constitution or State law. *Springfield Preservation Trust, Inc. v. Springfield Library & Museums Ass'n, Inc.*, 447 Mass. 408, 418, 852 N.E.2d 83 (2006), citing *Grace, supra* at 49-50.

10 The Home Rule Amendment was approved by a convention of the House and Senate in 1963 and 1965, and adopted by the voters in 1966. Massachusetts Legislative Research Council Report Relative to Revising the Municipal Home Rule Amendment, 1971 Senate Doc. No. 1455, at 58-59. It annulled *art. 2 of the Amendments to the Massachusetts Constitution, id.* at 58, which had established municipalities as "hierarchical subordinates to the state Legislature that could only enact local legislation after receiving an affirmative grant of power" from the Legislature. See Jerison, Home Rule in Massachusetts, 67 Mass. L. Rev. 51, 51 (1982). *Article 89, § 1, of the Amendments to the Massachusetts Constitution* declared: "It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article."

We turn now to the application of these principles to the ordinance. Based on our de novo [*13] review of the judge's decision, *Twomey v. Middleborough*, 468 Mass. 260, 267, 10 N.E.3d 618 (2014), citing *Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 215, 786 N.E.2d 817 (2003), we conclude that the ordinance is inconsistent with the comprehensive scheme of legislation intended to protect the public from convicted sex offenders and, thereby, manifests the "sharp

conflict" that renders it unconstitutional under the Home Rule Amendment. Although the registry law and the other laws governing sex offenders do not expressly prohibit local regulation, we infer from the comprehensive nature of the statutory scheme for oversight of sex offenders and the negative effect that the ordinance may have on the monitoring and tracking of sex offenders, that the Legislature intended to preclude local regulation of sex offender residency options.

To provide context for our conclusion that the Legislature intended to preclude further regulation of sex offender residence options, we first recapitulate the depth and breadth of the legislation mandating oversight of sex offenders. In 1999, the Legislature enacted a comprehensive package of laws which effected a major overhaul of the statutory scheme governing the identification, treatment and postrelease management of convicted sex offenders. St. 1999, c. 74. That package of laws, described as "An Act improving [*14] the sex offender registry and establishing civil commitment and community parole supervision for life for sex offenders," includes the registry law, *G. L. c. 6, §§ 178C-178Q*. St. 1999, c. 74, as amended by St. 2003, c. 26, § 12. The stated purpose of the act is to "assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act." St. 1999, c. 74, § 1. It accomplishes that purpose through three primary mechanisms: (1) compelling sex offenders to register and maintain current personal information with the board and local police, and distributing such information in accordance with the registry law, *G. L. c. 6, §§ 178C-178Q*, inserted by St. 1999, C. 74, § 2, as amended by St. 2003, c. 26, § 12; (2) civilly confining certain offenders deemed most likely to reoffend, *G. L. c. 123A*, inserted by St. 1999, c. 74, §§ 3-8; and (3) controlling certain aspects of the postincarceration lives of certain sex offenders, *G. L. c. 127, § 133D*,

inserted by St. 1999, c. 74, § 9 (community parole supervision for life).

The first mechanism in the 1999 registry law, as amended through St. 2013, c. 63, requires that sex offenders [*15] update their registration information annually and when they change residences, employment, or schooling; a sex offender who is homeless must also update their registration information every thirty days and wear a global positioning system (GPS) device. *G. L. c. 6, §§ 178F, 178F 1/2, 178F 3/4*. The law defines who is considered a "sex offender"; creates the board; requires sex offenders to register with the board; requires the board to create a central computerized registry of sex offender information and transmit that data to the Federal Bureau of Investigation and to police departments in the municipalities where the offender intends to live and work; creates a classification system for offenders subject to judicial review; and, after classification, requires sex offenders to maintain current registration information with local police. *G. L. c. 6, §§ 178C, 178D, 178E, 178F, 178F 1/2, 178K, 178L, 178M*. The law creates criminal penalties for failing to register and provides a mechanism for terminating the obligation to register. *G. L. c. 6, §§ 178F, 178G, 178H, 178K*.

The registry law further provides guidelines for determining the offender's classification level, which is based on the risk of reoffense and the public safety interest in making registration information available [*16] to the public. See *G. L. c. 6, § 178K (2) (a)-(c)*. In that regard, the classification level assigned to each sex offender depends, in part, on the amount of personal information deemed necessary for public safety and appropriate for public availability.¹¹ Registration information for level one sex offenders is not provided to the public, information for level two and level three offenders is available to the public by request or on the Internet,¹² and information for level three offenders may be disseminated actively to the public. *G. L. c. 6, §§ 178D, 178I, 178J*.

11 The classification levels are to be determined based on the risk of reoffense, the degree of dangerousness posed to the public, and whether a public safety interest is served by public availability of information about the sex offender. *G. L. c. 6, § 178K*.

12 Initially, only registration information for level three sex offenders was publically available on the Internet. St. 2003, c. 140, § 5. Level two sex offenders were added in 2013. St. 2013, c. 38, §§ 7-13. See *Moe v. Sex Offender Registry Bd.*, 467 Mass. 598, 616, 6 N.E.3d 530 (2014) (declaring unconstitutional retroactive application of amendment regarding level two data).

This framework demonstrates the legislative priority attached to monitoring the residence, employment, and schooling locations of sex offenders as a means [*17] to protect the public from sex offenders. That monitoring sex offenders is a priority is demonstrated clearly by the Legislature's choice to insert only a narrow residency restriction in the registry law. That restriction only bars level three offenders from residing in rest homes or similar long-term care facilities. *G. L. c. 6, § 178K (2) (e)*. Although we concluded in *Doe v. Police Comm'r of Boston*, 460 Mass. 342, 343, 951 N.E.2d 337 (2011), that this restriction was unconstitutional without an individualized hearing to determine the risk posed by the petitioner to the vulnerable community sought to be protected, the restriction is instructive of legislative intent. This provision demonstrates that the Legislature considered and addressed potential risks involved with sex offender residency in relation to a vulnerable population. We note that the Legislature limited its restriction to those offenders seeking to reside in an integrated setting with a vulnerable population and did not include those seeking to reside geographically close to a vulnerable population. We infer from the details of the rest home restriction that the Legislature intended to exercise control over any sex offender residency requirements at the State level and that the Legislature may not have considered [*18] it appropriate to create a blanket prohibition on residency. The ordinance, which restricts all level two and

level three sex offenders from living in ninety-five per cent of the residential areas of the city, conflicts with the relatively narrow rest home restriction created by the Legislature and is thus inconsistent with State law.

As a final observation on the legislative choice to define the sex offender residency restriction narrowly, we note the grave societal and constitutional implications of the de jure residential segregation of sex offenders. Except for the incarceration of persons under the criminal law and the civil commitment of mentally ill or dangerous persons, the days are long since past when whole communities of persons, such as Native Americans and Japanese-Americans may be lawfully banished from our midst.¹³ Also, because of the tension between a sex offender's liberty interest, *Doe v. Sex Offender Registry Bd.*, 460 Mass. 336, 338, 951 N.E.2d 344 (2011), and the imperatives of public safety, the Legislature has demonstrated a concern for careful crafting of laws in a field fraught with constitutional peril.¹⁴ See *Opinion of the Justices*, 423 Mass. 1201, 1202-1203, 668 N.E.2d 738 (1996) (providing guidance from this court in determining constitutionality of community notification provisions of registry law). For this [*19] reason as well, the Legislature cannot have intended to permit local regulation of sex offender residency.

13 For later-condemned examples of banishing communities of people in the United States, see *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-627, 630-631, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970) (early 1800s treaties forcing Indian tribes to migrate to new land uninhabited by settlers) and *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (1940s exile of persons of Japanese ancestry from west coast).

14 Constitutional peril is demonstrated through several cases challenging the constitutionality of the sex offender statutes. See, e.g., *Commonwealth v. Cole*, 468 Mass. 294, 296 n.4, 308, 10 N.E.3d 1081 (2014) (community parole supervision for life [CPSL] violates separation of powers provision of Massachusetts Constitution); *Moe v. Sex*

Offender Registry Bd., 467 Mass. 598, 599, 6 N.E.3d 530 (2014) (retroactive community notification of level two offenders violates due process provision of Massachusetts Constitution); *Doe v. Sex Offender Registry Bd.*, 459 Mass. 603, 621, 947 N.E.2d 9 (2011) (challenging CPSL statute on ex post facto grounds); *Opinion of the Justices*, 423 Mass. 1201, 1202-1203, 668 N.E.2d 738 (1996) (advising Senate of implication of double jeopardy provision of Federal Constitution and due process, ex post facto, equal protection, and cruel and unusual punishment provisions of Federal and Massachusetts Constitutions on community notification).

Apart from the conflict with the registry law's narrowly defined residency restriction, the ordinance also is inconsistent with the registry law in that it would undermine [*20] the effectiveness of the law's classification system. The Legislature set forth guidelines to be used by the board in classifying sex offenders and included consideration of whether the "sex offender is residing in a home situation that provides guidance and supervision." *G. L. c. 6, 178K (1) (c)*. The board expanded on that factor by requiring consideration of whether an offender's "living and work situation is stable." 803 Code Mass. Regs. § 1.40(12) (2013) (identifying supportive home environment as factor minimizing sex offender's risk to reoffend and degree of dangerousness). By requiring level two and level three sex offenders to move from their residences or face a civil penalty of \$300 per day, the ordinance disrupts the stability of the home situations of sex offenders. As a supervised and stable home situation has been recognized as a factor that minimizes the sex offender's risk of reoffense,¹⁵ this disruption is inconsistent with the Legislature's goal of protecting the public. Insofar as the ordinance is intended to impose residency restrictions on those sex offenders who may pose a risk to public safety that cannot be accommodated by the registry law, the second mechanism in the 1999 package of laws, the SDP law, serves [*21] that purpose. St. 1999, c. 74, §§ 3-8, amending *G. L. c. 127*. Through the civil commitment procedure under *G. L. c. 123A*, the Legislature already

has provided a method to exclude those sex offenders determined to be most likely to reoffend from the general population, even after their incarceration has been completed. *G. L. c. 123A*. Before a sex offender is released from incarceration, confinement, or commitment (with a limited exception for an offender imprisoned for six months or less on a parole violation), a determination is made whether that offender is likely to be a sexually dangerous person. *G. L. c. 123A*, §§ 12-13. If a judge determines, in accordance with certain procedures and evidentiary standards, that an offender has been "convicted of a sexual offense, suffers from a mental abnormality or personality disorder that renders him a menace to the health and safety of others, and is likely to engage in sexual offenses if not confined," the Commonwealth may civilly confine the offender.¹⁶ *Commonwealth v. Fay*, 467 Mass. 574, 580, 5 N.E.3d 1216, cert. denied, 135 S. Ct. 150, 190 L. Ed. 2d 109 (2014), citing *G. L. c. 127A*, §§ 1, 14. See *Fay*, *supra* at 585, n.13. Accordingly, the SDP law is the Legislature's chosen method to control sex offenders where it has been determined that maintaining and distributing the offender's registry information is insufficient [*22] to protect a community's public safety interest. The SDP law, therefore, further demonstrates the intent of the Legislature to focus on maintaining and distributing sex offender information as a means to protect the public for offenders who are not deemed dangerous enough to confine and the ordinance conflicts with that purpose by intruding on the controls deemed appropriate by the Legislature.

15 See 803 Code Mass. Regs. § 1.40(12) (2013). See generally *In re Taylor*, 60 Cal. 4th 1019, 1040-1041, 184 Cal. Rptr. 3d 682, 343 P.3d 867 (2015) (finding residency restrictions unconstitutional where restrictions increased homelessness and "hampered the surveillance and supervision" of offenders subject to restriction); Levenson & Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 Int'l J. Offender Therapy & Comp. Criminology 168, 169, 175 (2005) (decreased housing options from residency restrictions

result in homeless and transience, make monitoring and treatment more difficult, and exacerbate sex offender recidivism); Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 *Wash. U. L. Rev.* 101, 141-142 (2007) (potential of sex offender ghettos to provide networking opportunities for future offenses and create "environments in which sexual violence is the norm, [*23] not the exception").

16 A committed sex offender may be discharged after a hearing if the trier of fact does not find that the person remains a sexually dangerous person. *G. L. c. 123A*, § 9. If discharge is granted, notice is given to local police where the offender plans to reside and other applicable parties. *Id.*

The third mechanism in the 1999 package of laws, the community parole supervision for life (CPSL) law,¹⁷ together with other parole and probation laws, was intended to allow the Commonwealth to control sex offenders' postincarceration lives by requiring certain conditions dependent on the offender's particular situation. See *G. L. c. 127*, §§ 133A (parole), 133D (CPSL), and 133D 1/2 (parole and CPSL controls); *G. L. c. 265*, § 47 (probation controls). In addition to discretionary controls that may be assessed, the Legislature mandated that all persons under such controls wear a GPS device and be subject to certain geographic exclusion zones, "in and around the victim's residence, place of employment and school and other areas defined to minimize the [offender's] contact with children, if applicable." *G. L. c. 127*, § 133D 1/2. *G. L. c. 265*, § 47. See *Commonwealth v. Guzman*, 469 *Mass.* 492, 493, 14 *N.E.3d* 946 (2014) (GPS monitoring mandatory where defendant sentenced to probationary term for enumerated offense).¹⁸ The targeted approach to controlling [*24] sex offenders based on their particular circumstance and the GPS requirements set forth by the Legislature demonstrates the intent to encourage sex offender monitoring with minimum disruption to the stability of a broad population of offenders.

17 In *Commonwealth v. Cole*, 468 *Mass.* 294, 305-306, 10 *N.E.3d* 1081 (2014), we held that

the CPSL law, *G. L. c. 127*, § 133D, violated the constitutional mandate of separation of powers.

18 The city argues that parole and probation statutes may not be considered in our analysis because none of the named plaintiffs is subject to the controls contained therein. The statutes, however, are instructive as to the Legislature's intent for controlling sex offenders after incarceration and, therefore, are relevant to our analysis even if they do not affect the named plaintiffs.

In addition to the three mechanisms contained in the 1999 package of laws, other laws support the legislative goal of protecting communities through monitoring sex offenders and controlling only specific situations most likely to cause harm. First, the various methods used to encourage registration demonstrate that maintaining current sex offender information is a primary goal. In addition to the criminal penalties contained in the registry law, *G. L. c. 6*, § 178H, the Legislature mandates [*25] that transient benefits be withheld, *G. L. c. 18*, § 38, and motor vehicle licenses and registration be suspended, *G. L. c. 90*, § 22 (j), if a sex offender has not maintained current registration information. The Legislature also has imposed narrow restrictions to protect certain vulnerable communities from interaction with sex offenders instead of broadly affecting housing options for sex offenders. *General Laws c. 6*, § 178K (2) (e), inserted by St. 2006, c. 303, § 6, prohibits level three sex offenders from living a rest home or other regulated long-term care facility.¹⁹ In addition to this restriction, the Legislature has limited a sex offender's ability to live with adopted or foster children, *G. L. c. 119*, § 26A, or to work as a child care provider, *G. L. c. 15D*, §§ 7, 8, a school bus operator, *G. L. c. 90*, §§ 8A, 8A 1/2, or an ice cream truck vendor, *G. L. c. 265*, § 48.

19 This court deemed this provision to be unconstitutional as applied where there was no individualized determination of the risk of danger to the facility residents intended to be protected by the provision. *Doe v. Police*

Comm'r of Boston, 460 Mass. 342, 351, 951 N.E.2d 337 (2011).

Conclusion. The totality of the 1999 statutory scheme, incorporating as it does a series of interdependent policies and practices specifically designed to protect the public from level two and level three sex offenders by monitoring and notification to the [*26] public, evinces the Legislature's intent to have the first and final word on the subject of residency of sex offenders. In addition, insofar as the ordinance effects a wholesale displacement of sex offenders from their residences, it frustrates the purpose of the registry law and, therefore, is inconsistent and

invalid under the home rule provisions. *Wendell*, 394 Mass. at 527-528, citing *Bloom*, 363 Mass. at 156. Accordingly, we affirm the judgment of the Superior Court invalidating the "Residency Ordinance." In light of this disposition, we need not reach the broader constitutional grounds asserted by the plaintiffs and the amici. *Commonwealth v. Raposo*, 453 Mass. 739, 743, 905 N.E.2d 545 (2009), quoting *Commonwealth v. Paasche*, 391 Mass. 18, 21, 459 N.E.2d 1223 (1984) ("We do not decide constitutional questions unless they must necessarily be reached").

So ordered.

EASTHAMPTON SAVINGS BANK & OTHERS¹ vs. CITY OF SPRINGFIELD.

1 Chicopee Savings Bank, Hampden Bank, United Bank, Monson Savings Bank, and Country Bank for Savings.

SJC-11612

SUPREME JUDICIAL COURT OF MASSACHUSETTS

470 Mass. 284; 21 N.E.3d 922; 2014 Mass. LEXIS 953

**September 4, 2014, Argued
December 19, 2014, Decided**

PRIOR HISTORY: [***1]

Suffolk. CERTIFICATION of questions of law to the Supreme Judicial Court [*285] by the United States Court of Appeals for the First Circuit.

Easthampton Sav. Bank v. City of Springfield, 736 F.3d 46, 2013 U.S. App. LEXIS 23567 (1st Cir. Mass., 2013)

HEADNOTES

**MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES**

Constitutional Law, Home rule, Home Rule Amendment. *Municipal Corporations*, Home rule, By-laws and ordinances, Fees. *Mortgage*, Foreclosure. *Massachusetts Oil and Hazardous Material Release Prevention Act*. *State Sanitary Code*.

This court concluded that a municipal ordinance, adopted by the city of Springfield, that established a program requiring mandatory mediation between mortgagors and mortgagees to resolve pending foreclosures was preempted by *G. L. c. 244*, the foreclosure statute, where the ordinance altered what the Legislature had determined, as a matter of policy, to be the just medium between the parties involved in the contemplation of a mortgage foreclosure and, by so doing, necessarily frustrated the purpose of *G. L. c. 244*; and where the amendment of *G. L. c. 244* in 2012 to require objective evidence of a good faith effort to prevent foreclosure evidenced a legislative attempt to occupy the field to the exclusion of other options, including further regulation at the local level.

This court concluded that a municipal ordinance, adopted by the city of Springfield, that required owners of buildings that were vacant or undergoing foreclosure to register with the city, was not preempted by *G. L. c. 244*, the foreclosure statute, but was preempted by *G. L. c. 21E*, the Massachusetts Oil and Hazardous Material Release Prevention Act (act), where the ordinance (which required the owner to remove hazardous material from the property) defined "owner" more broadly than the act and thus directly placed the ordinance in conflict with a clearly stated legislative policy ; further, the ordinance conflicted with the State sanitary code, *G. L. c. 111, §§ 127A-127L* (code), where the ordinance required a surety bond in circumstances different from those of the code

This court concluded that monetary exactions imposed by a municipal ordinance of the city of Springfield on owners of buildings that were vacant or undergoing foreclosure was a lawful fee, and not a tax, where the exactions, although not voluntarily made, were used by the city to provide a particularized benefit to the owners in the form of maintaining property values, and were collected to compensate the city for its expenses in providing such services.

COUNSEL: *Tani E. Sapirstein* for the plaintiffs.

Thomas D. Moore, Associate City Solicitor (*Lisa C. deSousa*, Associate City Solicitor, with him) for the defendant.

The following submitted briefs for amici curiae:

Lee D. Goldstein for Harvard Legal Aid Bureau & others.

Robert G. Rowe, III, of the District of Columbia, for American Bankers Association, Inc.

Francis J. Nolan & Nathalie K. Salomon for Real Estate Bar Association for Massachusetts, Inc., & another.

Michael McDonagh for Massachusetts Association of Realtors.

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

OPINION BY: SPINA

OPINION

[**927] SPINA, J. We consider in the present case challenges brought against two ordinances adopted by the city of Springfield (city) in response to a wave of foreclosures triggered by the economic downturn of 2008. The United States Court of Appeals for the First Circuit has certified the following questions to this court, pursuant to *S.J.C. Rule 1:03*, as appearing in 382 Mass. 700 (1981):²

"1. Are Springfield's municipal ordinances Chapter 285, Article II, 'Vacant or Foreclosing Residential [***2] Property' (the [f]oreclosure [o]rdinance) or Chapter 182, Article I, 'Mediation of Foreclosures of Owner-Occupied Residential Properties' (the [m]ediation [o]rdinance) preempted, in part or in whole, by those state laws and regulations identified by the plaintiffs?

"2. Does the [f]oreclosure [o]rdinance impose an unlawful tax in violation of the Constitution of the Commonwealth of Massachusetts?"

Easthampton Sav. Bank v. Springfield, 736 F.3d 46, 53 (1st Cir. 2013).

² *Supreme Judicial Court Rule 1:03*, as appearing in 382 Mass. 700 (1981), provides: "This court may answer questions of law certified to it by ... a Court of Appeals of the United States ... when requested by the certifying court if there are

involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court."

We answer the first question that the mediation ordinance is preempted by *G. L. c. 244* and that the foreclosure ordinance is preempted by *G. L. c. 21E* and *G. L. c. 111* but not by *G. L. c. 244*. [*286] We answer the second question in [***3] the negative.³

3 We acknowledge the amicus briefs filed by the Massachusetts Bankers Association, Inc.; the American Bankers Association, Inc.; the Massachusetts Association of Realtors; and the Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club in support of the plaintiffs; and the Harvard Legal Aid Bureau, National Consumer Law Center, National Community Reinvestment Coalition, Massachusetts Law Reform Institute, and Massachusetts Alliance Against Predatory Lending; and the Massachusetts Municipal Lawyers Association, Inc., in support of the defendants.

1. *Procedural background.* We summarize certain undisputed facts in the order of certification and in the record before us. In 2011, in response to an increased number of foreclosures due to the housing market collapse of 2008 and its effect on public safety, the city enacted two ordinances addressing properties left vacant during or after the foreclosure process. The plaintiffs, six banks holding mortgage notes on properties in Springfield, filed suit in State court seeking declaratory and injunctive relief from the enforcement of the ordinances. The defendant city removed the case to Federal court. The Federal [***4] District Court allowed the city's motion for summary judgment. The plaintiffs appealed to the United States Court of Appeals for the First Circuit. That court determined that the outcome of the case centered on unresolved questions of Massachusetts [**928] law better suited for this Court. We now

consider the questions presented to this court.

2. *Springfield ordinances.* The two ordinances deal specifically with the foreclosure process. The mediation ordinance is entitled "Facilitating Mediation of Mortgage Foreclosures of Owner Occupied Residential Properties" and is codified in Chapter 7.60 of Title 7 of the Revised Ordinances of the city of Springfield, 1986, as amended (city ordinances). The foreclosure ordinance is entitled "Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties and Foreclosures of Owner Occupied Residential Properties," and is codified in Chapter 7.50 of Title 7 of the city ordinances.

a. *Mediation ordinance.* The mediation ordinance establishes a program requiring mandatory mediation between mortgagors and mortgagees. The ordinance requires that, upon giving notice of a default and the statutory right of redemption to the mortgagor, mediation must [***5] begin within forty-five days. The mediation consists of a conference between the mortgagor and mortgagee in which the parties must make a good faith effort to renegotiate the terms of the mortgage that was the subject of the notice or otherwise [*287] to resolve the pending foreclosure. If, after a mediation conference, the city-provided mediation program manager determines that the mortgagee has made a good faith effort to mediate but that the parties were unable to come to an agreement to avoid foreclosure, the manager will issue a certificate stating that the mortgagee has satisfied the requirements of the mediation ordinance and authorizing the mortgagee to proceed with its rights pursuant to *G. L. c. 244*. Failure of a mortgagee to comply with the mediation ordinance results in a \$300 fine with each day of noncompliance constituting a separate violation.

b. *Foreclosure ordinance.* The foreclosure ordinance requires owners of

buildings that are vacant or undergoing foreclosure to register with the city. The definition of "owner" includes "a mortgagee of any such property who has initiated the foreclosure process." Under the ordinance, the mortgage foreclosure process is initiated by "taking [***6] possession of a residential property pursuant to [G. L. c. 244, § 1]; [or by] commencing a foreclosure action on a property in any court of competent jurisdiction, including without limitation, filing a complaint in Land court under the Servicemembers Civil Relief Act -- Public Law 108-189 (50 U.S.C.S. App. § 501-536)." In addition, "where the mortgage authorizes [the] mortgagee entry to make repairs upon the mortgagor's failure to do so," the mortgagee has "initiated" the foreclosure process. Read together, a mortgagee whose mortgage expressly authorizes entry to make repairs upon the mortgagor's failure to do so is an owner under the ordinance without any consideration as to whether the mortgagor has vacated the property.

Under the foreclosure ordinance, an "owner" as defined in the ordinance is responsible for the maintenance of the property. The ordinance specifies the minimum requirements of maintenance, including the filing of a space utilization plan with the fire commissioner; the removal of hazardous material from the property; the securing of windows and doorways or the provision of twenty-four-hour on-site security; the removal of trash, debris, and stagnant water; the draining [***7] of water from plumbing if the property is vacant; the procurement of liability insurance for the property; and the provision of a \$10,000 cash bond against the possibility of noncompliance. Upon the satisfaction of these conditions, the city will issue a certificate of compliance to the owner.

[**929] If an owner fails to register a vacant or foreclosing property with the city and to obtain a certificate of compliance, the build- [*288] ing commissioner, once notified, is empowered to give notice and

order the owner to bring the property into compliance with the foreclosure ordinance. Failure to comply with an order to register and its attendant conditions authorizes the building commissioner and his agents to enter the property to inspect it and bring it into compliance with the ordinance. An owner must pay any expenses incurred by the commissioner in securing an unregistered property within seven days of receipt of notice, or the city may file a notice of claim against the property and obtain a lien. The ordinance's requirement of a \$10,000 bond ensures that, should the owner of a property subject to the ordinance fail to maintain the property according to the strictures of the ordinance, the city [***8] will be able to recoup the costs of entering the property and satisfying the maintenance requirements. If the property is registered and the owner fails to pay the expenses incurred by the city, the city may draw down the posted bond. Furthermore, the city will retain an unspecified portion of the bond as "an administrative fee to fund an account for expenses incurred in inspecting, securing, and marking said building and other such buildings that are not in compliance with [the foreclosure ordinance]."⁴ Finally, failure to comply with the foreclosure ordinance results in a fine of \$300 per day with each day constituting a separate violation.

4 The city has represented that this fee would likely be between \$500 and \$1,000. *Easthampton Sav. Bank v. Springfield*, 736 F.3d 46, 49 n.3 (1st Cir. 2013).

3. *Preemption.* The Home Rule Amendment authorizes a municipality by ordinance or bylaw to "exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight" of the Home Rule Amendment. See *art. 89, § 6, of the Amendments to the Massachusetts Constitution.* [***9] See also *G. L. c. 43B, §*

13 (Home Rules Procedures Act). Municipal bylaws are presumed to be valid. *Marshfield Family Skateland, Inc. v. Marshfield*, 389 Mass. 436, 440, 450 N.E.2d 605 (1983). The plaintiffs argue that the ordinances are inconsistent with several laws enacted by the General Court and thus are unconstitutional. The city argues that no conflict exists with the specified laws and that, should this court conclude otherwise, the foreclosure ordinance by its own language avoids any conflict.

In determining whether a local ordinance or bylaw is inconsistent with a State statute, the "question is not whether the Legislature [*289] intended to grant authority to municipalities to act ... , but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." *Wendell v. Attorney Gen.*, 394 Mass. 518, 524, 476 N.E.2d 585 (1985). Municipalities enjoy "considerable latitude" in this regard. *Bloom v. Worcester*, 363 Mass. 136, 154, 293 N.E.2d 268 (1973). There must be a "sharp conflict" between the ordinance or bylaw and the statute before a local law is invalidated. *Id.* Such a conflict "appears when either the legislative intent to preclude local action is clear, or, absent plain expression [***10] of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *Grace v. Brookline*, 379 Mass. 43, 54, 399 N.E.2d 1038 (1979).

Legislative intent to preclude local action can be express or inferred. *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 126, 967 N.E.2d 127 (2012). When express, the task of determining the inconsistency between a local enactment and a State law is relatively easy. See *Wendell*, 394 Mass. at 524. More difficult are the instances when the Legislature is silent on the issue of local regulation and a party challenging a local enactment asserts that "a legislative intent to bar such local action should be inferred in all the circumstances." *Id.* When "legislation on a subject is so

comprehensive that an inference would be justified that the Legislature intended to preempt the field," a municipal law cannot stand. *Id.* See *Anderson v. Boston*, 376 Mass. 178, 186, 380 N.E.2d 628 (1978) (construing campaign finance laws as "preempting any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question"). "In a close case, the considerations influencing the decision [***11] depend on the particular circumstances and a perception of the extent to which the Legislature has or has not made a preemptive intent clear. In such an analysis, it is not inappropriate to take note of what has or has not been traditionally a matter of local regulation." *Wendell*, 394 Mass. at 525.

The plaintiffs have identified three statutes that they argue are in conflict with the ordinances: *G. L. c. 244*, the Massachusetts foreclosure statute; *G. L. c. 21E*, the Massachusetts Oil and Hazardous Material Release Prevention Act (OHMRPA); and *G. L. c. 111*, §§ 127A-127L, the State sanitary code. We address each in turn.

a. *Massachusetts foreclosure statute.* The plaintiffs argue that the foreclosure statute preempts the foreclosure ordinance. The First Circuit has asked us also to consider whether the foreclosure [*290] statute preempts the mediation ordinance. As we explain, we conclude that the foreclosure statute preempts the mediation ordinance in whole but find no preemption of the foreclosure ordinance.

i. *Mediation ordinance.* *General Laws c. 244* establishes three means by which the equity of redemption of a mortgage may be foreclosed. They are foreclosure (1) by action, *G. L. c. 244*, §§ 3-10; [***12] (2) by entry and possession, *G. L. c. 244*, §§ 1, 2; or (3) by sale under the power of sale in a mortgage, *G. L. c. 244*, §§ 11-17C. *General Laws c. 244*, § 35A, as amended by St. 2010, c. 258, § 7, gives a mortgagor of residential

real property in the Commonwealth 150 days to cure a payment default before foreclosure proceedings may be commenced. A foreclosing mortgagee may reduce the 150-day period to ninety days by certifying that it has engaged "in a good faith effort to negotiate a commercially reasonable alternative to foreclosure ... involv[ing] at least 1 meeting, either in person or by telephone, between [the parties or their representatives,]" and that the meeting was not successful. *G. L. c. 244, § 35A (b)*. A good faith effort requires the mortgagee to consider the mortgagor's current circumstances, an analysis of the net present value of a modified mortgage loan compared to the "anticipated net recovery following foreclosure[,] and ... the interests of the creditor." *G. L. c. 244, § 35A (c)*. Should the good faith effort fail, the mortgagee must provide the mortgagor with an affidavit setting forth "the time and place of the meeting, parties participating, relief offered [***13] to the borrower, a summary of the creditor's net present value analysis and applicable inputs of the analysis and certification that any modification or option offered complies with current [F]ederal law or policy." *G. L. c. 244, § 35A (f)*.

A comparison of the foreclosure statute and the mediation ordinance reveals [**931] similar attempts to give mortgagees an incentive to negotiate with the mortgagors before proceeding to foreclose. The city contends that the mediation ordinance complements and does not conflict with the foreclosure statute because a mortgagee could comply with both laws. We disagree. The Legislature's decision to utilize the proverbial "carrot" of a shorter right-to-cure period trumps the city's choice of the "stick" of a daily fine. Furthermore, the ordinance by its own terms does not allow a mortgagee to proceed with foreclosure before obtaining a certificate of good faith mediation, a direct impingement on the process of foreclosure.

[*291] Mortgage foreclosure regulation traditionally has been a matter of State, and not local, concern. See Walsh, *The Finger in*

the Dike: State and Local Laws Combat the Foreclosure Tide, 44 *Suffolk U. L. Rev.* 139, 180-187 (2011) (reviewing legal [***14] challenges to efforts by municipalities to regulate mortgage foreclosure process). See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541-542, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) (noting traditional State-level management of foreclosure). The mediation ordinance alters what the Legislature determined, as a matter of policy, to be the just medium between the parties involved in the contemplation of a mortgage foreclosure. By so doing, the ordinance necessarily "frustrate[s] the purpose" of the foreclosure statute. *Wendell*, 394 *Mass. at* 529.

The Legislature's amendment of the foreclosure statute in 2012 provides further support for our conclusion that the foreclosure process is wholly a matter of State regulation absent an expression of a clear intent to allow local regulation. *General Laws c. 244, § 35B*, inserted by St. 2012, c. 194, § 2, prohibits a mortgagee from proceeding with foreclosure by sale if the mortgage loan at issue in the foreclosure qualifies as a "certain mortgage loan," as defined by *G. L. c. 244, § 35B (a)*. If the loan qualifies, the mortgagee must conduct an analysis of whether the mortgagor is capable of paying a modified mortgage loan, and it must offer the mortgagee any such identified loan. [***15] See *G. L. c. 244, § 35B (b)*. This analysis and offer, if any is forthcoming, constitute objective evidence of a good faith effort to prevent foreclosure. *Id.* We think the differing treatment of lenders based on the particular circumstances of the mortgage loan in question indicates that the Legislature considered and rejected other possible means of regulation. Accordingly, we discern a legislative intent to occupy the field to the exclusion of other options -- including further regulation at the local level.

ii. *Foreclosure ordinance.* The foreclosure statute does not preempt the foreclosure ordinance. As we stated above,

G. L. c. 244 establishes procedures by which the equity of redemption in a mortgage may be foreclosed. The foreclosure ordinance does not impact that process. Although a mortgagee's duty to maintain and repair arises under the ordinance and other liabilities may arise from actions required under the ordinance, nothing in the ordinance affects the procedures for foreclosing the equity of redemption. It is immaterial for purposes of liability under the ordinance that the ordinance considers the foreclosure process initiated at a different moment than the statute because [***16] the ordinance does not purport to have any legal effect on the statutory [*292] foreclosure process.⁵ We therefore conclude that the foreclosure ordinance [*932] does not conflict with the foreclosure statute.⁶

5 As discussed *infra*, where the mortgage authorizes the mortgagee to make repairs upon the mortgagor's failure to do so, the mortgagee is deemed to have initiated the foreclosure process.

6 The foreclosure ordinance also is not inconsistent with *G. L. c. 266, § 120*, the criminal trespass statute. The criminal trespass statute applies to those who enter "without right." *G. L. c. 266, § 120*. A mortgagee may have a right to enter property either under the terms of the mortgage or under *G. L. c. 244, § 9*.

b. *Massachusetts Oil and Hazardous Material Release Prevention Act*. As we explain, we determine that the foreclosure ordinance is inconsistent with *G. L. c. 21E*, the OHMRPA. The foreclosure ordinance requires an "owner of a vacant and/or foreclosing property" to "[r]emove from the property, to the satisfaction of the fire commissioner, hazardous material as that term is defined in *Massachusetts General Laws, chapter 21K*, as that statute may be amended from time to time." The plaintiffs argue [***17] that the foreclosure ordinance's definition of "owner" is broader than the definition included in the OHMRPA.⁷ In the plaintiff's view, this overbreadth directly places the foreclosure

ordinance squarely in conflict with a clearly stated legislative policy. We agree.

7 The definition of "owner" in *G. L. c. 21K* references the Massachusetts Oil and Hazardous Material Release Prevention Act (OHMRPA). Both *c. 21K*, which addresses the mitigation of hazardous materials, and the OHMRPA utilize the same definition of "hazardous material."

The OHMRPA is a statute "drafted in a comprehensive fashion to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties. To that end, the [Department of Environmental Quality Engineering] has promulgated extensive regulations ... for purposes of implementing, administering, and enforcing [the OHMRPA]." *Taygeta Corp. v. Varian Assocs.*, 436 Mass. 217, 223, 763 N.E.2d 1053 (2002). Under the OHMRPA, a secured lender will "not be deemed an owner or operator with respect to the site securing the loan" if certain conditions are met. *G. L. c. 21E, § 2 (c)*. However, this exemption from liability [***18] under OHMRPA applies only to "releases and threats of release that first begin to occur before such secured lender acquires ownership or possession of the site." *G. L. c. 21E, § 2 (c) (1)*. "Nothing in this definition shall relieve a secured lender of any liability for a release or threat of release that first begins to occur at or from a site ... during the time that such secured lender has ownership or possession of such site ... for any purpose." *Id.* Furthermore, [*293] "[n]otwithstanding any other provision of this definition, a secured lender shall be deemed an owner or operator of an abandoned site ... if such secured lender ... held ownership or possession of such site immediately prior to such abandonment." *G. L. c. 21E, § 2 (c) (2)*.

The plaintiffs argue that the foreclosure ordinance forcibly exposes them to liability under the OHMRPA if, in complying with the mandate of the ordinance, they enter a

property and become mortgagees in possession during or after which a release or threat of release of hazardous material occurs. The imposition of liability in such circumstances would defeat the safe harbor for secured lenders provided by the Legislature. We agree.

The [***19] OHMRPA is a "comprehensive" statute. *Taygeta Corp.*, 436 Mass. at 223. "Legislation which deals with a subject comprehensively ... may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise [**933] the legislative purpose of that statute would be frustrated." *Bloom*, 363 Mass. at 155. Here, we can infer that the Legislature has decided that secured lenders not in possession (nor previously in possession) of a site should not be liable for any hazardous material releases at that site. The foreclosure ordinance alters that calculus by requiring mortgagees not yet in possession to enter the property and assume possession. In so doing, a secured lender may become liable under the OHMRPA through compliance with the foreclosure ordinance. As such, the foreclosure ordinance is inconsistent with the OHMRPA.

The city argues that the very language of the ordinance eliminates any inconsistency between it and the OHMRPA because the ordinance does not apply to owners "exempt from such actions by Massachusetts General Laws." We are unpersuaded by this argument. "The existence of legislation on a subject ... is not necessarily a bar [***20] to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[.]" but can be a bar when "the Legislature has ... [impliedly] ... forbidden the adoption of local ordinances and by-laws on that subject." *Del Duca v. Town Adm'r of Methuen*, 368 Mass. 1, 11, 329 N.E.2d 748 (1975), quoting *Bloom*, 363 Mass. at 156. Simply put, a municipality has no regulatory power in a field already wholly occupied by the State unless

explicitly granted such power to regulate by the statute itself. The city cannot exempt a secured lender from the foreclosure ordinance if it has no power to include the lender. See N.J. Singer & J.D. Shambie Singer, [*294] Sutherland Statutory Construction § 47:11, at 326-327 (7th ed. rev. 2014) ("A true statutory exception exists only to exempt something which would otherwise be covered by an act").

c. *State sanitary code*. The plaintiffs challenge the foreclosure ordinance by claiming it is inconsistent with the Sanitary code and the regulations promulgated under it, 105 Code Mass. Regs. § 400 (1993), together known as the State sanitary code (code). "General Laws c. 111, §§ 127A-127N, reflect a comprehensive legislative attempt to effectuate [***21] compliance with minimum health and safety standards for residential premises." *Negron v. Gordon*, 373 Mass. 199, 202, 366 N.E.2d 241 (1977). A local board of health is permitted "to adopt such rules and regulations as, in its opinion, may be necessary for the particular locality under its jurisdiction; provided, such rules and regulations do not conflict with the laws of the commonwealth or the provisions of the code." *G. L. c. 111, § 127A*. Enforcement of the code and any local regulations falls to the local board of health or the Department of Public Health by service of an order on the owner of a property. *Id.* 105 Code Mass. Regs. § 400.200-400.300 (1993). The local board of health and the Department of Public Health, as well as a tenant, also may petition a court to enforce the requirements of the code. *G. L. c. 111, §§ 127A, 127C*. Among the available remedies are criminal or civil injunctive relief, correction of the violation by the board itself at the expense of the owner, appointment of a receiver, or condemnation and demolition of the building. *G. L. c. 111, §§ 127A, 127B, 127I*. 105 Code Mass. Regs. § 400.700(B) (1993). 105 Code Mass. Regs. §§ 410.910, 410.950-410.960 (2007).

The appointment [***22] of a receiver, while a familiar instrument of equity, is an extraordinary remedy. *Perez v. Boston Hous. Auth.*, 379 Mass. 703, 735-736, 400 N.E.2d 1231 (1980). *General Laws c. 111, § 127I*, "set[s] forth circumstances that permit a court to appoint a receiver (i.e., [**934] when it 'may' do so) as well as those circumstances when appointment of a receiver is mandated (i.e., when it 'shall' do so)." *Boston v. Rochalska*, 72 Mass. App. Ct. 236, 243, 890 N.E.2d 157 (2008). *Section 127I* "require[s] the appointment of a receiver to undertake remedial action when there are ongoing sanitary code violations in an occupied building 'and the court determines that such appointment is in the best interest of the occupants residing in the property,' but mak[es] the appointment discretionary when the building is unoccupied or, if occupied, when the best interests of occupants do not require appointment." *Id.* at 244.

[*295] The foreclosure ordinance amalgamates two separate enforcement procedures envisioned in the State sanitary code into a single regulatory mechanism: the use of the surety bond and direct entry by an enforcement authority. Under the State sanitary code, an enforcement authority initially can only issue an order to the owner (as defined [***23] by *105 Code Mass. Regs. § 410.020* [2007]) or petition a court for enforcement. Only after "a failure to comply with an order ... results in a condition which endangers or materially impairs the health or well-being of the occupant or the public" may an enforcement authority cause "such proper cleaning or repair and charge the responsible person or persons as hereinbefore provided with any and all expenses incurred." *105 Code Mass. Regs. § 410.960(A)* (2007). The code requires only receivers to post a bond, not owners subject to the code. *G. L. c. 111, § 127I*. Even then, receivers are required to post a bond only after appointment by a court of competent jurisdiction. *Id.*

The foreclosure ordinance requires an owner, subject only to an administrative order and fine followed by charged expenses under the code, to post a bond to ensure compliance with the ordinance. The building commissioner may draw on the bond after failure of an owner to pay within seven days the expenses of a direct entry by the building commissioner or his agents. The code envisions that expenses for such a direct entry can be recouped by an action at law or by placing a lien on the property. *105 Code Mass. Regs. § 410.950(D)* [***24] (2007). The foreclosure ordinance places a heavier burden on an owner than does the code to ensure enforcement of essentially the same mandates by requiring an owner to post a bond where the code would require none. "Given the comprehensiveness of the [code] and the remedies provided therein," it is inconsistent with the code for a municipality to require a surety bond of an owner in situations where the code would require none. See *Boston Gas Co. v. Newton*, 425 Mass. 697, 704-705, 682 N.E.2d 1336 (1997). In addition, the code's provision for the use of a surety bond limits the city's power to require such a bond in any other context of code enforcement. See *105 Code Mass. Regs. § 400.015* (1993) ("Nor should the existence of the State Sanitary Code limit or otherwise affect the power of any health authority with respect to any matter for which the State Sanitary Code makes no provision"). The city, by the terms of the code, may require only a surety bond in the manner the code allows. The foreclosure ordinance requires a surety bond in circumstances different from those of the code. Thus the foreclosure ordinance [*296] conflicts with the code.⁸

8 Although we determine that State law preempts the foreclosure [***25] ordinance, the effect of this preemption vis-à-vis a general severability clause is not before us. "Neither a trial judge nor this court can consider such alleged ordinances unless they are put in evidence." *Fournier v. Central Taxi Cab, Inc.*, 331 Mass. 248, 249, 118 N.E.2d 767 (1954), and cases cited. Nor are

local ordinances "an appropriate subject of judicial notice." *Lawrence v. Falzarano*, 380 Mass. 18, 25 n.10, 402 N.E.2d 1017 (1980). See *Mass. G. Evid.* § 202(c) (2013). We note that the foreclosure ordinance, unlike the mediation ordinance, does not have a severability provision specific to itself.

[**935] 4. *Lawful fee*. The plaintiffs challenge the foreclosure ordinance by characterizing it as an unlawful tax instead of a lawful fee. The city imposes a charge on foreclosing mortgagees to register the property with the city.⁹ "A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Silva v. Attleboro*, 454 Mass. 165, 168, 908 N.E.2d 722 (2009), quoting *Commonwealth v. Caldwell*, 25 Mass. App. Ct. 91, 92, 515 N.E.2d 589 (1987). The plaintiffs bear the burden of demonstrating the invalidity of the exaction. *Id.* The operation of the exaction, rather than the [***26] specific language used to describe it, ultimately demonstrates its nature. *Id.* Fees share certain common characteristics that distinguish them from taxes and establish the lens through which to determine their nature. *Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd.*, 459 Mass. 603, 610, 947 N.E.2d 9 (2011) (*Doe No. 10800*). Utilizing these characteristics, we arrive at the conclusion that the monetary exaction at issue here is a lawful fee, and not a tax.

9 Because we determine that the city's requirement that a registrant post a bond is preempted by State law, we analyze this question as if the city charged a fee directly instead of retaining part of the bond.

a. *Particularized benefit*. Fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society.'" *Emerson College v. Boston*, 391 Mass. 415, 424, 462 N.E.2d 1098 (1984), quoting *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341, 94 S. Ct. 1146, 39 L. Ed. 2d 370

(1974). In *Doe No. 10800*, we examined whether an exaction that the Legislature authorized from sex offenders who were required to register with a supervisory board constituted a regulatory fee or tax. 459 Mass. at 605, 610-615. [***27] There, we further affirmed our reasoning in *Silva*, 454 Mass. at 170, that "the particularized benefit provided in exchange for the [regulatory fee] is the existence of the regulatory scheme whose costs the fee serves to defray." Such fees "serve regulatory purposes either [*297] 'directly by, for example, deliberately discouraging particular conduct by making it more expensive,' or indirectly by defraying an agency's regulation-related expenses." *Id.* at 171, quoting *Nuclear Metals, Inc. v. Low-Level Waste Mgt. Bd.*, 421 Mass. 196, 201-202, 656 N.E.2d 563 (1995).

"In the context of regulatory fees, we construe the term 'benefit' broadly to encompass the provision of particular governmental services to a group of individuals whose actions have necessitated the regulatory scheme in the first instance and who should shoulder the burden of paying for such services. That this may not be viewed as a 'benefit' to [one subject to the scheme] in the traditional sense of the word does not detract from the fact that a governmental entity has provided a particularized 'service' to individuals who require it." *Doe No. 10800*, 459 Mass. at 611. The city has stated its belief that properties in foreclosure are more likely [***28] to become nuisances than other properties and that a downward spiral of urban blight can occur as nuisance properties in foreclosure affect the values [**936] of other properties around it, thereby increasing the likelihood of foreclosure. The foreclosure ordinance attempts to regulate this phenomenon by addressing the period of time between when a mortgagor has stopped tending to the property (due either to the futility of the exercise in the face of foreclosure and unavoidable eviction or to the fact that the property is already vacant with no party

responsible for its care) and when the mortgagee or new occupant comes into possession. While the act of foreclosing by mortgagees should not be equated with the acts of those subject to the regulatory scheme in *Doe No. 10800*, foreclosure is nevertheless the operation that triggers the conditions giving rise to the perceived necessity for the regulatory scheme. That this regulatory scheme is not viewed as a benefit by the plaintiffs does not detract from the fact that the city provides a particularized service to the plaintiffs in the form of maintaining property values of their loan collateral through enforcement of the foreclosure ordinance [***29] after foreclosure has commenced. See *Nuclear Metals, Inc.*, 421 Mass. at 205 ("It is appropriate that the entities which generate low-level radioactive waste [and not the taxpayers of the Commonwealth] should shoulder costs associated with protecting the general public from the hazards posed by the waste").

b. *Costs.* Fees, unlike taxes, "are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Emerson College*, 391 Mass. at 425. Here, the [*298] fee is paid into "an account for expenses incurred in inspecting, securing, and marking said building and other such buildings that are not in compliance with this Section." See *id.* at 427 (stating deposit of exaction into general fund nondecisively weighs in favor of tax, not fee). "The critical question is whether the fees are reasonably designed to compensate an entity for its anticipated regulatory expenses." *Doe No. 10800*, 459 Mass. at 612. In reviewing this question, "reasonable latitude must be given to the agency in fixing charges to cover its anticipated expenses in connection with the services to be rendered." *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 403, 486 N.E.2d 700 (1985). [***30] Such charges should "not be scrutinized too curiously even if some incidental revenue were obtained." *Id.*,

quoting *Opinion of the Justices*, 250 Mass. 591, 602, 148 N.E. 889 (1924). "Relevant expenses include both the direct and the indirect or incidental costs associated with the particular government service." *Doe No. 10800*, 459 Mass. at 613.

The plaintiffs argue that the funds that do not apply directly to the registered compliant properties are utilized to secure other, noncompliant properties and are never recovered by the original payor. These excess monies, therefore, indicate that the exaction is excessive to the costs of the benefit.¹⁰ This argument passes over the fact that the foreclosure ordinance envisions that the expenditures of the city in entering and securing a noncompliant property will indeed be initially financed by a portion of the administrative fee from the compliant [***937] properties paid into an account to fund the city's actions in securing the noncompliant properties but that ultimately the penalties that other properties will incur through noncompliance will cover those expenditures of the city. This initial financing of a portion of the regulatory scheme beyond the simple processing [***31] and registration of a compliant property is "an indirect or incidental cost[] associated" with the foreclosure ordinance. *Doe No. 10800*, 459 Mass. at 613.

10 The foreclosure ordinance does not specify the amount of the administrative fee. Therefore, although we discuss the role of the exaction relative to costs and ultimately determine that the exaction is a fee, we can make no further determination whether the exaction unlawfully raises revenue or, alternatively, compensates the city on the record before us. We note that the mere fact that a fee creates some revenue does not transform the fee into a tax. See *Opinion of the Justices*, 250 Mass. 591, 602, 148 N.E. 889 (1924).

c. *Voluntariness.* The parties agree that the exaction at issue in the foreclosure ordinance is involuntarily paid. We have "consis- [*299] tently given less weight to the voluntariness factor" in the context of

regulatory fees. *Silva, 454 Mass. at 172*. The purpose of the foreclosure ordinance is "to promote the health, safety and welfare of the public, to protect and preserve the quiet enjoyment of occupants, abutters and neighborhoods, and to minimize hazards to public safety personnel inspecting or entering such properties." Exactions [***32] founded upon the police power to regulate particular activities are regulatory fees. See *id. at 168*. Accordingly, in this context, the issue of voluntariness "is of no relevance in determining whether that charge is a fee or a tax." *Id. at 172*.

In conclusion, for the aforementioned reasons, we determine that the city's exaction from those subject to the foreclosure ordinance would be a lawful fee, rather than a tax.¹¹ Accordingly, we answer the second certified question in the negative.

11 The plaintiffs also argue that the city lacks the statutory authorization to impose this exaction. The plaintiffs point to nothing

in the record to support this contention. We assume, without deciding, that the city does have this authority pursuant to *G. L. c. 40, § 22F*, and that the city has duly adopted this provision.

We recognize that the city of Springfield has attempted to address the serious problem of urban blight within its borders through these ordinances. Although we conclude that the city may not achieve its goal by ordinance as it has here attempted, a solution may be provided through the Legislature.

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of [***33] this court. The clerk in turn will transmit one copy, under the seal of this court, to the clerk of the United States Court of Appeals for the First Circuit, as the answers to the questions certified, and will also transmit a copy to each party.

So ordered.

CHARLENE GALENSKI vs. TOWN OF ERVING & OTHERS.¹

1 Board of selectmen of Erving and treasurer of Erving.

SJC-11772.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

471 Mass. 305; 28 N.E.3d 470; 2015 Mass. LEXIS 170

January 6, 2015, Argued

April 17, 2015, Decided

PRIOR HISTORY: [***1] Franklin. CIVIL ACTION commenced in the Superior Court Department on November 21, 2012. The case was heard by *John A. Agostini, J.*, on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment affirmed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES

Public Employment, Retirement benefits. School and School Committee, Retirement benefits, Group insurance. Municipal Corporations, Group insurance, Allocation of insurance premiums. Insurance, Group, Premiums. Retirement.

In a civil action brought by a retired public school principal, contending that the defendant town had violated her right to payment by the town of a portion of her group medical insurance premiums, the town's retirement policy imposing a minimum term of service as a prerequisite to premium contributions from the town was invalid, where the town had voted to accept certain local option provisions of *G. L. c. 32B*, relating to group health insurance for municipal employees, and therefore, the terms of the statute governed whether and in what amounts the town must contribute to the cost of a retiree's health insurance premiums.

COUNSEL: *Patricia M. Rapinchuk* for the defendants.

Eric Lucentini (Sandra Lucentini with him) for the plaintiff.

JUDGES: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, HINES, JJ.

OPINION BY: DUFFLY

OPINION

[**472] DUFFLY, J. Charlene Galenski retired in 2012 after six years of service as a school principal in the town of Erving (town); she previously had been a long-time public school teacher in other municipalities in the Commonwealth. Galenski then sought continued health insurance coverage and contribution by the town to the cost of her group health insurance premiums. In 2001, the town had voted to adopt *G. L. c. 32B*, § 9E, which required it to contribute over [***2] fifty per cent of the health insurance premiums of all of its retirees. Before employing Galenski, however, the town had enacted a policy stating that it would contribute only to the group health insurance premiums of retired employees who had [*306] retired after a minimum of ten years of employment with the town. Although Galenski was permitted to remain a member

of the town's group health insurance plan after she retired, the town determined she was not eligible for any contribution by the town to her health insurance premiums.

Galenski filed a complaint in the Superior Court contending that the town had violated her right to payment by the town of a portion of her group medical insurance premiums, as required under *G. L. c. 32B*, § 9E; she sought declaratory and injunctive relief, and also raised a claim of estoppel based on detrimental reliance. A judge of the Superior Court allowed Galenski's motion for summary judgment on the first two claims, denied the town's cross motion for summary judgment, and issued a permanent injunction prohibiting the town from enforcing its policy.² The town appealed, and we transferred the case to this court on our own motion. We conclude that, because the town had voted to [***3] accept *G. L. c. 32B*, a local option statute that governs group health insurance for municipal employees, the terms of the statute govern whether and in what amounts the town must contribute to the cost of a retiree's health insurance premiums. Accordingly, the town's retirement policy imposing a minimum term of service as a prerequisite to premium contributions from the town is invalid.

2 Final judgment was entered only as to the first two claims; the claim of detrimental reliance is not before us.

1. *Factual background.* We recite the facts as set forth in the judge's decision, supplemented by undisputed facts in the [**473] record. In 1956, the town voted to accept *G. L. c. 32B*; by accepting certain local option provisions of that statute, the town was required to make group health insurance coverage available to retired employees. In 2001, the town's voters chose to accept *G. L. c. 32B*, § 9E.³ *General Laws c. 32B*, § 9E, requires municipalities to contribute to the group health insurance premiums of retired employees at a rate determined by the municipality, but that rate must exceed fifty per cent of the cost of the insurance [*307] premiums.⁴

3 The town of Erving (town) accepted *G. L. c. 32B, § 9E*, by a majority vote on the following ballot question, the language of which is prescribed [***4] by the statute:

"Shall the town, in addition to the payment of fifty percent of a premium for contributory group life, hospital, surgical, medical, dental, and other health insurance for employees retired from the service of the town ... pay a subsidiary or additional rate?"

4 During the time frame at issue here, the town's rate of contribution under *G. L. c. 32B, § 9E*, was seventy-nine per cent of the cost of a retiree's health insurance premiums.

In February, 2006, the town enacted a retirement policy restricting participation in its group health insurance plan to those employees who retired from the town "after a minimum of ten (10) years of employment by the [t]own." The policy further provided that "[a]n eligible retiree with less than ten (10) years of employment with the [town] may choose to continue health insurance coverage through the [t]own's carrier at [one hundred per cent] of the retiree's cost."

Galenski began employment as the principal of Erving Elementary School on July 1, 2006.⁵ At that time, she was a long-time educator with over thirty years of creditable service⁶ as a public school teacher in the Commonwealth.⁷ As an active employee, Galenski was enrolled in the town's health insurance plan, and the [***5] town contributed to the cost of her health insurance premiums. Galenski retired in good standing in October, 2012, after six years of service to the town.

5 Charlene Galenski was informed of the town's retirement policy before she commenced employment.

6 An employee must have a minimum of ten years of creditable service to qualify for superannuation retirement. See *G. L. c. 32, § 5 (1) (m)*.

7 Galenski spent the first thirty years of her public school teaching career in other municipalities, at least some of which had accepted *G. L. c. 32B, § 9A* or *9E*.

At a meeting on October 1, 2012, the town's board of selectmen determined that Galenski, although eligible to continue to participate in the town's group health insurance plan, would be responsible for one hundred per cent of her insurance premiums. After her retirement, Galenski continued to participate in the town's group health insurance plan, paying the entire amount of the monthly premiums.⁸

8 The judge's order on the town's cross motion for summary judgment noted that Galenski was at that time still paying one hundred per cent of the then approximately \$1,200 monthly premium.

2. *Discussion.* a. *Standard of review.* We review a grant of summary judgment de novo to determine whether, viewing [***6] the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law. *DeWolfe v. Hingham Ctr., Ltd.*, 464 Mass. 795, 799, 985 N.E.2d 1187 (2013). See *Mass. R. Civ. P. 56 (c)*, as [*308] amended, 436 Mass. 1404 (2002).

b. *Statutory framework.* *General Laws c. 32B* is a local-option statute governing [**474] various insurance benefits for employees of municipalities and other State political subdivisions. *Cioch v. Treasurer of Ludlow*, 449 Mass. 690, 690 n.2, 871 N.E.2d 469 (2007). The purpose of *G. L. c. 32B* "is to provide a plan of group life insurance, group accidental death and dismemberment insurance and group general or blanket hospital, surgical, medical, dental and other health insurance for certain persons in the service of counties ..., cities, towns and districts and their dependents." *G. L. c. 32B, § 1*.

As a local-option statute, *G. L. c. 32B* "does not take effect until a governmental unit accepts it." *Connors v. Boston*, 430 Mass. 31, 37, 714 N.E.2d 335 (1999). "Once accepted, however, it provides the exclusive mechanisms by which and to whom the [municipality] may provide group health

insurance." *Id.* See *Yeretsky v. Attleboro*, 424 Mass. 315, 316-317, 676 N.E.2d 1118 (1997). Where a municipality has exercised its local option to provide group health insurance for its employees through acceptance of *G. L. c. 32B*, "employees are automatically covered by group insurance unless the employee 'give[s] written notice ... indicating that he is not to be insured for such coverages.'" *McDonald v. Town Manager of Southbridge*, 39 Mass. App. Ct. 479, 480, 657 N.E.2d 1285 (1995), S.C., 423 Mass. 1018, 672 N.E.2d 10 (1996), [***7] quoting *G. L. c. 32B*, § 4.

Under the "default" provision of *G. L. c. 32B*, § 9, if group health insurance is offered to a municipality's active employees, such insurance coverage "shall be continued [for retired employees] and the retired employee shall pay the full premium cost, subject to the provisions of [*G. L. c. 32B*, § 9A or 9E,] whichever may be applicable." See *Yeretsky v. Attleboro*, *supra* at 317. In lieu of the default provision under *G. L. c. 32B*, § 9, a municipality adopting *G. L. c. 32B* may opt to accept one of these two local options, which require contributions by the municipality to a retiree's group insurance premiums. By adopting *G. L. c. 32B*, § 9A, a municipality chooses to pay fifty per cent of a retiree's insurance premiums; if a municipality adopts *G. L. c. 32B*, § 9E, the municipality then "may elect to pay 'a subsidiary or additional rate' greater than fifty per cent of a retiree's health insurance premium." *Somerville v. Commonwealth Employment Relations Bd.*, 470 Mass. 563, 565, 24 N.E.3d 552 (2015). In addition, *G. L. c. 32B*, § 9E, mandates that "[n]o governmental unit ... shall provide different subsidiary or additional rates to any group or class within that unit."

[*309] c. *Validity of the town's term of service requirement.* The town contends that its term of service policy, restricting the town's obligation to contribute to retirees' health insurance premiums to those retirees who were employed by the [***8] town for a minimum of ten years, is consistent with the language and purpose of *G. L. c. 32B*, § 9E. The town relies on *Cioch v. Treasurer of*

Ludlow, 449 Mass. at 696-697, for the proposition that a town policy or regulation permissibly may limit a retiree's eligibility for insurance coverage under *G. L. c. 32B*, § 9E. The town construes the prohibition in *G. L. c. 32B*, § 9E, against affording different premium contribution rates to "any group or class" as meaning only that groups such as teachers, fire fighters, and police officers cannot, through collective bargaining, negotiate different rates of contribution for their members. The town argues that such collective bargaining by separate groups could expose a municipality to expensive administrative costs, thereby defeating what it views to be the Legislature's purpose of cost containment.

[*475] "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Worcester v. College Hill Props., LLC*, 465 Mass. 134, 139, 987 N.E.2d 1236 (2013), quoting *Harvard Crimson, Inc. v. President & Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518 (2006). In interpreting a statute, we look first to its plain [***9] language. *Worcester v. College Hill Props., LLC*, *supra* at 138.

Municipalities accepting *G. L. c. 32B*, § 9E, "shall ... in addition to the payment of fifty per cent of a premium for contributory group life, hospital, surgical, medical, dental and other health insurance for employees retired from the service of the town, and their dependents, pay a subsidiary or additional rate" that is determined by vote of the municipality. "The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation." *Hashimi v. Kalil*, 388 Mass. 607, 609, 446 N.E.2d 1387 (1983). The statute, by its terms, is mandatory, and "once accepted the municipality must comply with the statute's unambiguous mandates,"

notwithstanding that the statute was adopted voluntarily. *Adams v. Boston*, 461 Mass. 602, 609, 963 N.E.2d 694 (2012). Because the town chose to adopt *G. L. c. 32B, § 9E*, the plain language of that section mandates that the town contribute more than fifty per cent of the premiums of "employees retired from the service of the town."

[*310] As stated, an "employee" within the meaning of *G. L. c. 32B*, is defined as "any person in the service of a governmental unit ... who receives compensation for any such service, whether such person is employed, appointed or elected by popular vote, ... provided, however, that the duties of such person require not less than [twenty] hours, regularly, [***10] in the service of the governmental unit during the regular work week of permanent or temporary employment." *G. L. c. 32B, § 2*. As a public school principal, Galenski held a position that falls within this definition. As an employee with more than thirty years of creditable service, Galenski was eligible to receive retirement benefits. See *G. L. c. 32, § 5 (1) (m)*; note 6, *supra*. Because she was a member of the town's group health insurance plan while employed as the principal of Erving Elementary School, Galenski was statutorily entitled to continued group health insurance as a retiree. See *G. L. c. 32B, § 9*. Cf. *Lexington Educ. Ass'n v. Lexington*, 15 Mass. App. Ct. 749, 752, 448 N.E.2d 1271 (1983) (rejecting town's "self-imposed and super-statutory" minimum hours requirement for eligibility for health insurance benefits as inconsistent with statutory definition of "employee").

In describing contributions by a municipality to its retirees' insurance premiums, *G. L. c. 32B, § 9E*, further mandates that "[n]o governmental unit ... shall provide different subsidiary or additional rates to any group or class within that unit." Identical language appears in *G. L. c. 32B, § 7A*, which governs contributions to insurance premiums of active employees.

On the date of Galenski's retirement, the town's retirement policy provided, in pertinent part:

"For a retiree ... to [***11] qualify for participation in the [town's] group insurance ... [t]he employee must qualify for county or teacher's retirement and must retire from the [town] after a minimum of ten (10) years of employment by the [town] ... , having been eligible for [**476] health insurance for all of the ten (10) years"

"An eligible retiree with less than ten (10) years of employment with the [town] may choose to continue health insurance through the [town's] carrier at [one hundred per cent] of the retiree's cost."

The requirement that a retiree "must retire from the [town] after a minimum of ten (10) years of employment by the [town]" in [*311] order to receive contribution towards insurance premiums is not consistent with *G. L. c. 32B, § 9E*. The town's requirement of a minimum term of service places retirees like Galenski into a subclass of retirees who are not entitled to contribution to their health insurance premiums, despite otherwise qualifying for superannuation retirement benefits.

"[A] municipality may not enact a bylaw, policy, or regulation that is inconsistent with State law." *Cioch v. Treasurer of Ludlow*, 449 Mass. at 699. The town's retirement policy is inconsistent with *G. L. c. 32B* in two significant respects and, accordingly, is invalid. First, the retirement policy establishes different [***12] insurance premium contribution rates for different groups of employees, despite the "literal mandate of equal treatment for all groups of employees with respect to employer contributions toward insurance costs." See *Swampscott Educ. Ass'n v. Swampscott*, 391 Mass. 864, 867, 464 N.E.2d 953 (1984) (interpreting identical language in *G. L. c. 32B, § 7A [d]*, which

governs insurance premium contribution for active employees, where "town has undertaken voluntarily to pay more than [fifty per cent] of one group of employees' insurance costs"). Second, the retirement policy seeks to exempt the town from contributing to any portion of the insurance premiums for one group of employees, notwithstanding that the town has adopted *G. L. c. 32B, § 9E*, which by its plain language obligates the town to contribute more than fifty per cent of the costs of that group's insurance premiums.

Our interpretation of the clear statutory language is consistent with the Legislature's manifest purpose in enacting *G. L. c. 32B*, which is to provide group health insurance for municipal employees. See *G. L. c. 32B, § 1*. The statute provides local governments "with a volume of purchasing power sufficient to assure that their employees will receive the highest possible level of benefits at the lowest possible cost." *Connors v. Boston*, 430 Mass. at 39, quoting 1967 Senate Doc. No. 1174, at 4. The [***13] town argues that its retirement policy simply furthers the cost containment goals of *G. L. c. 32B*. This argument is unavailing. The purpose of the statute is to create "a comprehensive scheme of coverage" for governmental employees" by "gather[ing] them in large groups so as to effect economies of scale" (citation omitted). *McDonald v. Town Manager of Southbridge*, 39 Mass. App. Ct. at 480. The goal of cost containment does not, however, permit the town to seek further reduction of its costs through a policy that eliminates its obligation to contribute to the insurance premiums of a certain subset of retirees.

[*312] Invalidation of a town regulation is appropriate where "the purpose of the statute cannot be achieved in the face of the local by-law" (citation omitted). *Connors v. Boston*, *supra* at 35. The town's term of service policy is inconsistent with the "comprehensive scheme of coverage" established by *G. L. c. 32B*, because it treats retired employees differently based on their years of service to the town, and precludes them from receiving

benefits to which they are statutorily entitled. See *McDonald v. Town [**477] Manager of Southbridge*, *supra* at 481.

The town's reliance on *Cioch v. Treasurer of Ludlow*, 449 Mass. at 696-697, is misplaced. In that case, we addressed the validity of a municipality's policy requiring a retiree to have been enrolled in a group health [***14] insurance plan while an active employee in order to continue that coverage during retirement. *Id.* at 696. The plaintiff was a retiree who had been enrolled in her husband's health insurance plan while she was an active employee of a municipality. Three years after her retirement, when her husband retired, she sought to enroll in one of the municipality's health insurance plans. *Id.* at 692-693. We noted that the statute "accords municipalities substantial latitude in the adoption of 'such rules and regulations, not inconsistent with [*G. L. c. 32B*], as may be necessary for [its] administration." *Id.* at 697-698, quoting *G. L. c. 32B, § 14*. We upheld the municipality's policy because "[n]othing in the plain language of *G. L. c. 32B, §[] 9 or 16*, requires a municipality to permit a retiree who has not enrolled in a municipal health insurance plan while employed, to enroll in a municipal health insurance plan after she has retired, or precludes it from doing so." *Cioch v. Treasurer of Ludlow*, *supra* at 698. We concluded that, while a municipality permissibly could limit enrollment to active employees, it remained obligated by the statute to "provide[] for continued coverage of those employees during their retirement." *Id.* at 699.

Finally, we reject the town's assertion that its "policy [***15] is not unlike pension benefits that are calculated based on years of service," and its suggestion that its policy furthers reasonable cost containment efforts because it should not be held "responsible for paying a significant portion of [an] employee's health insurance premium in retirement [who had worked for other municipalities]." To the contrary, the Legislature was cognizant of the potential consequences to a town which, because it has

chosen to [*313] accept *G. L. c. 32B, § 9E*, must, as the last employer in a retiree's long-term public service career, contribute to the premiums of such retirees. The Legislature enacted *G. L. c. 32B, § 9A ½*, specifically to address those concerns. Where a retiree has served a number of municipalities, *G. L. c. 32B, § 9A ½*,¹⁰ creates a reimbursement scheme between those employing municipalities, and allows [*478] the municipality from which the employee retired to recover its proportional share of contributions from other municipalities where the retiree had been employed.

9 The town also claims that its policy is a valid exercise of its power under the Home Rule Amendment, which provides that a town may "exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution [***16] or laws enacted by the general court." *Art. 89, § 6, of the Amendments to the Massachusetts Constitution*. Because Massachusetts has "the strongest type of home rule," municipal action is presumed to be valid unless preempted by State law. *Connors v. Boston*, 430 Mass. 31, 35, 714 N.E.2d 335 (1999). The town argues that its policy is not inconsistent with *G. L. c. 32B*, which establishes only a "sparse framework," and, therefore, that the Legislature did not intend to preempt municipal action such as the town's retirement policy. Our determination that the town's policy is in conflict with the language and intent of *G. L. c. 32B, §§ 9 and 9E*, disposes of this claim. Cf. *Connors v. Boston*, *supra* at 39-40, citing *Boston Gas Co. v. Newton*, 425 Mass. 697, 699, 682 N.E.2d 1336 (1997) (addressing question of preemption, and holding that local executive order expanding definition of dependent was inconsistent with language and intent of *G. L. c. 32B*).

10 Pursuant to *G. L. c. 32B, § 9A ½*,

"Whenever a retired employee or beneficiary receives a healthcare premium contribution from a governmental unit in a case where a portion of the retiree's creditable service is attributable to service in

[one] or more governmental units, the first governmental unit shall be reimbursed in full, in accordance with this paragraph, by the other governmental units for the portion of the premium contributions that corresponds to the percentage of the retiree's creditable service [***17] that is attributable to each governmental unit. The other governmental units shall be charged based on their own contribution rate or the contribution rate of the first employer, whichever is lower."

The plain language of this provision supports our interpretation of *G. L. c. 32B, § 9E*, as reflecting the Legislature's intent that a municipality that has chosen to adopt that section must contribute to the premiums of all of its retirees, regardless whether, as active employees, their years of creditable service were performed largely in other municipalities.¹¹ We give effect to all provisions [*314] of a statute, which "must be viewed 'as a whole.'" *Wolfe v. Gormally*, 440 Mass. 699, 704, 802 N.E.2d 64 (2004), quoting 2A N. Singer, *Sutherland Statutory Construction* § 46.05, at 154 (6th ed. 2000). The town's interpretation of the statutory scheme is inconsistent with *G. L. c. 32B, § 9A ½*, which reflects the Legislature's understanding that the last employer in line will be required to contribute to the insurance premiums of its retirees, notwithstanding that the retiree may have spent a substantial portion of her career working for a different municipality.

11 The town argues that, notwithstanding *G. L. c. 32B, § 9A ½*, it should be permitted to exclude retirees who served the town for fewer than ten years from [***18] its insurance premium contributions, arguing, essentially, that *G. L. c. 32B, § 9A ½*, does not do enough to contain costs. The town contends that it should be permitted to further reduce costs by limiting the class of retirees eligible for premium contributions to those employed by the town for longer periods of service. The town notes, for example, that although it may seek reimbursement from other municipalities under *G. L. c. 32B, § 9A*

1/2, it first must contribute to the premiums, and may seek reimbursement only the following year. It notes also that it must seek reimbursement based on the lower of the municipalities' rates of contribution. Concerns that the cost containment measures

established by the statute are inadequate may be addressed to the Legislature.

Judgment affirmed.

PHILIP L. GODUTI, TRUSTEE,¹ vs. CITY OF WORCESTER.

1 Of the Pension Nominee Trust.

No. 14-P-597.

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 355; 31 N.E.3d 70; 2015 Mass. App. LEXIS 49

January 12, 2015, Argued

May 13, 2015, Decided

PRIOR HISTORY: [***1] Suffolk. CIVIL ACTION commenced in the Land Court Department on September 29, 2011.

The case was heard by *Keith C. Long, J.*, on motions for summary judgment. *Goduti v. City of Worcester, 2014 Mass. LCR LEXIS 19 (2014)*

DISPOSITION: Appeal dismissed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Moot Question. Practice, Civil, Moot case, Summary judgment. Real Property, Foreclosure of tax title, Record title. Mortgage, Foreclosure. Municipal Corporations, Tax title property. Taxation, Real estate tax: tax taking.

This court concluded that, in a civil action challenging the validity of the defendant city's tax assessments of the plaintiff's property, the plaintiff's stipulation to and payment in full of the amount of the tax debt in a separate foreclosure action brought by the city caused the case to become moot ; further, this court stated that, even if the case had not been

moot, it would have concluded that summary judgment for the city was proper, where the city did not act unreasonably in continuing to assess taxes to the property's mortgagor occupants rather than the plaintiff mortgagee (despite the passage of three years following the plaintiff's recording of a certificate of entry), who had paid and continued to pay the taxes and who appeared of record to be the title owners both before and after the filing of the certificate of entry; and where the plaintiff, by accepting payments from the occupants (during the three-year period after which his title would have ripened) and treating them as payments toward the mortgage or interest thereon, waived his right to foreclosure by entry.

COUNSEL: *Michael J. Markoff* for the plaintiff.

Karen A. Meyer, Assistant City Solicitor, for the defendant.

JUDGES: Present: FECTEAU, WOLOHOJIAN, & MASSING, JJ.

OPINION BY: FECTEAU

OPINION

[**71] FECTEAU, J. Philip L. Goduti appeals from the allowance of summary judgment against him by a judge of the Land Court in his declaratory judgment action regarding the legality of the tax assessment by the city of Worcester (city) for the years 2006 through 2011 on a property located at 2 Gambier Avenue, Worcester (property). He first contends that the city was not authorized, under *G. L. c. 59, § 11*, to assess taxes to his mortgagor, who [*356] failed to pay the taxes, but was required, instead, to assess taxes during those years only to him, the purported record owner of the property following his foreclosure by entry pursuant to *G. L. c. 244, § 1*. Second, Goduti argues that the judge incorrectly determined, especially at the summary judgment stage, that he had waived his foreclosure. While we need not reach his arguments because this case [***2] has become moot, we reject his contentions nevertheless.

1. *Background.* The property in question was first acquired by Sandra and James Dunn, wife and husband, in 1973. In 1989, Goduti became a mortgagee of the property behind two others.² While remaining current on the first two mortgages, the Dunns fell behind on their mortgage payments to Goduti. Utilizing the foreclosure by entry procedure of *G. L. c. 244, § 1*, Goduti recorded a certificate of entry in the registry of deeds on October 9, 1996, thereby signaling his intent to foreclose. During the three-year period after Goduti filed his certificate of entry, after which foreclosure would be completed and his title would ripen, he accepted regular payments from the Dunns; Goduti disputes that those payments were applied to the mortgage, claiming that they were for use or occupation of the property. When the Dunns divorced in 2004, the property was conveyed, via a quitclaim deed, to Ms. Dunn alone, and the same was recorded in the registry of deeds.

2 Both mortgages senior to Goduti's were in existence through 2004, when one of the mortgages was discharged. The other mortgage was discharged in 2011.

The city had been assessing real estate (and other) taxes [***3] to the Dunns but, after the 2004 deed was recorded, it assessed only Ms. Dunn. She stopped paying taxes in the fiscal year 2006, and as a result, the city issued an instrument of taking in 2007. [**72] Ms. Dunn continued to occupy the house until 2011, when she conveyed title to Goduti via a "confirmatory deed," and Goduti then immediately conveyed the property to Michele A. Bouffard,³ who remains the current owner; Bouffard, in turn, granted Goduti a mortgage. Apparently, as part of the transaction between Goduti and Bouffard, Goduti agreed to pay any tax debt owed to the city for the fiscal years 2006 through 2011.

3 There is some inconsistency in the spelling of her name in the record appendix.

Procedurally, Goduti (along with Bouffard) initiated this declaratory judgment action in September, 2011, against the city, challenging the validity of the tax assessments from 2006 through [*357] 2011. While the instant case was pending, the city filed a complaint (foreclosure complaint) in February, 2012, seeking to foreclose the right to redemption following its 2007 taking of the property for unpaid taxes for the fiscal year 2006.⁴ The judge, in September, 2012, denied Goduti's motion to consolidate the [***4] two cases, but ordered that they proceed simultaneously.⁵

4 Although the city filed its tax taking in 2007 after Ms. Dunn failed to pay taxes in fiscal year 2006, Ms. Dunn also failed to pay through fiscal year 2011. Under *G. L. c. 60, § 61*, the city needed to take the property only once; all subsequent unpaid taxes after fiscal year 2006 were also due under the 2007 taking.

5 The judge ruled, in part, that "[a]lthough these cases arise from the same underlying factual situation, tax lien and miscellaneous cases have different procedures and remedies that weigh against consolidation. The court will, however, coordinate the two cases so they proceed simultaneously with events scheduled together and discovery taken in one case fully applicable in the other."

In February, 2014, the judge allowed the city's summary judgment motion in the instant declaratory judgment action filed by Goduti, determining that Goduti had waived his right to foreclosure and, therefore, that he was not the owner of the property from the years 2006 through 2011. As a result, the judge determined, the city had validly taxed Ms. Dunn during those years, based on the 2004 quitclaim deed from Mr. Dunn to Ms. Dunn. Concomitantly, and in the related [***5] case, the judge determined that the 2007 tax taking was valid, and ordered that, if payment of the full tax debt was made within thirty days, the property would be redeemed but, if not, the right to redemption would be foreclosed. Immediately thereafter, in the related case, Goduti stipulated to the amount of the tax debt and paid it in full. In light of Goduti's actions, the city withdrew its foreclosure complaint. Goduti appealed from the final judgment in the instant declaratory judgment action.⁶

6 Bouffard did not appeal.

2. *Mootness*. When Goduti paid the tax debt in full and redeemed, and the city discharged its tax lien, there ceased to be a case or controversy between Goduti and the city regarding taxes owed for the fiscal years 2006 through 2011. See, e.g., *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 418-419, 589 N.E.2d 1224 (1992) (where plaintiffs challenged entitlement to certain benefits under State program, but program was eliminated during pendency of action, no actual controversy continued to exist). Therefore, this [*358] case is moot.⁷ We recognize that Goduti may have [**73] felt compelled to pay the debt in the related case to avoid foreclosure but, had he intended to preserve his rights in the instant case, there were steps he could have taken to signify [***6] his continuing intent to contest the assessment but avoid foreclosure on the property, including paying the tax debt under protest in the related case, or filing a motion to stay judgment in that case pending the instant appeal. The record shows no such

signs, however. Instead, a fair reading of the documents that led to the disposition of the tax lien action is consistent with a global settlement agreement encompassing Goduti's acceptance of the outcome in the instant case. In any event, even if we were to decide the merits of the case, we would be unpersuaded that the summary judgment was decided in error.

7 Goduti argues that the action is not moot because, if we were to determine that the judge erred in entering summary judgment, and he were to ultimately prevail below upon remand and further proceedings, the city would presumably credit the amount that he paid for the years 2006 through 2011 toward future taxes owed on the property. This argument ignores the very point it seeks to address: whether this court can and should address the merits of this case in light of the fact that he paid the tax debt at issue.

3. *Merits*. "We review a grant of summary judgment de novo to determine [***7] 'whether, viewing the evidence in the light most favorable to the nonmoving party, ... the moving party is entitled to a judgment as a matter of law.'" *Go-Best Assets Ltd. v. Citizens Bank of Mass.*, 463 Mass. 50, 54, 972 N.E.2d 426 (2012), quoting from *Juliano v. Simpson*, 461 Mass. 527, 529-530, 962 N.E.2d 175 (2012). See *Mass.R.Civ.P.* 56(c), as amended, 436 Mass. 1404 (2002). Summary judgment is appropriate where there is no genuine issue as to any material fact. *Ng Bros. Constr., Inc. v. Cranney*, 436 Mass. 638, 643, 766 N.E.2d 864 (2002). Issues involving statutory interpretation are questions of law for the court to decide and can appropriately be resolved by summary judgment. See *Annese Elec. Servs., Inc. v. Newton*, 431 Mass. 763, 764 n.2, 730 N.E.2d 290 (2000).

We first reject Goduti's contention that *G. L. c. 59, § 11*, requires that a municipality assess taxes only to the record owner. As the court in *Boston v. Quincy Mkt. Cold Storage & Warehouse Co.*, 312 Mass. 638, 644-645, 45 N.E.2d 959 (1942), made clear, the statute allows a municipality to assess taxes to the

owner in fact even if he is not the person appearing of record to be the owner of the property at issue. See *Springfield v. Schaffer*, 12 Mass. App. Ct. 277, 278-279, 423 N.E.2d 797 (1981).

Assuming *arguendo* that the statute permits a view that restricts the city's assessment of taxes only to the record owner, a view to [*359] which we do not subscribe, we discern no error in the city's assessment to Ms. Dunn. Under Massachusetts law, municipalities are only required to exercise "reasonable diligence" in determining "the owner of real estate from records in the county's registry of deeds and registry of probate"; what constitutes reasonable diligence "varies [***8] with the circumstances." *Lamontagne v. Knightly*, 30 Mass. App. Ct. 647, 653, 572 N.E.2d 1375 (1991) (quotations omitted). Here, a record search would have revealed the 2004 quitclaim deed from Mr. Dunn to Ms. Dunn. While it also would have revealed Goduti's 1996 certificate of entry, that certificate alone, as further explained, *infra*, did not in itself signify that Goduti was the record owner. Goduti has cited no case law for the proposition that a mortgagee becomes *record* owner of a property either when he records a certificate of entry, or three years after that entry in the absence of further action, and we have found no support for that proposition.

Moreover, the Dunns (and then Ms. Dunn alone) continued to pay the taxes assessed to them long after Goduti recorded the certificate of entry in 1996, and after the three-year holding period passed. Goduti made no attempt over the years to correct what he now asserts was an invalid [**74] assessment, and only asserted his instant argument once it became clear that he would be responsible, pursuant to his 2011 agreement with Bouffard, for the tax debt.⁸ See *Robertson v. Plymouth*, 18 Mass. App. Ct. 592, 596-597, 468 N.E.2d 1090 (1984) (quotation omitted) (court, when faced with challenge to city's diligence in determining record owner of property, may consider that "validity of [the] tax title[] [***9] is put in

question long after the event" by party who could have, but did not, previously complain). Therefore, it cannot be said that the city acted unreasonably in continuing to assess taxes to the Dunns, who occupied the property, had paid and continued to pay the taxes, and appeared of record to be the title owners both before and after the filing of the certificate of entry in 1996.

8 We note also that the record reveals no attempt by Goduti to notify the city of his purported status as owner of record. See *G. L. c. 244, § 15A*.

Second, and operating under a correct interpretation of *G. L. c. 59, § 11*, the judge did not err in determining that Goduti was not the owner in fact of the property at issue because his title never ripened after he recorded the certificate of entry in 1996. By law, Goduti would not have acquired title to the property until three years after recording the certificate of entry. *Santiago v. [*360] Alba Mgmt., Inc.*, 77 Mass. App. Ct. 46, 50, 928 N.E.2d 359 (2010). See *Joyner v. Lenox Savs. Bank*, 322 Mass. 46, 52, 76 N.E.2d 169 (1947); *Beaton v. Land Ct.*, 367 Mass. 385, 393, 326 N.E.2d 302 (1975). During that three-year period, a mortgagee may waive his right to foreclosure by taking acts inconsistent with an intent to foreclose, including by accepting a portion of the mortgage debt or interest thereon. See *Trow v. Berry*, 113 Mass. 139, 147 (1873) (evidence showed that "the real relation between the parties was that of debtor and creditor, [***10] mortgagor and mortgagee; and cannot be explained consistently with the right of the mortgagee to hold the estate under the foreclosure"); *Joyner, supra* at 53-54. That is precisely what happened here.

Specifically, the judge properly determined that there was no genuine dispute of material fact concerning whether Goduti had waived his right to foreclosure by entry during the three-year holding period by accepting payments from Ms. Dunn and applying them toward the mortgage or interest thereon.⁹ Viewing the motion record in the

light most favorable to Goduti, ample evidence in the record showed that Goduti, during and after the three-year period in which his title would have ripened, accepted payments from Ms. Dunn and treated them as payments toward the mortgage or interest thereon.¹⁰

9 We reject Goduti's argument that whether he waived foreclosure was an issue that should have been reserved for the jury. See *Joyner*, 322 Mass. at 54 ("there remains the question whether some intentional act of the bank was *as matter of law* a waiver or requires an inference of waiver") (emphasis supplied).

10 We also take note of a Land Court docket entry on July 8, 2013, that describes a conference with the judge during which the parties expressed [***11] agreement "that these actions should be decided on summary judgment."

Namely, correspondence between attorneys representing the Dunns (and then Ms. Dunn) and Goduti (as well as Goduti himself, an attorney) during the three-year holding period indicated a mutual interest in reaching a settlement for at least a partial payoff of the mortgage. There also was explicit confirmation, including from Goduti himself, that such an agreement had been reached. Letters between [**75] the parties after the three-year period also indicated an ongoing agreement whereby Ms. Dunn would continue to make payments toward the mortgage in exchange for Goduti not foreclosing on the property. Additionally, Goduti maintained ledgers tracking Ms. Dunn's payments to him, marking the payments as "interest received," thereby also confirming the agreement reached. [*361] Moreover, Goduti's deposition testimony in the instant case indicates that his intent during the three-year window was inconsistent with an intent to

foreclose.¹¹ We also note that the judge was justified in essentially discounting Goduti's affidavit -- in which he asserted that the payments from Ms. Dunn during the three-year holding period were only for use and [***12] occupation of the property -- in the face of the aforementioned documentary evidence and his deposition testimony, given the inconsistencies between them. See *Lyons v. Nutt*, 436 Mass. 244, 249, 763 N.E.2d 1065 (2002); *Phinney v. Morgan*, 39 Mass. App. Ct. 202, 207, 654 N.E.2d 77 (1995) (party cannot defeat summary judgment by submitting affidavit that contradicts its previous sworn statements). For instance, when asked during his deposition whether he remembered initiating a foreclosure action in 1996, Goduti testified, "I don't remember anything about it at all. ... I just have no present recollection of it." This contradicts his affidavit statements concerning his specific intent during that time period, and only renders more reliable the aforementioned documentary evidence, which was made contemporaneously to the relevant events in this case.

11 For example, Goduti stated that the house was subject to a superior mortgage, the house was not worth much, and Ms. Dunn was an "old lady" on whom he was adverse to foreclose.

Finally, and read in context of the documentary evidence, the undisputed facts clearly demonstrate, as matter of law, that Goduti waived his right to foreclosure. For example, Ms. Dunn continued to occupy the property until 2011, Goduti made no attempt to assert title following the recording of the Dunns' [***13] 2004 quitclaim deed, and Ms. Dunn herself conveyed title to Goduti in 2011.

Appeal dismissed

GROTON-DUNSTABLE REGIONAL SCHOOL COMMITTEE v. GROTON-DUNSTABLE EDUCATORS ASSOCIATION.

No. 14-P-701.

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 621; 33 N.E.3d 1253; 2015 Mass. App. LEXIS 77

March 9, 2015, Argued
July 20, 2015, Decided

PRIOR HISTORY: [**1] Middlesex. CIVIL ACTION commenced in the Superior Court Department on November 4, 2013.

The case was heard by *Robert L. Ullmann, J.*, on a motion for judgment on the pleadings.

DISPOSITION: Judgment affirmed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

School and School Committee, Professional teacher status, Termination of employment. *Education Reform Act. Arbitration*, Collective bargaining, School committee. *Public Employment*, Collective bargaining, Termination.

The defendant teacher's union was not entitled to pursue arbitration of the termination of a teacher having professional status under the provisions of its collective bargaining agreement (agreement), where *G. L. c. 71, § 42*, provided the exclusive route to such arbitration; moreover, the union was not entitled to have the teacher's termination reviewed under the just cause standard provided by the agreement, given that the source, authority, and scope of arbitration for terminated teachers derived from the statute, rather than from contract (regardless of the existence or terms of the agreement).

COUNSEL: *Laurie R. Houle* for the defendant.

Howard L. Greenspan for the plaintiff.

JUDGES: Present: TRAINOR, WOLOHOJIAN, & CARHART, JJ.

OPINION BY: WOLOHOJIAN

OPINION

WOLOHOJIAN, J. At issue is whether the defendant union is entitled on behalf of a terminated teacher to pursue arbitration under the provisions of its collective bargaining agreement, or whether it is instead required to pursue arbitration under *G. L. c. 71, § 42*, amended by St. 1993, c. 71, § 44. Because we conclude that *G. L. c. 71, § 42*, provides the exclusive route to arbitrate the termination of a teacher with professional teacher status (previously known as tenure), we affirm the judgment resulting from the allowance of the plaintiff school committee's motion for judgment on the pleadings.

The school committee and the union entered into a collective bargaining agreement (CBA) that covered the period September [**622] 1, 2011, through August 31, 2014. One article of the CBA governed the arbitration of grievances, and set out detailed procedures [**2] for such arbitration. Another article of the CBA provided that teachers would not "be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantages or salary increase without just cause."

Melissa Pooler, a teacher with professional teacher status,¹ was terminated by the school committee on July 16, 2013. After the union's grievance on behalf of Pooler was denied,² the union claimed arbitration under the CBA. The school committee responded by suing to stay arbitration pursuant to *G. L. c. 150C, § 2*. The school committee's motion for a preliminary injunction was allowed, as was its subsequent motion for judgment on the pleadings. The latter is the subject of this appeal.³

1 See *G. L. c. 71, § 41*, amended by St. 1996, c. 99 ("a teacher... who has served in the public schools of a school district for three previous consecutive school years shall be ... entitled to professional teacher status").

2 At the same time, Pooler filed a petition for arbitration under *G. L. c. 71, § 42*. Subsequently, however, she and the union requested that her petition be held in abeyance to allow the union to pursue a grievance on her behalf under the CBA.

3 Our review is de novo. *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 600, 925 N.E.2d 9 (2010).

Section 42 of G. L. c. 71 provides, as pertinent here, that teachers with [**3] professional teacher status (such as Pooler) may seek to have an arbitrator review their termination in accordance with the procedures specified in the statute. *Section 42* also provides that such a teacher "shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause." Of particular importance here, § 42 provides that "[w]ith the exception of other remedies provided by statute, the remedies provided hereunder shall be the exclusive remedies available to teachers for wrongful termination."

The union contends that, despite the exclusivity language just quoted, § 42 does not preclude the union from pursuing arbitration under the provisions of the CBA. Relying on three cases that predate the Education Reform Act of 1993,⁴ the union contends [**623] that § 42 does not limit or override *G. L. c. 150E, § 8*, which allows parties to include arbitration provisions in collective bargaining agreements.⁵ It follows, in the union's view, that § 42 is not the exclusive avenue through which a terminated teacher, or the union on the teacher's behalf, [**4] can pursue arbitration.

4 *Old Rochester Regional Teacher's Club v. Old Rochester Regional Sch. Dist. Comm.*,

398 Mass. 695, 500 N.E.2d 1315 (1986); *School Comm. of Waltham v. Waltham Educators Assn.*, 398 Mass. 703, 500 N.E.2d 1312 (1986); *School Comm. of Needham v. Needham Educ. Assn.*, 398 Mass. 709, 500 N.E.2d 1320 (1986).

5 "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." *G. L. c. 150E, § 8*, amended by St. 1989, c. 341, § 80.

It is not surprising that the union is unable to point to any authority dating after 1993, when the Education Reform Act (Act) was enacted. The Act made sweeping changes to the arbitration procedures available to terminated teachers, as well as to the scope and authority of arbitrators, and the standards those arbitrators are to apply.⁶ Recognizing that these changes might be in conflict with arbitration provisions in then-existing collective bargaining agreements, the Act provides in an uncodified provision that § 42 "shall not apply to employees subject to collective bargaining agreements executed prior to the effective date of this act insofar as such collective bargaining agreements are in conflict with said section[]." St. 1993, c. 71, § 77. However, the Legislature clearly mandated that "[c]ollective bargaining agreements effective after the date of this act shall be subject to the provisions of said section[] [**5] [42]" (emphasis added). *Ibid.* The CBA at issue in this case was negotiated almost twenty years after the Act was enacted. The exclusivity provision of § 42 accordingly applies, and the union had no right to pursue arbitration under the CBA. Its remedy lies exclusively through § 42.

6 "The statutory scheme governing teacher dismissals set forth in *G. L. c. 71, § 42*, was enacted as part of the [Education] Reform Act, which brought broad-based changes to the funding and governance structure of the public education system in Massachusetts." *School Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 112, 12 N.E.3d 384 (2014).

The union also argues that Pooler is entitled to have her termination reviewed under the "just cause" standard provided in the CBA, rather than the standard contained in § 42. But since the enactment of the Act, our cases have consistently held that the source, authority, and scope of arbitration for terminated teachers derive from § 42, not from contract -- regardless of the existence or terms of a collective bargaining agreement. See, e.g., *School Dist. of Beverly v. Geller*, 435 Mass. 223, 229-230, 755 N.E.2d 1241 (2001); *Atwater v. Commissioner of Educ.*, 460 Mass. 844, 856-857, 957 N.E.2d 1060

(2011); *School Comm. of Lexington v. Zagaeski*, 469 Mass. 104, [*624] 111-112, 12 N.E.3d 384 (2014); *School Comm. of Chicopee v. Chicopee Educ. Assn.*, 80 Mass. App. Ct. 357, 364-365, 953 N.E.2d 236 (2011). The school committee's decision to terminate Pooler must accordingly be assessed under the standards of *G. L. c. 71, § 42. Zagaeski*, 469 Mass. at 113.

For these reasons, arbitration under the CBA was properly stayed.

Judgment affirmed.

STEPHEN M. MCGRATH vs. TOWN OF FOXBOROUGH.

14-P-1259

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 1133; 2015 Mass. App. Unpub. LEXIS 701

June 26, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

JUDGES: Vuono, Wolohojian & Sullivan, JJ. [*1]

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Stephen M. McGrath (plaintiff or McGrath) a police officer in Foxborough (town or Foxborough), brought suit seeking a declaration that the town had violated *G. L. c. 41, § 96B*, inserted by St. 1994, c. 333, which requires that a "student officer" be paid "the regular wages provided for the position to which he was appointed," and alleging a violation of *G. L. c. 149, § 148*, the Wage Act. The parties filed cross motions for summary judgment; a Superior Court judge allowed the town's motion, denied the

plaintiff's, and entered a declaratory judgment in the town's favor.¹ The plaintiff appeals, and we reverse.

1 Declaratory judgment entered for the town as follows: "Under [*G. L. c. 41, § 96B*], the town is not obligated to pay student police officers any wages established by the collective bargaining agreement between the town and the Union because the statute exempts student officers from the provisions of collective bargaining agreements and the 'regular wages' in the statute means the wages for student officers established by the town's Personnel By-Law."

Discussion. We review a grant of summary judgment de novo, with "no deference [*2] to the decision of the motion judge." *DeWolfe v. Hingham Centre, Ltd.*, 464 Mass. 795, 799, 985 N.E.2d 1187 (2013). "We ask whether the evidence, in the light most favorable to the party losing the contest of cross motions, and the controlling law entitle the prevailing party to judgment." *Audubon Hill S. Condominium Assn. v. Community Assn. Underwriters of Am.*, 82 Mass. App. Ct. 461, 465, 975 N.E.2d 458 (2012).

General Laws c. 41, § 96B, as amended by St. 2002, c. 196, § 17, provides as follows:

"Every person who receives an appointment to a position on a full-time basis in which he will exercise police powers in the police department of any city or town, shall, prior to exercising police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the municipal police training committee. The provisions of chapter thirty-one and any collective bargaining agreement notwithstanding, any person so attending such a school shall be deemed to be a student officer and shall be exempted from the provisions of chapter thirty-one and any collective bargaining agreement for that period during which he is assigned to a municipal police training

*school, provided that such person shall be paid the regular wages provided for the position to which he was appointed and such reasonable expenses as may be determined by the appointing authority and be subject to the provisions of chapter one hundred [*3] and fifty-two" (emphasis supplied).*

This case turns on the emphasized text. In essence, the town argues that McGrath, while attending the police academy, was by statute deemed a student officer and, therefore, only entitled to be paid according to the student officer rate provided in the town's by-law. McGrath, on the other hand, argues that he was appointed as a police officer and, therefore, was entitled to be receive the regular wages (without ancillary benefits) of a police officer as established in the collective bargaining agreement (CBA), even while attending the academy.

It is undisputed that, on July 26, 2006, the then town manager appointed McGrath to the position of police officer for the town, pursuant to *G. L. c. 41, § 96B*, the civil service law. The appointment letter stated:

"I am pleased to inform you [McGrath] that I am appointing you to the position of Police Officer, in the Foxborough Police Department, starting on September 17, 2006."²

Although McGrath was appointed as a police officer starting September 17, 2006, he spent his first few months (until February 24, 2007) training at the police academy. He did not (and could not) exercise police powers while in training.

2 The letter also stated [*4] that McGrath would be compensated as a "student officer" until he completed his training at the police academy. McGrath accepted his appointment on these terms. However, the town does not argue that the letter supersedes the statutory requirements.

Based on these undisputed facts, it is clear that as of July 26, 2006 (the date of the

appointment letter), McGrath was a person who had "receive[d] an appointment to a position on a full-time basis in which he will exercise police powers in the police department of any city or town." *G. L. c. 41, § 96B*. It is equally clear that McGrath was to be deemed a student officer from September 17, 2006, to February 24, 2007, while he attended the police academy. During that period, he was to "be paid the regular wages provided for the position to which he was appointed," but was otherwise "exempted from the provisions of chapter thirty-one and any collective bargaining agreement." *G. L. c. 41, § 96B*.

Our previous construction and application of *G. L. c. 41, § 96B*, in *Cambridge v. Cambridge Police Patrol Officers Assn.*, 58 *Mass. App. Ct. 522, 791 N.E.2d 355 (2002)*, informs our analysis and conclusion here. As we stated, the statute "assur[es] that police recruits who are in training will receive the same basic pay as regular sworn officers but not necessarily the other economic or non-economic benefits of a collective [*5] bargaining agreement. *Section 96B* distinguishes 'regular wages' from other forms of remuneration that might be secured by a collective bargaining agreement and guarantees cadets the right only to receive regular wages plus 'reasonable expenses.'" *Id. at 526*. The regular wages for a police officer in Foxborough are set by the CBA; the town was accordingly not permitted to compensate McGrath at a "student officer" rate set in its by-law.

The town argues that even if the CBA established the regular wages of a Foxborough police officer, prior practice bound McGrath to the lower student officer pay scale contained in the town's by-law. To support this argument, the town points to the fact that, for over fifteen years, the town has paid student officers at the rate set in the by-law without protest from the union or other student police officers who were effected. Neither the by-law, nor the fact that third parties may have acquiesced to its application, can override the requirements of *§ 96B*. See

Galenski v. Erving, 471 *Mass. 305, 311, 28 N.E.3d 470 (2015)*, quoting from *Cioch v. Treasurer of Ludlow*, 449 *Mass. 690, 699, 871 N.E.2d 469 (2007)* ("[A] municipality may not enact a bylaw, policy or regulation that is inconsistent with State law"). And, to the extent that the town argues that past practice should inform the meaning of the CBA with [*6] regard to the rate of compensation of student police officers, the same idea holds.

In the alternative, relying on *Rooney v. Yarmouth*, 410 *Mass. 485, 573 N.E.2d 969 (1991)*, the town argues that by agreeing to incorporate *§ 96B* into the CBA, the employee waived any right to judicial relief until after the union had exhausted the grievance procedure.³ The factual predicate for this argument is flawed. The CBA did not incorporate the terms of *§ 96B*; rather, it stated that the employment of student officers was governed by *§ 96B* notwithstanding any provisions of the CBA. The plaintiff accordingly was not required to pursue a grievance. "[T]he right to timely payment of wages is a distinct, independent statutory right that can be enforced judicially even though the subject matter of [the types of wages at issue] is incorporated in the plaintiffs' collective agreement." *Newton v. Commissioner of the Dept. of Youth Servs.*, 62 *Mass. App. Ct. 343, 346, 816 N.E.2d 993 (2004)*. "[T]he mere fact that the collective bargaining agreement must be consulted for the rate of pay does not preclude a plaintiff from pursuing his or her [Wage Act] claims in court." *Id. at 347*.⁴

3 The union filed a grievance. The town objected on the ground, among others, that it was not arbitrable. The union did not pursue the grievance.

4 The rate of pay for a police officer, the position to which the plaintiff was [*7] appointed, is undisputed.

For the reasons set out above, the declaratory judgment in favor of the defendant is reversed, and the case is remanded for further proceedings consistent with this decision.

So ordered.

By the Court (Vuono, Wolohojian & Sullivan, JJ.⁵),

5 The panelists are listed in order of seniority.

Entered: June 26, 2015.

PAUL MENDONCA v. CIVIL SERVICE COMMISSION & ANOTHER.¹

1 Executive Office of Labor and Workforce Development.

No. 13-P-1979.

APPEALS COURT OF MASSACHUSETTS

86 Mass. App. Ct. 757; 23 N.E.3d 108; 2014 Mass. App. LEXIS 166

September 15, 2014, Argued

December 12, 2014, Decided

PRIOR HISTORY: [***1]

Suffolk. CIVIL ACTION commenced in the Superior Court Department on January 13, 2012.

The case was heard by *Garry V. Inge, J.*, on a motion for judgment on the pleadings.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES

Veteran. Handicapped Persons. Public Employment, Provisional employee, Termination, Reinstatement of personnel. Civil Service, Termination of employment, Reinstatement of personnel. Employment, Termination. Administrative Law, Substantial evidence.

Discussion of the standard of review applicable to a decision of the Civil Service Commission.

There was no error in the conclusion of the Civil Service Commission that a disabled veteran challenging his layoff by the Executive Office of Labor and Workforce Development was not entitled to rights under the Veterans' Tenure Act (act), *G. L. c. 30, § 9A*, where his position was classified under the civil service laws, and the act, by its terms, applies to veterans holding positions that are not classified.

A Superior Court judge erred in upholding a decision of the Civil Service Commission concluding that the Executive Office of Labor and Workforce Development had not violated the Disabled Veterans' Act, *G. L. c. 31, § 26*, by laying off a disabled veteran while retaining another employee who held the same job title in a different position and who was not a disabled veteran, where the record did not provide substantial evidence that the disabled veteran was unqualified for the other employee's position.

COUNSEL: *Richard L. Neumeier (Galen Gilbert with him)* for the plaintiff.

Iraida J. Alvarez, Assistant Attorney General, for the defendants.

JUDGES: Present: Berry, Kafker, & Carhart, JJ.

OPINION BY: CARHART

OPINION

[**109] CARHART, J. Paul Mendonca appeals from the entry of judgment in favor of the defendants following a Superior Court judge's denial of his motion for judgment on the pleadings. Mendonca had sought review pursuant to *G. L. c. 31, § 44*, of a decision by [*758] the Civil Service Commission

(commission) upholding his layoff by the Executive Office of Labor and Workforce Development (EOLWD). Mendonca alleged that the layoff violated his rights as a disabled veteran. We agree and reverse.

Background. Mendonca is a disabled Vietnam War veteran. He holds a bachelor of science degree in business management from Suffolk University and a master's degree in business administration from the University of Massachusetts. Mendonca's extensive work history includes management, training, and marketing in the human resources field. He has negotiated and managed labor agreements [***2] to ensure labor law compliance; he has established and implemented human resources systems for various companies; he has recruited and trained staff; and he has secured competitive State abandoned property audit contracts for private companies.

On May 3, 1999, the Commonwealth hired Mendonca as a provisional Administrator III. A Management Questionnaire (MQ) describing Mendonca's position shows that Mendonca was responsible for administering the Commonwealth's federally funded Job Search/Job Readiness Program (JS/JR). Mendonca worked closely with several State agencies, including the Departments of Transitional Assistance (DTA), Unemployment Assistance (DUA), and Career Services (DCS), and ensured that JS/JR "[wa]s operated according to Federal, State and contractual requirements." Mendonca's duties included negotiating and drafting interdepartmental service agreements; specifically, he "[r]ecommend[ed] amounts and conditions for reimbursement, scope of services, program requirements, key performance objectives, budget provisions and staffing configurations to ensure contractual goals are achievable."

[**110] On March 29, 2007, the human resources division of EOLWD determined that the title [***3] Program Coordinator II more accurately reflected Mendonca's duties. However, Mendonca retained the title

Administrator III. Mendonca was laid off on April 10, 2008, when his position was eliminated as a result of budget cuts. Four other Administrator III positions existed at that time: Web services manager, deputy director of contracts and procurement (deputy director), Hurley Building superintendent (superintendent), and manager of the office of multilingual services. The individuals holding these positions included one veteran holding a permanent original appointment, and three nonveterans.

The MQ for each respective position lists its requirements. The Web services manager must hold a "Bachelor's degree in Fine [*759] Arts" and have five to ten years' experience developing and managing Web sites. The superintendent position "requires a high degree of technical knowledge in building systems including fire detection/alarm systems; HVAC² systems; plumbing and electrical systems; elevator systems; State and local building codes; and [Americans with Disabilities Act] requirements." The superintendent "must be on call 24 hours a day, seven days a week, and must be prepared to immediately bring [***4] resources to bear to resolve emergency situations." For example, the superintendent must be able to resolve dangerous building conditions and malfunctioning heating or air conditioning systems. The manager of the office of multilingual services must be bilingual in English and Spanish, and the position "requires mastery of several foreign languages" and a "Linguistics degree." Finally, the deputy director "advise[s] agency personnel on procurement matters associated with the Commonwealth's operations and policy to ensure ... compliance with all applicable state and federal laws, rules and regulations." The deputy director position entails managing and training staff in matters "relating to procuring goods and services; managing multi-year encumbrances of state and federal funds for Federal/State programs, grants; Interdepartmental Service Agreements and miscellaneous Agreements; writing proposals ...; approving attorney fee requests;

and contract review." The deputy director analyzes and recommends action on issues relating to procurement and contracts with private entities, "ensuring compliance with state and federal laws and Executive Orders." The position requires "a minimum [***5] of an Associate[']s Degree in Accounting and or Business Management," along with five years' experience in accounting, finance, and contract and procurement management.

2 Heating, ventilation, and air conditioning.

EOLWD determined that Mendonca could not be retained because he was not qualified for any of the other Administrator III positions. Mendonca appealed EOLWD's decision to the commission, which held a hearing on August 3, 2009. David E. Olsen, human resources director for EOLWD, testified that he was responsible for laying off Mendonca. He noted Mendonca's veteran status and stated that he understood *G. L. c. 31* to require "[t]hat veterans shall be retained in title until all other similarly situated offices are eliminated." Olsen therefore investigated the remaining Administrator III positions to determine whether Mendonca could be retained.

[*760] Olsen concluded that Mendonca could not be retained as an Administrator III because the remaining positions were "very different" from Mendonca's job, and [**111] "Mendonca's skill and his personnel file, his resume, his background, had always been in either human resources, job placement type of work." Olsen did not consider Mendonca for any positions [***6] outside of the Administrator III title because the positions were "not similarly situated"; they either had different job classifications or dealt with the public instead of staff.³ Olsen testified that, in evaluating Mendonca's case, he "was operating within the scope of [his] interpretation of the law."

3 Olsen testified that Administrator III was a "staff oriented" position, meaning it dealt solely with a State agency and its staff. A "line oriented" position deals directly with the public. Mendonca was an Administrator III;

however, Olsen testified that Mendonca's duties more closely resembled those of a "Program Manager." Olsen stated that he did not consider Mendonca for any Program Manager positions because "[t]hose jobs were line oriented as opposed to staff oriented," and it would be very unlikely that a "staff oriented" manager would "cross over" to become "line oriented" because it is rare that "[a]n individual could possess both skills."

Dana Johnson testified for Mendonca. Johnson is a rehabilitation counselor. She evaluates individuals to determine "if somebody's under employed or if somebody actually is employable or what it would take to make somebody employable." She [***7] often provides expert testimony in insurance and divorce cases. Johnson testified that transferable skills are those "that you can take from one job and bring them to another." Nontransferable skills are those limited to a particular position or field. In Johnson's opinion, Mendonca's position as JS/JR coordinator required transferable skills including: evaluating a government program and determining what training or further resources the employees may need to improve performance; budgeting; handling State reimbursements; coordinating services with other government agencies; and assessing vendor contracts to ensure that the Commonwealth's money is well spent. Mendonca was required in his position to read, analyze, and follow through on contracts, which Johnson also considers to be transferable skills.

On December 15, 2011, the hearing officer issued a written decision which contained thirty-three findings of facts. Of particular relevance to our discussion is the following finding:

"30. In regard to the position of Deputy Director of Contracts and Procurement, [Mendonca] has no experience in contract [*761] procurement activities and the laws regarding trade and procurement regulations. He [***8] has not reviewed procurement contracts,

granted agreements or approved fee requests from attorneys representing [DUA] Unemployment Insurance clients. [Mendonca] does not possess knowledge of [EOLWD]'s Affirmative Market Program or of the laws and regulations on trade such as the North American Free Trade Agreement ('NAFTA') and the Trade Adjustment Assistance Act. Furthermore, [Mendonca] does not possess knowledge, skills or abilities relating to the MARS system (the state's accounting system), financial systems, or GAP (general accounting principles) policies and procedures specific to the comptroller's office."

The hearing officer concluded, based on her findings, that (1) Mendonca is not entitled to relief under the Veterans' Tenure Act, *G. L. c. 30, § 9A*, because his position is "classified"; (2) as a matter of law, Mendonca is not entitled under the Disabled Veterans' Act, *G. L. c. 31, § 26*, to an absolute preference in employment; (3) Mendonca is not entitled to relief under *G. L. c. 31, § 39*, because he was a "provisional" employee; and (4) EOLWD's decision that Mendonca was not qualified for [**112] any of the other Administrator III positions was supported by substantial evidence. [***9] Mendonca sought Superior Court review pursuant to *G. L. c. 31, § 44*. On October 11, 2013, the Superior Court judge upheld the commission's decision.

Discussion. 1. *Standards of review.* The commission was required "to determine, on the basis of the evidence before it, whether [EOLWD] sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by [EOLWD]." *Brckett v. Civil Serv. Commn.*, 447 Mass. 233, 241, 850 N.E.2d 533 (2006). "Reasonable justification in this context means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules

of law." *Ibid.*, quoting from *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427 (1928). The judge was required to uphold the commission's decision if supported by substantial evidence. *Ibid.*

"[W]e review the commission's decision to determine if it violates any of the standards set forth in *G. L. c. 30A, § 14(7)*, and [*762] cases construing those standards." *Plymouth v. Civil Serv. Commn.*, 426 Mass. 1, 5, 686 N.E.2d 188 (1997). While we are "bound to accept the findings of fact of the commission's [***10] hearing officer, if supported by substantial evidence," *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711 (2003), "we are required to overturn commission decisions that are inconsistent with governing law." *Plymouth, supra*. We review conclusions of law de novo, *Andrews v. Civil Serv. Commn.*, 446 Mass. 611, 615, 846 N.E.2d 1126 (2006), and ask "whether, on the basis of the transcript of evidence before the [hearing officer] and the [hearing officer]'s findings and conclusions, the commission substantially erred in a way that materially affected the rights of the parties." *Gloucester v. Civil Serv. Commn.*, 408 Mass. 292, 297, 557 N.E.2d 1141 (1990). Mendonca bears the burden of proving the invalidity of the commission's decision. See *Brckett, supra* at 242.

2. *Veterans' Tenure Act.* The hearing officer concluded that Mendonca was not entitled to additional rights under the Veterans' Tenure Act, *G. L. c. 30, § 9A*, because Administrator III is a classified position. Under that statute, veterans holding positions not classified under the civil service laws may not be laid off except in accordance with *G. L. c. 31, §§ 41-45*. *G. L. c. 30, § 9A*, as amended by St. 1978, c. 393, § 8. *General Laws c. 31, §§ 41-45*, require that [***11] a layoff be for "just cause," and that the employee have notice, a hearing, and review of the decision. If layoff of a veteran holding an unclassified job "results from lack of work or lack of money," the Veterans' Tenure Act provides that such veteran "shall not be

separated ... while similar offices or positions in the same group or grade ... exist unless all such offices or positions are held by such veterans." *G. L. c. 30, § 9A*.

The Administrator III position is classified under the civil service laws, see *G. L. c. 31, § 45(1)*, and the Veterans' Tenure Act applies, by its terms, to veterans holding positions that are not classified. See *Aquino v. Civil Serv. Commn.*, 34 *Mass. App. Ct.* 538, 541, 613 *N.E.2d 131* (1993) (applying the "well-known maxim" that "expression of one thing is the exclusion of another"). Because Mendonca's position was "expressly exempted by the language of [*G. L. c. 31, § 9A*]," there was no error in the hearing officer's conclusion. *Barkin v. Milk Control Commn.*, 8 *Mass. App. Ct.* 517, 520, 395 *N.E.2d 890* (1979).

[**113] Indeed, as a "provisional" employee, Mendonca could not achieve [*763] tenure⁴ and could be terminated at any time. See *G. L. c. 31, § 14*; *Sullivan v. Commissioner of Commerce & Dev.*, 351 *Mass.* 462, 465, 221 *N.E.2d 761* (1966); [***12] *Dallas v. Commissioner of Pub. Health*, 1 *Mass. App. Ct.* 768, 771, 307 *N.E.2d 589* (1974); *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, 61 *Mass. App. Ct.* 404, 408 *n.4*, 810 *N.E.2d 1259* (2004). EOLWD did not need to show just cause for its action, *Rafferty v. Commissioner of Pub. Welfare*, 20 *Mass. App. Ct.* 718, 723, 482 *N.E.2d 841* (1985), and Mendonca was not entitled to a hearing because he was not "discharged as a result of allegations relative to his personal character or work performance." *G. L. c. 31, § 41*, inserted by St. 1978, c. 393, § 11.

4 "A tenured employee in the civil service system is one who initially occupied a position by original appointment pursuant to *G. L. c. 31, § 6*, and has completed the probationary period, or one who has received a 'promotional appointment' on a permanent basis as provided in *G. L. c. 31, § 8*." *Andrews*, 446 *Mass.* at 613.

3. *Disabled Veterans' Act*. Under the Disabled Veterans' Act, "[a]n appointing

authority shall appoint a veteran in making a provisional appointment under section twelve," and "[a] disabled veteran shall be retained in employment in preference to all other persons, including veterans." *G. L. c. 31, § 26*, inserted by St. 1978, c. 393, § 11. *General Laws c. 31, § 26*, represents [***13] "a legislatively created mechanism under which veterans receive a preference over non-veterans in certain types of civil service employment." *Aquino*, 34 *Mass. App. Ct.* at 539. Because the statute requires that "disabled veterans be[] kept on the payroll in preference to others," *Provencal v. Police Dept. of Worcester*, 423 *Mass.* 626, 630, 670 *N.E.2d 171* (1996), "all employees having the same title in a particular departmental unit who are not disabled veterans must be laid off first according to seniority, followed by such employees who are disabled veterans according to seniority." 1980 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 98 (July 21, 1980).

Here, EOLWD laid off Mendonca while retaining three Administrator IIIs who are not veterans, and one Administrator III who is not a disabled veteran. The hearing officer concluded that EOLWD's actions did not violate *G. L. c. 31, § 26*, because "substantial evidence established that [Mendonca] could not show that there were any other Administrator III positions for which he was qualified within EOLWD into which he could have been transferred." Massachusetts courts have recognized a "basic requirement that the veteran being preferred be otherwise qualified [***14] to perform the duties of the office or position to which he was [*764] appointed." *Hutcheson v. Director of Civil Serv.*, 361 *Mass.* 480, 497-498, 281 *N.E.2d 53* (1972) (Quirico, J., dissenting), and cases cited. Mendonca offered his resume and Johnson's testimony to demonstrate his qualification for two of the remaining Administrator III positions -- Hurley Building superintendent and deputy director of contracts and procurement. The hearing officer relied on Olsen's testimony, the documentary evidence, and Johnson's testimony regarding

transferable skills in concluding that Mendonca was not qualified for any other Administrator III positions. While the record supports the hearing officer's findings concerning the Hurley Building superintendent position, we cannot agree that it provides substantial evidence that Mendonca was unqualified for the deputy director position.

"Substantial evidence' means such evidence as a reasonable mind might accept [*114] as adequate to support a conclusion." *G. L. c. 30A, § 1(6)*. While Olsen testified that Mendonca's job "was very different" from those performed by the other Administrator IIIs, the title Administrator III is "applied to a position or to a group of positions having [***15] similar duties and the same general level of responsibility." *G. L. c. 31, § 1*, inserted by St. 1978, c. 393, § 11 (defining "Title"). To avoid this reality, Olsen testified that Mendonca's duties more closely resembled those of a program manager, which is a "line oriented" position. Olsen then stated that he did not consider Mendonca for a program manager position because they were "line oriented" as opposed to "staff oriented" and therefore not "similarly situated" to Mendonca's Administrator III position. Thus, according to Olsen's testimony, Mendonca was not qualified for the Administrator III positions because those are "staff oriented" and Mendonca was a "line manager," and Olsen did not need to consider Mendonca for a "line oriented" program manager position because Administrator III is "staff oriented" and *G. L. c. 31, § 26*, only requires Olsen to investigate "similarly situated offices."

In hiring Mendonca as a provisional employee, EOLWD was required to substantiate that Mendonca "meets the proposed requirements for appointment to the position [of Administrator III] and possesses the knowledge, skills and abilities necessary to perform such duties." *G. L. c. 31, § 13*, amended [***16] by St. 1985, c. 257, § 4. "A provisional appointment ... shall be terminated" whenever it is determined "that the person appointed does not, in fact, possess

the approved qualifications or satisfy the approved requirements for the position," *G. L. c. 31, § 14*, inserted by St. [*765] 1978, c. 393, § 11; however, Mendonca's provisional employment was not terminated when he was reclassified as a "line oriented" Program Coordinator II. Olsen's stated justification for not retaining Mendonca either in his titled Administrator III position or in the Program Coordinator II position was that an individual rarely possesses the skills to work in both "staff oriented" and "line oriented" positions. Olsen also testified that Mendonca's experience was in human resources (a "staff oriented" field), and that his duties as JS/JR coordinator more closely resembled those of a "line manager." We do not think that "under the substantial evidence test," Olsen's inconsistent testimony and circular logic could "reasonably form the basis of impartial, reasoned judgment." *Cobble v. Commissioner of the Dept. of Social Servs., 430 Mass. 385, 393 n.8, 719 N.E.2d 500 (1999)*.

The deputy director position requires an associate's degree [***17] in business administration. Mendonca has a bachelor's degree in business management and a master's degree in business administration. While the hearing officer found that Mendonca "does not possess knowledge, skills or abilities relating to the" Commonwealth's accounting system, financial systems, and general accounting policies and procedures specific to the comptroller's office, Mendonca's MQ shows that he was responsible for "reconciling statewide claimed earnings, invoicing, determining and accounting for specific Career Center earnings," and working closely with other EOLWD departments "for successful program outcomes and adherence to approved budgets." Moreover, Johnson testified that Mendonca's experience "working with the state reimbursement," "do[ing] some of the budgeting work and work[ing] within the system" were transferable skills.

The hearing officer found that Mendonca "has no experience in contract procurement activities and the laws regarding trade and procurement regulations" despite crediting

Johnson's testimony that [**115] Mendonca's transferable skills include "being able to analyze contracts, being able to work with vendors, ... being able to work with other state agencies, [***18] [and] being able to read and analyze the requirements for submitting ... requests." Mendonca's position as JS/JR coordinator involved reading, analyzing, and following through on contracts while following State procedures. Mendonca's experience in labor relations undoubtedly involved reading, analyzing, and applying Federal laws and regulations, and his resume demonstrates that he has experience with cash management and audits in relation to compensation and benefits. As an [*766] Administrator III, Mendonca "reconcil[e]d performance earnings for the JS/JR program," "[r]ecommend[ed] amounts and conditions for reimbursement," and "[m]onitor[ed] the preparation of documents to validate DCS compensation, resolve discrepancies and prepare invoice to DTA to secure program funding." Thus, contrary to the hearing officer's finding, Mendonca does "possess knowledge, skills or abilities" relating to financial systems and general accounting policies and procedures specific to the Commonwealth.

While "the substantial evidence test accords an appropriate degree of judicial deference to administrative decisions," reversal by a reviewing court is required "if the cumulative weight of the evidence tends [***19] substantially toward opposite inferences." *Cobble, supra at 391*. The evidence in this case demonstrates that Mendonca is a disabled veteran, that he is qualified for the Administrator III position, and that EOLWD laid him off while retaining four Administrator IIIs who are not disabled veterans. *General Laws c. 31, § 26*, mandates a preference for disabled veterans in continuing the employer-employee relationship, *Provencal, 423 Mass. at 628*, and applies with respect to other employees in the same title. *Andrews, 446 Mass. at 616-*

617. "Preference to veterans must be a reality[;] [i]t cannot be made illusory or a mere gesture" by performing only the most cursory consideration of a veteran's qualifications for similarly situated positions. *Opinion of the Justices, 324 Mass. 736, 744, 85 N.E.2d 238 (1949)*. Olsen's stated reasons for not retaining Mendonca cannot be considered "sufficiently supported by credible evidence" to overcome the preference which the statute provides, *Selectmen of Wakefield, 262 Mass. at 482*; nor does his testimony provide substantial evidence in support of the hearing officer's findings. The judge's decision upholding the hearing officer's findings and conclusions is not "legally [***20] tenable" in light of the statutory preference for disabled veterans, *School Comm. of Brockton v. Civil Serv. Commn., 43 Mass. App. Ct. 486, 490, 684 N.E.2d 620 (1997)*, quoting from *Gloucester v. Civil Serv. Commn., 408 Mass. 292, 297, 557 N.E.2d 1141 (1990)*.⁵

5 The defendants argue that Mendonca has waived his right to be reinstated as an Administrator III because the JS/JR program has been eliminated and he only sought reinstatement to his "old job" in Superior Court. However, Mendonca also sought from the Superior Court "a Decision ... finding that the lay off from his position was not justified." Because Mendonca is entitled to the veterans' preference, which applies to those holding the same title, *Andrews, supra*, he has not waived his right to be reinstated as an Administrator III.

[*767] *Conclusion*. The judgment is reversed, and the case is remanded to the Superior Court for the entry of a new judgment ordering the commission to vacate its decision and enter a new decision ordering the reinstatement of Mendonca to an Administrative [**116] III position retroactive to April 10, 2008.

So ordered.

JOHN W. MURRAY vs. TOWN OF HUDSON & OTHERS.¹

¹ Alteris Insurance Services, Inc. (Alteris), and Argonaut Insurance Company (Argonaut). In June, 2014, a stipulation of dismissal with prejudice was entered relative to the plaintiff's claims against Alteris and Argonaut.

SJC-11816.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

472 Mass. 376; 2015 Mass. LEXIS 488

April 9, 2015, Argued
August 3, 2015, Decided

PRIOR HISTORY: [**1] Worcester. CIVIL ACTION commenced in the Superior Court Department on April 24, 2013.

The case was heard by *John S. McCann, J.*, on a motion for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Municipal Corporations, Liability for tort, Parks, Notice to municipality, Governmental immunity. *Negligence*, Municipality, One owning or controlling real estate, Athletics. *Massachusetts Tort Claims Act*. *Parks and Parkways*. *Governmental Immunity*. *Notice*, Claim under Massachusetts Tort Claims Act. *Practice, Civil*, Presentment of claim under Massachusetts Tort Claims Act.

In a civil action brought by the plaintiff, a high school student from one town who was a member of that school's baseball team, alleging that the defendant town was negligent and engaged in wanton and reckless conduct in allowing the plaintiff's team to use a dangerous bullpen while playing a team from the defendant's high school on a baseball field owned by the defendant that it allowed the public to use without a fee, the judge erred in granting summary judgment in favor of the defendant on the ground that the plaintiff's

claim was barred by the recreational use statute, where, given that the defendant's high school had invited the other town's high school to play an athletic match on a town field, the defendant owed the visiting student-athletes the same duty to provide a reasonably safe playing field that it owed to its own students.

In a civil action brought by the plaintiff, a high school student from one town who was a member of that school's baseball team, alleging that the defendant town was negligent and engaged in wanton and reckless conduct in allowing the plaintiff's team to use a dangerous bullpen while playing a team from the defendant's high school on a baseball field owned by the defendant that it allowed the public to use without a fee, the judge erred in granting summary judgment in favor of the defendant on the ground that the plaintiff had not complied with the presentment requirement of the Massachusetts Tort Claims Act, *G. L. c. 258, § 4* (act), where the plaintiff's presentment letter provided the defendant with adequate notice of the circumstances of the plaintiff's negligence claim, without limitation as to any specific theory of negligence, and allowed the defendant reasonably to investigate those circumstances and determine whether the defendant might be liable on the claim under the act; further, the defendant was not entitled to summary judgment on the ground that it was immune from liability under the act's discretionary function exception, where it was not apparent from the [*377] record that the

plaintiff intended to rest solely on a theory of negligent design or that the features of the bullpen mound were the type of design decisions that fall within the discretionary function exception.

COUNSEL: *Brian W. Murray* for the plaintiff.

John J. Davis for town of Hudson.

Charlotte E. Glinka, Thomas R. Murphy, Elizabeth S. Dillon, & John A. Finbury, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

JUDGES: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.

OPINION BY: GANTS

OPINION

GANTS, C.J. During a varsity baseball game between two high school teams at a public park in the town of Hudson (town), the plaintiff, a ballplayer with the visiting team, seriously injured his knee while warming up in the bullpen. The plaintiff filed suit in the Superior Court against the town under the Massachusetts Tort Claims Act, *G. L. c. 258* (act), alleging that his injury was caused by the town's negligence and its wanton and reckless conduct in allowing the visiting team to use a dangerous bullpen. The judge allowed the town's [**2] motion for summary judgment, concluding that the evidence did not support a finding of wanton or reckless conduct, and that the plaintiff's negligence claim was barred by the recreational use statute, *G. L. c. 21, § 17C*, where the injury occurred on a baseball field owned by the town that it allowed the public to use without a fee, and where the town had no "special relationship" with the plaintiff because he was a student from a visiting high school rather than the town's own high school. We conclude that the town could be found liable for negligence despite the recreational use

statute because, where a town's school invites another town's school to play an athletic match on a town field, the town owes the visiting student-athletes the same duty to provide a reasonably safe playing field that it owes to its own students. We also conclude that there was no failure of presentment under § 4 of the act, and that it cannot be determined until trial whether liability is barred by the discretionary function exemption in § 10 (b) of the act. We therefore reverse the allowance of the motion for summary judgment and remand the case to [*378] the Superior Court for trial.²

2 We acknowledge the amicus brief submitted by the Massachusetts [**3] Academy of Trial Attorneys.

Background. We recite the undisputed facts in the summary judgment record. Hudson High School (Hudson) hosted a varsity baseball game against Milford High School (Milford) on the night of May 15, 2010.³ The game was played at Riverside Park, a public park in the town maintained by the town's department of public works.⁴ The plaintiff, a member of the visiting Milford team, alleges as follows:

"During the game, [the plaintiff] was asked by his coach to warm up as a pitcher and he went to a designated 'bullpen' area located behind the third base dugout. The 'bullpen' area consisted of a[n] ... area with wooden landscape timbers or berms enclosing the pitching rubber approximately [eighty-four] inches apart. During the course of his warm-ups, [the plaintiff]'s left foot on the follow through of a pitch struck the wooden landscape timber or berm located to his right. The uneven landing resulted in a twisting of [the plaintiff]'s left knee and caused him to fall to the ground and experience immediate pain. [The plaintiff] was caused to suffer a badly torn meniscus in his left knee which required two (2) surgical procedures as well as other medical

and physical therapy [**4] treatments to repair and heal."⁵

The bullpen was designed and constructed by a former town employee, and was maintained by the town and by student athletes.

3 Hudson High School and Milford High School are both members of the Massachusetts Interscholastic Athletic Association (MIAA). The baseball game on May 15, 2010, was an interscholastic event governed by the rules of the MIAA.

4 The town of Hudson (town) does not charge a fee for the use of Riverside Park, and does not receive any portion of any annual athletic fee that the plaintiff pays Milford High School.

5 During his deposition testimony, the plaintiff stated that the poor grading of the dirt forced him to start his pitching motion on the far right side of the rubber. He also stated that he had never warmed up in a bullpen with exposed wooden timbers before.

As required under § 4 of the act, the plaintiff sent a letter to the town board of selectmen on December 10, 2010, reciting the above-quoted allegations, notifying them that he was asserting a claim against the town, and making demand of \$100,000 for his "injuries, pain and suffering and medical expenses." The letter [*379] alleged that the town had "engaged in willful, wanton or reckless conduct," [**5] and had committed a breach of its "duty of reasonable care to visiting high school baseball players and was negligent in allowing them to utilize the ... bullpen area." The letter further alleged that the "bullpen area" was "inherently dangerous" in three ways:

"First, the width of approximately [eighty-four] inches between the wooden timbers that enclose the pitching mound is much too narrow an area, particularly when compared to the field's actual pitching mound which is approximately 140 inches across in the landing area and 203 inches in diameter at the pitching rubber.

"Secondly, the use of wooden timbers at all in this type of athletic setting, i.e. a pitching mound, is extremely dangerous. It invites exactly the kind of injury which occurred in this instance by creating an uneven landing spot for pitchers.

"Third, the area itself is poorly lit. As stated, [the plaintiff] was injured during a night game. The poor lighting prevented him from viewing clearly, competently and thoroughly the condition of the warm up mound, particularly the type, size and locations of the wooden berms."

After the town's insurer denied the plaintiff's claim, the plaintiff brought this action, claiming [**6] that the town had committed a breach of its "duty of reasonable care" and "engaged in willful, wanton and reckless conduct" by "allowing a 'bullpen' area to be accessed by [the plaintiff] that was poorly constructed, maintained and illuminated, all without any posted warnings." After the town's motion for summary judgment was allowed by the judge, the plaintiff appealed, and we transferred the case to this court on our own motion.

Discussion. 1. *Recreational use statute.* Murray challenges the judge's ruling that the recreational use statute bars his negligence claim against the town. The recreational use statute, *G. L. c. 21, § 17C*, was enacted in 1972 "to encourage landowners to permit broad, public, free use of land for recreational purposes by limiting their obligations to lawful visitors under the common law." *Ali v. Boston*, 441 Mass. 233, 238, 804 N.E.2d 927 (2004). *General Laws c. 21, § 17C (a)*, provides, in relevant part:

"Any person having an interest in land including the structures, buildings, and equipment attached to the land ... who [*380] lawfully permits the public to use such land for recreational ... purposes without imposing a charge or fee therefor ...

shall not be liable for personal injuries ... sustained by such members of the public, including without limitation [**7] a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person."

The statute makes recreational users a "discrete subgroup of lawful visitors owed only the standard of care applicable to trespassers: that is, landowners must refrain from wilful, wanton, or reckless conduct as to their safety." *Ali, supra at 237*. Because landowners do not owe recreational users the reasonable duty of care owed to other lawful visitors, they may not be found liable to them for ordinary negligence. See *id.* Government landowners that provide free access to their land for public use are protected from liability by *G. L. c. 21, § 17C*, to the same extent as private landowners. See *G. L. c. 21, § 17C (b)* (including "any governmental body, agency or instrumentality" within meaning of term "person").⁶ The town is thus a proper party to invoke the recreational use statute.

6 The definition of "person" under the recreational use statute was added in 1998 to *G. L. c. 21, § 17C*. St. 1998, c. 268. But even before the statute made clear that "any person having an interest in land" included a governmental body, we had held that government landowners were protected from negligence liability by the recreational use statute, relying on the Massachusetts [**8] Tort Claims Act, *G. L. c. 258, § 2*, which expressly provides that government entities "shall be liable ... in the same manner and to the same extent as a private individual under like circumstances." See *Anderson v. Springfield*, 406 Mass. 632, 634, 549 N.E.2d 1127 (1990).

The original legislative purpose of the recreational use statute was to encourage landowners to give the public free access to their land for recreational purposes by protecting them from negligence claims if a member of the public were to be injured on the land.⁷ It was not intended to diminish the duty of care that a [*381] school owes its students to provide reasonably safe school

premises for school-related activities, including interscholastic sports. "Personal injury from defective premises ... is not a risk that schoolchildren should, as matter of public policy, be required to run in return for the benefit of a public education." *Whitney v. Worcester*, 373 Mass. 208, 223, 366 N.E.2d 1210 (1977). See *Alter v. Newton*, 35 Mass. App. Ct. 142, 145, 617 N.E.2d 656 (1993) ("Because of the relationship between a school and its students, the city had a duty of care to the plaintiff to provide her with reasonably safe school premises").⁸ Therefore, the recreational use statute does not alter the standard of care that a school owes its own students arising from its special relationship with its students, and would not protect the town [**9] from liability for negligence claims brought against it by students enrolled in its own public schools for injuries sustained while the students were engaged in school-related activities. See *id. at 149*, quoting *Bauer v. Minidoka Sch. Dist. No. 331*, 116 Idaho 586, 588-589, 778 P.2d 336 (1989) ("if the recreational use statute were applied to injuries children suffered while on school premises as students,' the special relationship of the school to its students would be substantially impaired").⁹ Cf. *Wilkins v. Haverhill*, 468 Mass. 86, 91 n.9, 8 N.E.3d 753 (2014), quoting *Ali*, 441 Mass. at 236 (because [*382] municipalities need no "encouragement to open their schools for parent-teacher conferences," applying recreational use statute to parent's slip and fall on ice in school walkway on parent-teacher night "would upend the balance that the Legislature intended to strike 'between encouraging public access to private land and protecting landowners from liability for injuries'").

7 The recreational use statute, which also is called the public use statute, was enacted following the commission of a report by the Legislature, published in 1967, which found that "the general public was increasingly pursuing 'participant forms' of outdoor recreation (e.g., boating, camping, and hiking), creating a need for more land than was then available for public recreational

use," [**10] and which also found that "the need for additional space would not be met unless private landowners were persuaded to open their land to the recreating public" despite their "fear[s] that they would incur liability for injured recreationalists." *Ali v. Boston*, 441 Mass. 233, 235-236, 804 N.E.2d 927 (2004), citing 1967 Senate Doc. No. 1136, at 15-16. As originally enacted, the recreational use statute only extended immunity to landowners who open their land to the public for recreational purposes. See St. 1972, c. 575. It has been amended to encompass landowners who open their land to the public for other enumerated public purposes, including educational purposes. See St. 1998, c. 268.

8 See also *Driscoll v. Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 304, 873 N.E.2d 1177 (2007) (Mills, J., concurring in part and dissenting in part) ("The existence of a duty that secondary schools owe to minor children is further supported by the special protections that both the courts and the Legislature have long accorded to minors, and by the doctrine of in loco parentis" [footnote omitted]).

9 See also *McIntosh v. Omaha Pub. Sch.*, 249 Neb. 529, 538, 544 N.W.2d 502 (1996), appeal after remand, 254 Neb. 641, 578 N.W.2d 431 (1998), overruled on other grounds by *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006) ("Clearly, a student participating in a clinic sponsored by his school's athletic program does not fall under the category of recreational use of land open to members of the public without charge"); [**11] *M.M. v. Fargo Pub. Sch. Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806, 815 (N.D. 2010), appeal after remand, 2012 ND 79, 815 N.W.2d 273 (N.D. 2012) ("we do not believe the Legislature intended to relieve school districts of duties of care owed their students, who are mandated by law to attend their schools, based on a statutory scheme designed to encourage landowners to make available to the public land and water areas for recreational purposes"); *Auman v. School Dist. of Stanley-Boyd*, 2001 WI 125, 248 Wis. 2d 548, 554, 563-564, 635 N.W.2d 762 (2001) (where plaintiff was injured sliding down snow pile on school playground during recess, "[h]er participation in what is a 'recreational activity' in common parlance ... does not

convert the educational purpose of school attendance into a recreational activity under the [recreational immunity] statute," and "[n]o reason exists to immunize school districts from liability for not exercising reasonable care in the maintenance of school facilities or supervision of schoolchildren during regular school hours").

If the baseball game between the Hudson and Milford teams had been played on a field on the Hudson grounds, it would be plain that the town owed a duty to its students to maintain the field in a reasonably safe condition. That duty remains where, as here, Hudson chooses to play its home interscholastic baseball games in a town park off the high school grounds.

The town [**12] does not dispute that, if a Hudson pitcher had been injured warming up in the home team bullpen, the recreational use statute would not shield the town from liability for negligence because of the special relationship the town has with its own students. But the town argues, and the judge concluded, that because the plaintiff was a pitcher on the visiting team and not a student at Hudson, there was no "special relationship" between the plaintiff and the town "that stands in the way of the normal operation of the recreational use statute." The consequence of such a ruling would be that the town owes a duty of care to maintain a reasonably safe bullpen for the home team, but need only avoid wilful, wanton, or reckless conduct in maintaining the visiting team's bullpen. This not only would be poor sportsmanship; it would be bad law.

Hudson has chosen to offer interscholastic baseball as a school-related activity for its students, but it can do so only if other schools agree to compete against it; otherwise, Hudson high school could offer only intramural baseball. Where the town, as it did here, invites a school like Milford to play a baseball game on the town's home field, thereby enabling [**13] Hudson students to play interscholastic baseball, the town owes the students on the visiting team the same duty of care to provide a reasonably safe

playing field that it owes its own students. Where the recreational use statute does not shield the town from liability for negligence resulting in injuries to its own public school students, the statute also does not shield the town from liability for negligence resulting in injuries to visiting student-athletes. See *Morales v. Johnston*, 895 A.2d 721, 724, 731 (R.I. 2006) (despite recreational use statute, town owed visiting student-athlete "a special duty of care to protect her from a dangerous condition on the athletic field"). Cf. *Avila v. Citrus Community College Dist.*, 38 Cal. 4th 148, 161-162, 41 Cal. Rptr. 3d 299, 131 P.3d 383 (2006) (despite doctrine of assumption of risk, "the host school and its agents owe a duty to home and visiting players alike to ... not increase the risks inherent in the sport").

The judge rested his ruling in part on *Kavanagh v. Trustees of Boston Univ.*, 440 Mass. 195, 196, 795 N.E.2d 1170 (2003), where a Boston University basketball player during an intercollegiate basketball game punched and broke the nose of an opposing player. In that case, we affirmed the grant of summary judgment in favor of Boston University, noting that the university owed no duty to protect the plaintiff from third-party conduct absent a "special relationship" between [**14] the plaintiff and Boston University, and concluding that a college's "special relationship" with its own students does not extend to student-athletes from a different college. *Id.* at 201-203. We need not consider here whether to revisit that precedent, which did not involve the recreational use statute, because the issue in that case was whether the university was negligent in failing to protect the plaintiff from third-party conduct, not whether the university was negligent in failing reasonably to provide a safe basketball court. Had the plaintiff in that case been injured by falling on an unreasonably unsafe basketball floor, our analysis might have been quite different.

For these reasons, we conclude that, despite the recreational use statute, the town may be found liable for negligence in

providing the pitchers from the opposing team with a bullpen that was not reasonably safe.¹⁰

10 The plaintiff also argues that the recreational use statute does not bar his claim because, when the game was being played, the ballfield was open only to the two high school baseball teams and not to the general public. We reject this argument. Where a landowner makes available its land for use by the general public, [**15] the recreational use statute will not cease to protect the landowner simply because the landowner, without charging a fee, allows members of the public to reserve a particular field at a particular date and time to avoid conflicts over who may use that field. Contrast *Marcus v. Newton*, 462 Mass. 148, 156-157, 967 N.E.2d 140 (2012) (recreational use statute did not apply where softball league paid fee to town to reserve field, and where there was no evidence in summary judgment record that fee was used to reimburse town for marginal costs directly attributable to league's use of field).

2. *Massachusetts Tort Claims Act.* The town also argues that the plaintiff did not comply with the act's presentment requirement, *G. L. c. 258, § 4*, because the plaintiff's presentment letter to the town raised only a "negligent design" theory, and did not also raise the "negligent maintenance" theory alleged in his complaint. Further, the town argues that it is not liable for "negligent design," because the design of the bullpen was a "discretionary function" falling within the act's discretionary function exception, *G. L. c. 258, § 10 (b)*. The motion judge did not reach either of these arguments. Because our review of a motion for summary judgment is *de novo*, see *Roman v. Trustees of Tufts College*, 461 Mass. 707, 711, 964 N.E.2d 331 (2012), and because we may affirm an allowance [**16] of summary judgment on grounds other than those reached by the judge, see *id.*, we address these arguments here.

Under the act, *G. L. c. 258, § 4*, "[a] civil action shall not be instituted against a public employer on a claim for damages [under the act] unless the claimant shall have first presented his claim in writing to the executive

officer of such public employer" "This strict presentment requirement is a statutory prerequisite for recovery under the [a]ct." *Shapiro v. Worcester*, 464 Mass. 261, 267, 982 N.E.2d 516 (2013). Its purpose is to "ensure[] that the responsible public official receives notice of the claim so that the official can investigate to determine whether or not a claim is valid, preclude payment of inflated or nonmeritorious claims, settle valid claims expeditiously, and take steps to ensure that similar claims will not be brought in the future." *Richardson v. Dailey*, 424 Mass. 258, 261, 675 N.E.2d 787 (1997), quoting *Lodge v. District Attorney for the Suffolk Dist.*, 21 Mass. App. Ct. 277, 283, 486 N.E.2d 764 (1985). See *Shapiro*, *supra* at 268. See also *Estate of Gavin v. Tewksbury State Hosp.*, 468 Mass. 123, 131-135, 9 N.E.3d 299 (2014).

A presentment letter should be precise in identifying the legal basis of a plaintiff's claim, but it is adequate if it sets forth sufficient facts from which public officials reasonably can discern the legal basis of the claim, and determine whether it states a claim for which damages may be recovered under the act. See *Gilmore v. Commonwealth*, 417 Mass. 718, 723, 632 N.E.2d 838 (1994) ("While a presentment letter should [**17] be precise in identifying the legal basis of a plaintiff's claim, [the plaintiff's] letters ... were not so obscure that educated public officials should find themselves baffled or misled with respect to" claim being asserted). Here, the presentment letter identified the legal basis of the plaintiff's claims as negligence and wilful, wanton, or reckless conduct; it did not characterize the specific theory of negligence, and did not [*385] use the terms "negligent design" or "negligent maintenance." The letter claimed that the town was negligent in allowing the visiting players to use a bullpen that was "inherently dangerous," and described what made the bullpen dangerous, noting specifically the width of the pitching mound in the visiting team's bullpen, the use of wooden "timbers" to enclose the pitching mound, and the poor quality of lighting.¹¹ It is

not apparent from these allegations in the presentment letter that liability in this case would rest solely on the "design" of the bullpen. We conclude that the presentment letter provided the town with adequate notice of the circumstances of the plaintiff's negligence claim -- without limitation to any specific theory of negligence -- and that [**18] the town reasonably could investigate those circumstances and determine whether the town might be liable on the claim under the act. See *McAllister v. Boston Hous. Auth.*, 429 Mass. 300, 305 n.7, 708 N.E.2d 95 (1999), overruled on other grounds by *Sheehan v. Weaver*, 467 Mass. 734, 7 N.E.3d 459 (2014) (where presentment letter only explicitly raised one of plaintiff's theories of liability, presentment requirement was satisfied with respect to all theories because "executive officer had the opportunity to investigate the circumstances of each claim, as all theories of liability argued by the plaintiff were based on the same facts").

11 The letter noted that there were "perhaps more" reasons why the bullpen was dangerous.

Having concluded that the plaintiff's presentment letter does not limit the plaintiff to a "negligent design" theory, we also conclude that the town is not entitled to summary judgment based on its claim that the town is immune from liability on a "negligent design" theory under the act's discretionary function exception.¹² It is not apparent from the summary judgment record that the plaintiff intends to rest solely on that theory. Nor is it apparent from the summary judgment record that the width of the mound and the enclosure of the mound by wooden "timbers" are the type of design decisions that fall [**19] within the discretionary function exception. See *Barnett v. Lynn*, 433 Mass. 662, 664, 745 N.E.2d 344 (2001), quoting *Patrazza v. Commonwealth*, 398 Mass. 464, 467, 497 N.E.2d 271 (1986) [*386] ("Generally, such discretionary conduct is 'characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect

to public policy and planning"). The issue whether some or all of the plaintiff's claims come within the discretionary function exception cannot be resolved until the judge can determine whether the plaintiff rests liability on a negligent design theory and, if so, whether the decisions concerning the design of the bullpen constitute the type of discretionary policy-making and planning by government officials that is protected by sovereign immunity. See *Greenwood v. Easton*, 444 Mass. 467, 470, 828 N.E.2d 945 (2005) ("Deciding whether particular discretionary acts involve policy making or planning depends on the specific facts of each case"); *Alter*, 35 Mass. App. Ct. at 148 ("the application of the discretionary function exception is a question of law for the court").

12 The discretionary function exception, G. L. c. 258, § 10 (b), provides that a public employer shall not be liable for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within [**20] the scope of his office or employment, whether or not the discretion involved is abused."

Conclusion. We reverse the order granting summary judgment in favor of the defendants, and remand the case to the Superior Court for trial.

So ordered.

**JACQUELINE OUELLETTE v. CONTRIBUTORY RETIREMENT APPEAL BOARD
& OTHERS.¹**

1 Public Employee Retirement Administration Commission and Haverhill retirement board.

No. 13-P-291.

APPEALS COURT OF MASSACHUSETTS

86 Mass. App. Ct. 396; 17 N.E.3d 421; 2014 Mass. App. LEXIS 128

**December 9, 2013, Argued
September 30, 2014, Decided**

PRIOR HISTORY: [***1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on December 3, 2009.

The case was heard by *Bonnie H. MacLeod*, J., on a motion for judgment on the pleadings.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES

Public Employment, Accidental disability retirement, Retirement, Retirement benefits.
Public Employee Retirement Administration

Commission. Contributory Retirement Appeal Board. Retirement. Administrative Law, Agency's interpretation of statute. Words, "Member in service."

The Contributory Retirement Appeal Board did not err in concluding that the plaintiff's accidental disability retirement allowance was subject to the statutory cap set forth in G. L. c. 32, § 7(2)(a)(ii), where, given that the plaintiff became a member inactive under G. L. c. 32, § 3(1)(a)(ii), on the date of her superannuation retirement, she was not a member in service continuously until the effective date (more

than one year later) of her disability retirement allowance under § 3(1)(a)(i).

COUNSEL: *John M. Becker* for the plaintiff.

Kirk G. Hanson, Assistant Attorney General, for Contributory Retirement Appeal Board & another.

JUDGES: Present: GRAINGER, BROWN, & CARHART, JJ.

OPINION BY: BROWN

OPINION

[**422] BROWN, J. At issue in this appeal is whether the Contributory Retirement Appeal Board (CRAB) properly concluded that the accidental disability retirement allowance of Jacqueline Ouellette was subject to the statutory cap set forth in *G. L. c. 32, § 7(2)(a)(ii)*.

[**423] *Background.* Ouellette worked for the city of Haverhill as a police officer from January, 1981, until December 5, 2003. On March 3, 2004, the Public Employee Retirement Administration Commission (PERAC) approved Ouellette's application, submitted through the Haverhill retirement board (board), for a volun- [*397] tary superannuation (regular) retirement, effective December 31, 2003. See *G. L. c. 32, § 5*.

On August 14, 2005, the plaintiff applied for an accidental disability retirement allowance, claiming posttraumatic stress disorder stemming from two incidents that occurred in November, 2003. After two medical panel reviews, PERAC [***2] unanimously certified that Ouellette satisfied all the statutory criteria for accidental disability retirement.² See *G. L. c. 32, § 7(1)*.

2 In 2000, Ouellette was first assigned to the unit responsible for investigating sex crimes. In October, 2002, Ouellette transferred to the information technology (IT) department, performing IT duties until

her retirement. Ouellette claimed in her application for accident disability retirement that in November, 2003, she sustained personal injuries upon learning that one of the sexual assault victims had committed suicide and that a pedophile priest would need to be retried.

On February 27, 2008, upon granting Ouellette's request for accidental disability retirement, effective February 14, 2005, PERAC imposed, pursuant to *G. L. c. 32, § 7(2)(a)(ii)*, a seventy-five percent cap on her disability retirement allowance. *General Laws c. 32, § 7(2)(a)(ii)*, as appearing in St. 1987, c. 697, § 33, provides in pertinent part that "for any employee who was not a member in service on or before January [1, 1988,] or who has not been continuously a member in service since that date, the total yearly amount ... as determined in accordance with the provisions of clause (i) shall not exceed seventy-five percent of the annual rate of [***3] regular compensation as determined in this paragraph " PERAC reasoned that the plaintiff was not a member in service continuously until the effective date of her disability retirement allowance, because she became a "member inactive" on December 31, 2003, the date of her superannuation retirement.³

3 There are two kinds of membership in the State employees' retirement system. As herein relevant, a "member in service" is "[a]ny member who is regularly employed in the performance of his duties" *G. L. c. 32, § 3(1)(a)(i)*, as amended through St. 1971, c. 94. The member in service retains that status "until his death or until his prior separation from the service becomes effective by reason of his retirement" *Ibid.* The definition of a "member inactive" includes "[a]ny member in service who has been retired and who is receiving a retirement allowance, any member in service whose employment has been terminated and who may be entitled to any present or potential retirement allowance ... , or any member in service who is on an authorized leave of absence without pay other than as provided in clause (i) ... [for not more than

one year]." *G. L. c. 32, § 3(1)(a)(ii)*, as appearing in St. 1978, c. 523, § 1.

[*398]

Ouellette appealed [***4] PERAC's refusal to lift the cap to CRAB.⁴ See *G. L. c. 32, § 16(4)*. An administrative magistrate of the division of administrative law appeals (DALA) affirmed PERAC's decision.⁵ Following Ouellette's submission of an objection, CRAB adopted the magistrate's findings and issued a final decision affirming PERAC's imposition of the cap. On review, a judge of the Superior Court affirmed [**424] CRAB's decision. This appeal ensued.

4 By PERAC's calculations, the sum of Ouellette's annuity and pension allowances after application of the cap was \$41,200.92. Absent the cap, Ouellette would have received a total yearly accidental disability allowance of \$45,467.88.

5 Two witnesses testified at the DALA hearing: Ouellette and John Boorack, a senior actuarial analyst. No transcript of their testimony has been provided.

Discussion. The case turns on the meaning of the provision in § 7(2)(a)(ii), "any employee who was not a member in service on or before [January 1, 1988,] or who has not been continuously a member in service since that date." PERAC interprets the provision as requiring that the employee be a "member in service" continuously until the effective date of her accidental disability retirement. The plaintiff contends that because [***5] she was continuously a member in service until her injury the cap does not apply.

General Laws c. 32, § 7, governs the conditions for an accidental retirement allowance and the amount awarded. Section (7)(1) controls eligibility. *Section 7(2)*, on the other hand, governs the amount that the member can receive once the member has met the conditions set forth in § 7(1). *Section 7(2)* also limits when the accidental disability retirement allowance can take effect (effective date).

Pursuant to the first paragraph of *G. L. c. 32, § 7(2)*, a member's disability allowance becomes effective on the *latest* of three possible dates: (1) the date of the injury or the hazard undergone, (2) the calendar date falling six months prior to the date of the submission of the written application for disability retirement, or (3) the date for which the member last received regular compensation.⁶ No challenge is made to CRAB's determination that the effective date of Ouellette's accidental disability retirement was February 14, 2005.

6 Accidental disability retirement provides more generous benefits than regular superannuation and ordinary disability retirement and has a stricter standard of eligibility. See *Murphy v. Contributory Retirement Appeal Bd.*, 463 Mass. 333, 347, 974 N.E.2d 46 (2012).

Section 7(2)(a) sets out the components of the allowance that [*399] the member receives as of [***6] the effective date of the retirement. An accidental disability allowance consists primarily of an annuity and a pension, with provision for additional upward adjustments not applicable here. See *G. L. c. 32, § 7(2)(a)(i)-(iii)*. The normal annual allowance is the sum of "(i) [a] yearly amount of annuity equal to the yearly amount of the regular life annuity specified in clause (i) of Option (a) of *subdivision (2)* of section twelve ... [and] (ii) [a] yearly amount of pension equal to seventy-two per cent of the annual rate of his regular compensation on the date such injury was sustained or such hazard was undergone, or equal to seventy-two per cent of the average annual rate of his regular compensation for the twelve-month period for which he last received regular compensation immediately preceding the date his retirement allowance becomes effective, whichever is greater. ..." *G. L. c. 32, § 7(2)(a)(i)-(ii)*. These provisions were contained in the version of § 7(2)(a)(i) and (ii), as amended through St. 1970, c. 644, § 1. In 1987, the Legislature added, after the language just quoted from § 7(2)(a)(ii), additional language capping that

sum at seventy-five percent of the annual rate of regular compensation for "any employee who was not a member in [***7] service on or before January [1, 1988,] or who has not been continuously a member in service since that date" (emphasis supplied), with the added proviso that no individual who was a member in service on January 1, 1988, whose allowance is limited by the seventy-five percent cap shall receive an amount of pension that is less than seventy-two percent of that individual's regular compensation on January 1, 1988. *G. L. c. 32, § 7(2)(a)(ii)*, as appearing in *St. 1987, c. 697, § 33*.

[**425] All parties agree that the starting date of the continuous service requirement is January 1, 1988; however, they do not agree on the ending date. CRAB read the requirement language to run from January 1, 1988, until the effective date of Ouellette's accidental disability retirement. CRAB found that when Ouellette began receiving her superannuation retirement allowance in December, 2003, she became a member inactive. CRAB concluded that as a result Ouellette was not a member in service continuously from January 1, 1988, through February 14, 2005, the effective date of her accidental disability retirement, and therefore was not entitled to avoid the limitation on her allowance.

"We review CRAB's decision under a deferential standard and [***8] will reverse only if its decision was based on an erroneous interpretation of law or is unsupported by substantial evidence." [**400] *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669, 676, 904 N.E.2d 755 (2009). See *G. L. c. 30A, § 14(7)*. Accordingly, we give substantial deference to CRAB's interpretation of any ambiguous statutory text, see *Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 228-229, 967 N.E.2d 1095 (2012), "unless [the] statute unambiguously bars [its] approach." *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633, 830 N.E.2d 207 (2005). On the other hand, no judicial deference at all is

given to an erroneous interpretation of a statute. See *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 647-648, 933 N.E.2d 666 (2010), S.C., 465 Mass. 801, 992 N.E.2d 250 (2013).

We deal here with a claim of legal error.⁷ We conclude that CRAB's interpretation of the statute was reasonable and thus did not constitute an error of law. The statutory language was susceptible of multiple interpretations. Faced with an ambiguity about which end date the Legislature had in mind for purposes of the continuous service requirement, CRAB logically looked to the surrounding text for meaning. See *Franklin Office Park Realty Corp. v. Commissioner of Dept. of Env'tl. Protection*, 466 Mass. 454, 462, 995 N.E.2d 785 (2013) ("Words grouped together in a statute must be read in harmony ..."). As with the relationship between the body paragraphs of a unified essay and a thesis statement in an [**401] introductory [**426] paragraph, CRAB could properly have concluded the end date related back to the effective date. The over-all structure of § 7(2) and the use of the effective date to set the relevant time frame in other [***9] provisions of that statute supported CRAB's interpretation.⁸ Moreover, CRAB's selection of the latest possible date furthered the obvious cost containment purpose of the cap.⁹ See *id. at 461*. While it is possible to construe the statute in the manner urged by Ouellette, who maintains that the date of the injury should always be the operative end date, CRAB's choice between plausible interpretations cannot correctly be said to be wrong.

7 The plaintiff's position is that the Legislature intended, when it enacted the new cap on disability retirement benefits, to exempt from the cap persons who were already employees at the time the amendment was enacted, provided they continued in public service with no break until the date of injury -- that is, the new limitation on benefits was to apply to new employees (an employee "not a member in

service on or before [January 1, 1988,]) and to persons who, even if employed on or before January 1, 1988, left or had a break in public service after that date and then returned and were subsequently injured (employee "who has not been continuously a member in service since that date") (the latter were given a lesser protection of a limitation on the cap). In this [***10] view, CRAB's interpretation that an employee "who has not been continuously a member in service since that date" includes not only an employee with a break in service before injury but also an employee who has served continuously since on or before January 1, 1988, up until the date of injury and applies and receives superannuation retirement before applying for disability retirement, adds a category not contemplated by the Legislature. Further, the plaintiff argues that, in reducing the retirement benefit to the latter, CRAB makes an irrational distinction between two categories of employees, both of whom were employed on or before January 1, 1988, and both of whom served continuously until they were injured (where the only relevant distinction should be the delay in application, which is already taken into account in § 7[2] by a later effective date of disability retirement). Thus, the plaintiff contends, CRAB's interpretation is not an equally reasonable one and the rule deferring to the agency's choice of an equally rational interpretation does not apply.

8 As CRAB pointed out, the effective date of the retirement factors into the calculation of "the annual rate of regular compensation," [***11] which in turn is used to determine the pension component of the allowance as well as limit on the total annual amount of the allowance. See *G. L. c. 32, § 7(2)(a)(ii), (c)*.

9 Two cost-saving mechanisms are provided by the cap. First, all employees attaining member in service status after January 1, 1988, are subject to the seventy-five percent cap. Second, individuals who attained member in service status on or before that date are also subject to the cap if they are unable to meet the continuous service requirement of the exemption.

Nothing in the case law or *G. L. c. 32* required CRAB to apply the date of injury as

the operative date. It is well settled that the member must have been in service on the date of the disabling accident (*vis à vis* the date of the application) in order to be eligible for accidental disability retirement. See *State Retirement Bd. v. Contributory Retirement Appeal Bd.*, 12 *Mass. App. Ct.* 306, 308, 423 *N.E.2d* 1046 (1981) (*Olson* case); *Leal v. Contributory Retirement Appeal Bd.*, 42 *Mass. App. Ct.* 330, 332, 677 *N.E.2d* 238 (1997). These cases are premised on the legislative purpose expressed in *G. L. c. 32, § 3(1)(a)(ii)* and *(c)*,¹⁰ to preserve for members the rights, privileges, and potential benefits for which they qualified during their years of public employment. See *Gannon v. Contributory Retirement Appeal Bd.*, 338 *Mass.* 628, 631-633, 156 *N.E.2d* 654 (1959); *Boston Retirement Bd. v. McCormick*, 345 *Mass.* 692, 695-696, 189 *N.E.2d* 204 (1963); *Leal v. Contributory Retirement Appeal Bd.*, 42 *Mass. App. Ct.* at 332.

10 *Section 3(1)(c)* of *G. L. c. 32* states: "No description of a person having any rights or privileges under the provisions of sections one to twenty-eight inclusive, [***12] such as member in service, member inactive, beneficiary or otherwise, shall serve to deprive him of any such rights or privileges. A member shall retain his membership in the system so long as he is living and entitled to any present or potential benefit therein."

The *Olson* line of cases, relied on by the plaintiff, is inapposite. All of these cases involved member *eligibility* for accidental [*402] disability benefits, a question which is evaluated under a different statutory section (*G. L. c. 32, § 7[1]*) and language. None provided any analysis of the appropriate calculation of the retirement allowance under *G. L. c. 32, § 7(2)*. Eligibility for benefits is not challenged here. Different principles and policy considerations materially impacted the decisions.¹¹ We conclude that CRAB did not err by limiting these cases to their holdings.

11 For example, the *Gannon* and *McCormick* decisions, upon which the latter two cases were built, were based in part upon the employees' statutory rights under *G. L. c. 32, § 14(1)* (providing that while living, employees who become entitled to payments under *G. L. c. 152* retain all the rights of members in service until their effective retirement dates). As Ouellette was not receiving payments under *G. L. c. 152*, this provision did not apply to her. [***13]

[**427] Consistent with this line of cases, following her superannuation retirement, Ouellette was permitted to secure a more lucrative accidental disability retirement for which she had qualified while a member in service. She was not deprived of any right to a potential retirement allowance or of any other statutory right, privilege, or benefit under *G. L. c. 32, §§ 1-28*. To the extent that Ouellette argues that she had a reasonable financial expectation of receiving, pursuant to *G. L. c. 32, § 7(2)(a)*, a full accidental disability retirement, the benefits defined as contractual rights and benefits under *G. L. c. 32, § 25(5)*, that are immune from subsequent reduction are limited to those belonging to members of retirement systems who are retired for superannuation. See *G. L. c. 32, § 25(5)* (members entitled to contractual rights and benefits with regard to superannuation retirement); *Smolinski v. Boston Retirement Bd.*, 346 Mass. 210, 211-212, 190 N.E.2d 877 (1963) (finding § 25[5] inapplicable to accidental disability retirement as it applies only to those "retired for superannuation"). No cap was placed on Ouellette's superannuation retirement benefits here. In light of this clear, long-standing precedent

predating her employment, Ouellette had no reasonable expectation frustrated by the imposition of the cap on her accidental disability retirement allowance. [***14]

No other alleged violations of the standards of *G. L. c. 30A, § 14(7)*, argued by Ouellette, have any substance.

Conclusion. In the absence of governing precedent, CRAB wrote on a blank slate, bringing its specialized knowledge of retirement law to bear in its interpretation of *G. L. c. 32, § 7(2)*. Even if we would have made another selection in deciding the issue in the first instance, we find CRAB's construction of the statutory scheme reasonable and not inconsistent with the statutory text or the case law. [*403]

It is fair to say that Ouellette's particular circumstances may not have been the type of situation envisioned by the Legislature in fashioning an exemption from the cap. The statutory language does not provide any exceptions to the continuous service requirement. We are not at liberty "to add words to a statute that the Legislature did not put there." *Retirement Bd. of Somerville v. Buonomo*, 467 Mass. 662, 672, 6 N.E.3d 1069 (2014). To ignore CRAB's reasonable interpretation in order to bring Ouellette within the coverage of the exemption would create bad law. See *Leblanc v. Friedman*, 438 Mass. 592, 602-603, 781 N.E.2d 1283 (2003) (Cowan, J., dissenting).

The judgment of the Superior Court affirming the decision of CRAB is affirmed.

So ordered.

RUSSELL BLOCK ASSOCIATES vs. BOARD OF ASSESSORS OF WORCESTER.

No. 14-P-283.

APPEALS COURT OF MASSACHUSETTS

88 Mass. App. Ct. 351

November 10, 2014, Argued

September 16, 2015, Decided

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

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Taxation, Real estate tax: abatement, classification of property. Real Property, Tax.

The Appellate Tax Board (board) was warranted in classifying the taxpayer's parking garage as a multiple-use property subject to taxation under the allocation method specified by *G. L. c. 59, § 2A(b)*, i.e., part residential and part commercial, where, given that the garage was designed and built to serve the parking needs of the tenants of the taxpayer's residential building (the development of which had depended on the garage to meet zoning and lending requirements), the board correctly concluded that the garage was an accessory building incidental to habitation within the meaning of the statute, and where the statute's exclusive use language was appropriately read in the circumstances as referring to that portion of the property used exclusively for residential accessory purposes. [____-____] RUBIN, J., dissenting.

COUNSEL: *John F. O'Day, Jr.*, Assistant City Solicitor, for board of assessors of Worcester.

Daniel I. Cotton for the taxpayer.

JUDGES: Present: RUBIN, BROWN, & MALDONADO, JJ. RUBIN, J. (dissenting).

OPINION BY: BROWN

OPINION

BROWN, J. The board of assessors of Worcester (assessors) challenges a decision of the Appellate Tax Board (board) granting the taxpayer an abatement of the fiscal year (FY) 2012 tax on its parking garage. The issue for consideration is whether the board erred by

finding and ruling that the subject property was a multiple-use property appropriately classified as part residential and part commercial.¹ See *G. L. c. 59, § 2A(b)*. We conclude that the board's classification determination was a reasonable interpretation of the statutory language. Accordingly, we affirm the decision of the board.

1 The assessors have not disputed either the board's reduction of the property's fair cash valuation or the percentage allocations of valuation assigned to each classification.

1. *Facts.* We summarize the board's findings.² In 1992, the taxpayer, Russell Block Associates, constructed a twenty-four story residential building (Tower) in the city of Worcester. The [*2] Tower development project was conditioned on the construction of a parking garage.³ The five-story garage in issue contains 300 parking spaces and is located across a small side street from the Tower. There are no dwelling units in the garage. By contract entitled "Agreement to Provide Parking Spaces," the taxpayer agreed to reserve a minimum of one hundred spaces and up to a maximum of 250 spaces for exclusive use by the tenants of the Tower.

2 The board based its findings of fact on the testimony and the exhibits presented at the evidentiary hearing. None of the evidence was provided to this court. In fact, the sole document provided from the proceedings below was a copy of the board's "Decision with Findings." We have confined our analysis to the facts contained in that decision.

3 Sufficient off-street parking for the proposed use was necessary to comply with city zoning requirements and to meet financing requirements.

For the next nineteen years, the assessors classified the garage as a mixed-use property, taxing a large percentage of its value at the lower residential rate.⁴ In classifying the property in this manner, the assessors followed the guidelines issued by the Commissioner of [*3] Revenue (commissioner).⁵ See *G. L. c. 58, § 3; McNeill*

v. Assessors of W. Springfield, 396 Mass. 603, 606, 487 N.E.2d 849 (1986). Beginning in FY 2012, however, the assessors classified the property as entirely commercial.

4 In 2010, for example, the taxpayer derived eighty-five percent of its total income from the residential tenants of the Tower. The board also found that at all material times, the tenants occupied "significantly more than the minimum number of spaces."

5 In FY 2011, the assessors, applying the commissioner's three-digit coding system, classified part of the garage as code 106 (residential "accessory land with improvement - garage, etc.") and part as code 336 (commercial parking garage).

2. *Standard of review.* Our task is to embrace an interpretation "consistent with the purpose of the statute and in harmony with the statute as a whole." *Adams v. Assessors of Westport*, 76 Mass. App. Ct. 180, 183-184, 920 N.E.2d 879 (2010), quoting from *Sudbury v. Scott*, 439 Mass. 288, 296 n.11, 787 N.E.2d 536 (2003). We give a measure of deference to the board's expertise in interpreting the tax statutes it is charged with administering. See *French v. Assessors of Boston*, 383 Mass. 481, 482, 419 N.E.2d 1372 (1981); *Raytheon Co. v. Commissioner of Rev.*, 455 Mass. 334, 337-338, 916 N.E.2d 372 (2009).

3. *Discussion.* Classification determinations for taxation purposes turn on the use of the real property. See *G. L. c. 59, § 2A(b)*. The statute sets forth four distinct use classes: residential, open space, commercial, and industrial. The statute also recognizes the existence of a fifth, mixed-use category [*4] of real property, providing in pertinent part, "Where real property is used or held for use for more than one purpose and such uses result in different classifications, the assessors shall allocate to each classification the percentage of the fair cash valuation on the property devoted to each use according to the guidelines promulgated by the commissioner." *G. L. c. 59, § 2A(b)*, as amended through St. 2008, c. 522, § 3.

To start, we agree with the assessors that the doctrine of estoppel has no application in the case. See *Cameron Painting, Inc. v. University of Mass.*, 83 Mass. App. Ct. 345, 350, 983 N.E.2d 1210 (2013). Turning to the merits, the primary question in dispute is whether the garage qualified in part for residential classification. See *G. L. c. 59, § 2A(b)*.⁶ The assessors first contend that the parking garage is not "used or held for human habitation containing one or more dwelling units," *G. L. c. 59, § 2A(b)*, see note 6, *supra*, and thus cannot satisfy the definitional requirements of § 2A(b). We disagree. This argument ignores the second sentence of the definition, providing that "accessory land, buildings or improvements incidental to such habitation" are included in the definition of residential property. *G. L. c. 59, § 2A(b)*. See *McNeill v. Assessors of W. Springfield*, 396 Mass. at 606 (describing the statutory definition of residential property as "extremely broad and general"). Compare *Salem & Beverly Water Supply Bd. v. Assessors of Danvers*, 63 Mass. App. Ct. 222, 222-224, 226-227, 824 N.E.2d 893 (2005) [*5] (reservoir and surrounding watershed land did not fit within the definition of accessory residential property).

6 *General Laws c. 59, § 2A(b)*, provides, in relevant part, "The assessors ... shall classify such real property according to the following uses: - 'Class one, residential', property used or held for human habitation containing one or more dwelling units Such property includes accessory land, buildings or improvements incidental to such habitation and used exclusively by the residents of the property or their guests"

Applying the statutory language to the facts of the case, the board concluded that for the tax year in question, eighty-five percent of the garage served an "accessory" use for the residential tenants of the Tower. The assessors, we think, cannot show that the conclusion was erroneous. The parking garage was part and parcel of the Tower development plan. The residents of the

Tower, as all city dwellers, need a place to park their vehicles. The garage was designed and built to serve the tenants' parking needs and indeed was required to do so to meet zoning and lending requirements for the development of the Tower. On these facts, the board was warranted in concluding that [*6] the garage was an accessory building "incidental to ... habitation" within the meaning of the statute. Cf. *St. Paul's Sch. v. Concord*, 117 N.H. 243, 257, 372 A.2d 269 (1977) (applying analogous New Hampshire tax exemption for schools) ("The tax status of ... parking lots should be determined according to the status of the buildings which they serve. Where a building is partially taxed, or where one or more buildings served are taxed, a proportionate value of the parking lot should also be taxed"), quoted with approval in *Lynn Hosp. v. Assessors of Lynn*, 383 Mass. 14, 19, 417 N.E.2d 14 (1981). Compare also in the zoning context *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 844, 641 N.E.2d 1334 (1994), quoting from 6 Rohan, Zoning and Land Use Controls § 40A.01, at 40A-3 (1994) (for zoning purposes, "[a]n accessory or 'incidental' use is permitted as 'necessary, expected or convenient in conjunction with the principal use of the land'").

The second, more difficult question raised by the assessors is whether the property satisfies the exclusive use requirement of the definition in § 2A(b): "Such property includes accessory land, buildings or improvements incidental to such habitation *and used exclusively by the residents of the property or their guests*" (emphasis supplied). *G. L. c. 59, § 2A(b)*. The assessors contend that where, as here, the entire garage was not used exclusively by the tenants of the Tower or their guests, it did not qualify for residential [*7] status.

Although the plain text may be construed in the manner suggested by the assessors, the phrase "used exclusively" is not defined by statute,⁷ and in the context of a multiple-use property, the statutory language in issue is amenable to a second interpretation. As noted

above, after setting out the four distinct classes based on use, § 2A(b) recognizes the existence of a fifth, mixed-use category. That is, the Legislature recognized that a single property may be used for more than one purpose and that such uses result in different classifications.⁸ The garage, as the board justifiably found, was one of them. Reading § 2A(b) as a harmonious whole, as we are required to do, the exclusive use language is appropriately read in this context as referring to that portion of the property used exclusively for residential accessory purposes. Any ambiguities that exist must be resolved in favor of the taxpayer. See *Adams v. Assessors of Westport*, 76 Mass. App. Ct. at 184.

7 By way of contrast, until June 15, 1988, Florida statutory law defined "exclusive use of property" for tax exemption purposes to mean "used one hundred percent for exempt purposes"; thereafter, the definition was amended to mean "use of property solely for exempt purposes." See *Fla. Stat. § 196.012(2)*; *Saint Andrew's Sch. of Boca Raton, Inc. v. Walker*, 540 So.2d 207, 207-209 (Fla. Dist. Ct. App. 1989) (holding [*8] that notwithstanding its residential quality, faculty housing was used exclusively for educational purposes and entitled to exemption).

8 The Legislature expressly directed local assessors making mixed-use classification determinations to follow the commissioner's guidelines. *G. L. c. 59, § 2A(b)*. As the board noted in support of its decision, the commissioner's coding system contains codes for multiple-use properties, including code 013 for "Multiple-use, primarily Residential" property. See Department of Revenue's Division of Local Services Property Type Classification Codes (revised March, 2012), at 3. The example given by the commissioner of a code 013 property is "a building with a retail store on the first floor, apartments on the upper floors, and a major portion of the related land ... reserved for tenant parking." The high-rise residential Tower, which we are informed has (1) commercial business on the first floor and (2) a dedicated parking garage, a major portion of which is reserved and, as the board found, actually

used for residential tenant parking, could be found to fall within this code. See note 4, *supra*.

The use of the property is the critical criterion for classification purposes. [*9] Adopting the interpretation urged by the assessors would require us to disregard the use restriction on the garage, the statute's provision for mixed-use classifications, and the commissioner's guidelines, which were followed by the assessors for nineteen years. We prefer an interpretation that is "the most reasonable and sensible in the circumstances." *Bridgewater State Univ. Foundation v. Assessors of Bridgewater*, 463 Mass. 154, 160-161, 972 N.E.2d 1016 (2012) (rejecting literal interpretation that would lead to absurd or unreasonable consequences). See *Adult Home at Erie Station, Inc. v. Assessor & Bd. of Assessment Review of Middleton*, 10 N.Y.3d 205, 214, 886 N.E.2d 137, 856 N.Y.S.2d 515 (2008) (word "exclusively" for tax exemption purposes should not be read literally, but rather means principally or primarily). Contrast *Sisterhood of Holy Nativity v. Tax Assessors of Newport*, 73 R.I. 445, 447-448, 57 A.2d 184 (1948) (building must be used exclusively for religious purposes to entitle owner to exemption; primary use is not sufficient).

We agree with the assessors that in the sense of being operated for profit the parking garage is strictly commercial. However, their argument that the taxpayer's prospective customer base was not relevant to the use inquiry is mistaken. In *Lynn Hosp. v. Assessors of Lynn*, 383 Mass. at 15-16, the facts established that the adjacent parking garage owned by the hospital, a charitable organization granted tax-exempt status under *G. L. c. 59, § 5*, Third, was used not only by parkers on their way to the hospital (an exempt use), but also by parkers going to a nonexempt [*10] private medical building as well as by the general public. The Supreme Judicial Court held that the taxpayer was entitled to a partial exemption for the percentage of the parking garage actually used for exempt purposes. *Id.* at 17-19.

Compare *Vassar Bros. Hosp. v. Poughkeepsie*, 97 A.D.3d 756, 759, 948 N.Y.S.2d 403 (N.Y.App.Div. 2012) (law provided exempt property must be "used exclusively" for exempt purposes; as only portion of garage was allocated for use reasonably incidental to purpose of hospital, parking garage was partially exempt).

The *Lynn Hospital* case falls within a long line of cases supporting, notwithstanding the absence of express statutory authority, the practice of carving out, based on actual use, portions of real property for partial exemption and partial taxation. See *Milton Hosp. & Convalescent Home v. Assessors of Milton*, 360 Mass. 63, 70, 271 N.E.2d 745 (1971), and cases cited; *WB&T Mort. Co. v. Assessors of Boston*, 451 Mass. 716, 717-718, 724-725, 889 N.E.2d 404 (2008); *Mount Auburn Hosp. v. Assessors of Watertown*, 55 Mass. App. Ct. 611, 613, 620, 773 N.E.2d 452 (2002). Although the *Lynn Hospital* case arose under a different tax statute, the facts of that case support the board's application of the apportionment principle by analogy.

In sum, the board was warranted in classifying the parking garage as a multiple-use property subject to taxation under the allocation method specified by § 2A(b). The decision of the Appellate Tax Board is affirmed.

So ordered.

DISSENT BY: Rubin

DISSENT

RUBIN, J. (dissenting). The statute in this case is unambiguous, and because it is a fundamental [*11] rule of statutory construction in our Commonwealth that the words of an unambiguous statute should be interpreted according to their plain meaning, I respectfully dissent. See *Bridgewater State Univ. Foundation v. Assessors of Bridgewater*, 463 Mass. 154, 158, 972 N.E.2d 1016 (2012).

The words used by the Legislature in the definition of "residential" property set out in *G. L. c. 59, § 2A(b)*, as amended through St. 2008, c. 522, § 3, are clear. "Class one, residential" property status is limited to "property used or held for human habitation containing one or more dwelling units Such property includes accessory land, buildings or improvements incidental to such habitation and *used exclusively by the residents of the property or their guests...*" (Emphasis added.) The garage here of course is not used for human habitation, but is an "accessory ... building[]"; the board's findings establish, and it is conceded by the taxpayer, that it has never been used exclusively by the Tower residents and their guests. Therefore, the garage is not residential property within the meaning of the statute.

In an attempt to get around this, the court majority argues, at least at first, that the statute is ambiguous, and that the exclusive use language can refer in this context "to that portion of the property used [*12] exclusively for residential accessory purposes." *Ante* at _____. But the statutory language is clear. The garage is an accessory building, and an "accessory ... building[]" must be "used exclusively" by the residents or guests of the residential property to which it is an accessory to be entitled to classification as residential property. To say that only a portion of the building must be "used exclusively" by residents or guests is not to construe an ambiguous clause about exclusive use. It is to read it out of the statute.

To be sure, the statute also contains a "mixed use" provision that states, "Where real property is used or held for use for more than one purpose and *such uses result in different classifications*, the assessors shall allocate to each classification the percentage of the fair cash valuation of the property devoted to each use according to the guidelines promulgated by the commissioner" (emphasis added). *G. L. c. 59, § 2A(b)*. But in this case the use of a part of the garage for residents of the Tower does not result in a "different classification[]" of that portion of the garage from the

commercial classification of the rest of the garage. None of the garage is residential [*13] property because the garage is neither used for human habitation nor is it used exclusively by residents of the Tower or its guests. Rather, the entire garage -- the parts used by Tower residents and the parts available to the public -- is all properly classified as "'Class three, commercial', property used or held for use for business purposes and not specifically includible in another class" *G. L. c. 59, § 2A(b)*. The majority would rely on *Lynn Hosp. v. Assessors of Lynn*, 383 Mass. 14, 17-19, 417 N.E.2d 14 (1981), in support of a mixed-use classification, but that case holds only that under a different statute that does not contain an "exclusive use" provision, that portion of a garage owned by a hospital and which it used itself can be exempt from taxation even though another portion is not. It has no bearing on the issue in this case.

Of course there are debates about the proper way to construe statutes. Indeed, there is some indication that questions concerning the proper canons of statutory construction are becoming more pronounced in our legal culture. Compare, e.g., *King v. Burwell*, 135 S.Ct. 2480, 2495, 192 L. Ed. 2d 483 (2015) ("Petitioners' arguments about the plain meaning of [the Affordable Care Act] are strong. But while the meaning of the phrase [relied upon by Petitioners] may seem plain 'when viewed in isolation,' [*14] such a reading turns out to be 'untenable in light of [the statute] as a whole.' ... In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase"), with *id. at 2497* (Scalia, J., dissenting) ("Let us not forget ... *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them").

This debate may in part be reflected here: The court majority begins by saying the statute is ambiguous, but then, perhaps a bit more candidly, it acknowledges that it is not reading the statute "literally." Rather, it says that it is construing it in the way that is "the

most reasonable and sensible in the circumstances." *Ante* at ____, quoting from *Bridgewater State Univ. Foundation v. Assessors of Bridgewater*, 463 Mass. 154, 160-161, 972 N.E.2d 1016 (2012).

But the Supreme Judicial Court has instructed that statutory language that is clear and unambiguous is conclusive as to legislative intent, see *Commissioner of Correction v. Superior Ct. Dept. of the Trial Ct.*, 446 Mass. 123, 124, 842 N.E.2d 926 (2006), and that this rule "has particular force in interpreting tax statutes." *Gillette Co. v. Commissioner of Revenue*, 425 Mass. 670, 674, 683 N.E.2d 270 (1997), quoting from *Commissioner of Revenue v. AMI Woodbroke, Inc.*, 418 Mass. 92, 94, 634 N.E.2d 114 (1994). We are bound to apply these rules. Is the clear construction of the statute I put forth "absurd or unreasonable" such that it may be ignored under the Supreme Judicial Court's [*15] decision in *Bridgewater State Univ. Foundation v. Assessors of Bridgewater*, 463 Mass. at 158? I am not persuaded. In fact, I don't see how one can even make the case. Taxing a garage used by residents of a

building across the street as "commercial" property rather than taxing a portion of it as "residential" property obviously isn't "absurd," and I can't see how a choice either way could be called "unreasonable." These are context-specific lines created in order to balance all the various interests that go into providing property with tax classifications. They are archetypical decisions of legislatures that, when expressed clearly, should not -- really cannot -- be subject to judicial second guessing.

Do I think it is utterly unfair that the board of assessors of Worcester taxed this garage at a mixed-use rate for some twenty years, then changed its mind and upended the taxpayer's reasonable expectations? You bet. But as the court majority correctly notes, *ante* at ____, under settled law, the city cannot be estopped by its prior action.

So that leaves me where I began: with a clear statute that requires reversal of the Appellate Tax Board decision. With respect, I dissent.

BRIAN M. TOUHER¹ & OTHERS² vs. TOWN OF ESSEX.

- 1 During the pendency of this appeal, a suggestion of death was filed as to Paul Touher, and we allowed the plaintiffs' assented-to motion to substitute Brian M. Touher in his capacity as personal representative of the estate of Paul Touher.
- 2 Sarah Wendell and David R. Wendell, Jr., as trustees of the David R. Wendell 1993 Revocable Trust.

No. 14-P-796.

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 837; 2015 Mass. App. LEXIS 103

**March 24, 2015, Argued
August 10, 2015, Decided**

PRIOR HISTORY: [*1] Essex. CIVIL ACTION commenced in the Superior Court Department on May 11, 2012. The case was heard by *Richard E. Welch, III*, J., and motions to alter or amend the judgment and for a new trial or to amend the judgment were considered by him.

Walker v. Town of Essex, 2015 Mass. App. Unpub. LEXIS 824 (Mass. App. Ct., Aug. 10, 2015)

DISPOSITION: Judgment affirmed. Orders denying motions to alter or amend judgment,

or for a new trial or amendment of judgment, affirmed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Real Property, Lease. Contract, Lease of real estate, Unjust enrichment. Personal Property, Ownership. Landlord and Tenant, Fixture. Unjust Enrichment.

At the jury-waived trial of a civil action brought by the plaintiff seasonal residents of land owned by and rented to them by the town of Essex (town), seeking a declaration that they owned the structures they had erected on the town's land, the judge did not err in finding that there had been no express or implied agreement concerning whether the plaintiffs would own, upon termination of their leases, any structures they had affixed to the town's land [___-___]; further, the judge's conclusion that the structures were affixed to the land was neither wrong as a matter of law nor clearly erroneous as a matter of fact [___-___]; moreover, the judge did not err in rejecting the plaintiffs' claims that they were entitled to recover the value of the structures under a theory of unjust enrichment, where, in the circumstances, it could not be said that the town's retention of the structures was against the fundamental principles of justice or equity and good conscience [___-___].

COUNSEL: *Christopher Weld, Jr. (Suzanne Elovecky with him) for the plaintiffs.*

Gregg J. Corbo for the defendant.

JUDGES: Present: KANTROWITZ, BLAKE, & MASSING, JJ.

OPINION BY: MASSING

OPINION

MASSING, J. This appeal arises from a series of disputes between the seasonal residents of Conomo Point and the town of

Essex (town), which owns and rents them the land on which they reside. Four sets of plaintiff residents filed a complaint seeking a declaration that they owned the buildings they had erected on the town's land. After a jury-waived trial, a Superior Court judge entered a declaration that two sets of plaintiffs owned their cottages as personal property, but that the more substantial homes that the two other sets of plaintiffs had built were fixtures that belonged to the town. The latter - [*2] the decedent Paul Touher (Touher), and Sarah Wendell and David R. Wendell, Jr., as trustees of the David R. Wendell 1993 Revocable Trust (the Wendell Trust) (collectively, plaintiffs) -- appeal from that judgment, as well as the judge's posttrial decision that they had no equitable claim against the town to recover the value of the houses.³ Largely for the reasons that the trial judge set forth in his detailed memorandum and order, we affirm.

3 In a second case, a certified class of plaintiff leaseholders, including the Wendell Trust and Touher, challenged the town's assessment of the fair market value for them to rent their land on Conomo Point. The judge decided that matter in favor of the town, and the plaintiffs appealed. The issues are addressed in a memorandum and order pursuant to our *rule 1:28* issued this same day. *Walker v. Essex, post*, ___ (2015).

Background. 1. *Historical perspective.* For more than one century, the town has been leasing desirable plots of waterfront or near-waterfront property on Conomo Point -- once the location of the town's "poor farm" -- to seasonal residents. The lessees, at their own expense, built seasonal cottages on these properties. In addition to the rent they paid [*3] to lease the land, the residents were assessed and paid real estate taxes on the cottages.

At various times the town⁴ has sought to alter its economic relationship with the Conomo Point residents. In 1987, the town took steps to increase the rental rates for the properties. These efforts led to a class action suit in the Land Court (the Pingree case⁵) that

settled in 1991 with an agreement regarding the rental rates, which was incorporated into a set of new ten-year leases, each with a ten-year renewal option (the Pingree leases). Two decades later, as the expiration of the Pingree leases approached, the town sought to sever completely its relationship with the Conomo Point residents. While the town was considering a long-term plan for Conomo Point, however, it decided to offer the residents short-term bridge leases, allowing them to remain on the property for as many as five more years.

4 The town by-laws establish a Conomo Point Commission (commission), composed of the members of the town's board of selectmen, to manage the Conomo Point properties. We refer to the commission and the town interchangeably.

5 *Pingree vs. Essex, Land Ct., No. 124-199.*

To that end, the town successfully pursued [*4] a special act of the Legislature to allow it to enter into bridge leases with the residents, without the need to comply with the formal bidding process mandated by *G. L. c. 30B, § 16*. On May 2, 2011, "An Act Authorizing the Lease of Certain Property at Conomo Point in the town of Essex," reprinted in full in the margin,⁶ went into effect, authorizing the town to "lease for 5 years or less all or any portion of its property known as Conomo Point, at fair market value" and, if it so elected, to grant "a certain level of preference for current [lessees] of the property." *St. 2011, c. 17, § 1.*

6 "SECTION 1. Notwithstanding section 16 of chapter 30B of the General Laws or any other general or special law to the contrary, the town of Essex, if first authorized by a vote of its town meeting, may lease for 5 years or less all or any portion of its property known as Conomo Point, at fair market value, upon such terms and conditions as the board of selectmen deems appropriate, in accordance with a bylaw adopted by town meeting, which bylaw shall ensure that such leases shall be undertaken in accordance with an open, fair and competitive process, using sound business practices and principles of fair dealing, which

process may, but need [*5] not, recognize as a criteria for evaluation for any such lease a certain level of preference for current [lessees] of the property.

"SECTION 2. This act shall not exempt the town of Essex from sections 3, 15 or 15A of chapter 40 of the General Laws, sections 2-13.4 and 2-13.11 of the town bylaws or any other general or special law which requires a vote of town meeting to authorize the lease of real property.

"SECTION 3. This act shall take effect upon its passage."

St. 2011, c. 17.

The 2011 legislation used the word "leases," not "lessees." In 2012, substantially similar legislation was adopted, with the only difference being substitution of the word "lessees" for the word "leases." *St. 2012, c. 104, § 1.*

In anticipation of, and then following, the adoption of the legislation, the town entered into discussions with representatives of the residents. As part of this process, the town issued a request for proposals, drafted with the residents' input, for an appraiser to determine the fair market value of the leases. Dissatisfied with the results of his report, the resident group hired its own appraiser. After exchanging appraisals and further negotiations, the town offered the residents one-year leases for calendar year 2012, with a town option [*6] to extend the leases for up to four one-year periods. The leases included phased-in rent increases for the first three years, with the rent for the remaining two years left to the discretion of the town.

Also, in an effort "to resolve any disputes concerning ownership of buildings or structures without resorting to litigation," the town gave any resident who chose not to enter into a bridge lease "the option of removing any such buildings or structures at [the resident's] own expense." In all, the town offered bridge leases to 121 residents; of these, 119 accepted, including the Wendell Trust and Touher. Thereafter, fearing that the town eventually would seek to sell the land and the structures, the Wendell Trust and

Touher, along with two other sets of residents, filed their complaint, seeking a declaration that they owned their homes as personal property. The plaintiffs now appeal from the judgment and from posttrial orders in favor of the town.

2. *The Touher and Wendell Trust structures.* In 1962, Touher leased an unimproved lot on Conomo Point from the town for seventy-five dollars per year.⁷ The next spring he built a small, two-bedroom, one-bathroom cottage. Following the settlement [*7] of the Pingree case, with twenty years of leasing guaranteed, he made approximately \$120,000 in improvements, adding a master bedroom, a laundry room, and other amenities, nearly doubling the size of the original cottage.

7 By the time he exercised his option to extend his Pingree lease for the second ten-year period, Touher's annual rent (for calendar year 2002) had increased to \$1,236.97, and it would thereafter be adjusted annually to reflect changes in the consumer price index for the city of Boston.

In 1996, David Wendell, as then trustee of the Wendell Trust, paid \$175,000 to purchase a "large, impressive three story house" on Conomo Point overlooking the Atlantic Ocean. The town approved the prior owner's transfer of lease rights to the Wendell Trust, as well as Wendell's plans to renovate the house. Wendell has since passed away, but the Wendall Trust continues to hold the lease for the property.

Discussion. "The general rule is that the erection of a building on the land of another makes it a part of the realty." *Meeker v. Oszust*, 307 Mass. 366, 369, 30 N.E.2d 246 (1940). See *Barnes v. Hosmer*, 196 Mass. 323, 324, 82 N.E. 27 (1907); *Ward v. Perna*, 69 Mass. App. Ct. 532, 537, 870 N.E.2d 94 (2007). An exception applies where "there is an agreement, express or implied, that the building will remain personal property and that the owner of the building may [*8] remove it." *Ward v. Perna*, *supra*.

The trial judge determined that the homes built and occupied by the Wendell Trust and Touher were so affixed to the land as to become the property of the town, and that the town did not have an express or implied agreement with either of the plaintiffs that the homes they erected were to remain their personal property. The plaintiffs challenge both of these determinations. If they prevail on either, they are entitled to a declaration that they own the homes. "This is a mixed question of fact and law," *Noyes v. Gagnon*, 225 Mass. 580, 584, 114 N.E. 949 (1917). But see *Bay State York Co. v. Marvix, Inc.*, 331 Mass. 407, 411, 119 N.E.2d 727 (1954) ("[T]he intent to make [chattel] a part of the realty may be established as a matter of law ... but ordinarily its determination requires a finding of fact"); *Consiglio v. Carey*, 12 Mass. App. Ct. 135, 138, 421 N.E.2d 1257 (1981) ("The question whether similar items were annexed, and therefore realty, or unannexed and therefore personalty, has generally been held to be one of fact"). "The burden of proof is upon those who claim that it is personal property, to show that it retains that character." *Madigan v. McCarthy*, 108 Mass. 376, 377 (1871).

1. *Existence of an agreement.* Taking certain of the trial judge's findings out of context, the plaintiffs contend that the judge actually found "there was an agreement that the residents owned the structures and the Town owned [*9] the land." The trial judge did state, "As a general matter, it is fair to conclude that the residents understood that the Town owned the land and that *the initial, rather simple, cottages* that were placed upon Conomo Point were owned by the residents during the term of the lease" (emphasis supplied). The trial judge further found that the town required the renters to obtain town approval of their building plans, acquiesced when the lessees occasionally sold their structures to third parties, and at times referred to the residents as "homeowners."⁸ The judge acknowledged that "these references evidence some understanding that the residents owned their structures."

8 We reject the plaintiffs' contention that the town is estopped from denying that the plaintiffs own their dwellings because the town took the opposite position in the Pingree case. To the extent the issue of judicial estoppel was before the trial judge, he acted within his discretion not to apply the doctrine here. See *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 640, 824 N.E.2d 23 (2005) (decision to bar claim on ground of judicial estoppel reviewed for abuse of discretion). The pleadings in the Pingree case in which the town referred to the residents as "owners" of their dwellings are documents [*10] signed by both parties by agreement or stipulation as well as a notice of a proposed settlement issued from the court. These documents cannot fairly be characterized as the town "hav[ing] succeeded in convincing the court to accept its ... position." *Id.* at 641. Indeed, a case that ends in settlement does not qualify as "success" for the purposes of judicial estoppel. *East Cambridge Sav. Bank v. Wheeler*, 422 Mass. 621, 623, 664 N.E.2d 446 (1996). *Chiao-Yun Ku v. Framingham*, 53 Mass. App. Ct. 727, 729, 762 N.E.2d 855 (2002).

Nonetheless, on the pertinent question -- whether there was an agreement that any structure would "retain[] its character as personal property," *Duquenois v. Dorgan*, 341 Mass. 28, 29-30, 166 N.E.2d 741 (1960) -- the judge found no express or implied agreement concerning "what would happen to the structure at the end of the lease should it not [be] easily removed from the land, or, in other words, if the structure was affixed to the land. ... On this issue, there was no meeting of the minds between the Town and the residents." We discern no error in that finding.

The voluminous record is devoid of any express agreement that the Wendell Trust or Touher would own any structures they affixed to the town's land. The plaintiffs point to language repeated in several of their leases to the effect that the town had the option to terminate the lease "in the event that a dwelling house on the said lot during [*11] the term of this lease is substantially destroyed by fire or other unavoidable cause or is removed, [if] a dwelling house is not

erected within one year after ... substantial destruction or removal" (emphasis supplied). This language, which essentially makes the removal of a dwelling house a breach of the lease, hardly gives the lessees permission to remove their houses, let alone addresses the status of the houses if they become fixtures.⁹

9 By contrast, when Touher sought financing to build the original cottage, he granted a security interest in the cottage to the lender. The security agreement -- to which the town was not a party -- recited that "by terms of a lease between the borrowers and the Town of Essex, ... the cottage building is to remain personal property and not to become a part of the real estate." This was not an accurate recital of any term of the lease, but it demonstrates both the importance of an express agreement (at least to the lender), and how to draft one.

Nor does the record evidence carry the plaintiffs' burden to demonstrate an implied agreement between the town and the Wendell Trust or Touher that their homes should remain personal property if affixed to the [*12] land. "There are dicta in several cases in this Commonwealth that an agreement for the right of removal, or that the buildings shall remain as personal property of him who erects them, may be implied from the fact that they were erected by permission from the owner of the land." *Meeker v. Oszust*, 307 Mass. at 369. While the town did require formal approval of all the residents' building plans, and did in fact approve the Wendell Trust's renovations and Touher's original construction plans and improvements, this evidence could be taken to mean that the town believed that it would ultimately become the owner of any structures that were affixed to town land. In any event, we need not decide whether an agreement that the plaintiffs would own any affixed structures can be implied from the town's approval of the plaintiffs' construction or renovation plans. The trial judge found there was no such agreement. As we discern no error of law or fact, the trial judge's findings must stand. See *id.* at 372; *Cavazza v.*

Cavazza, 317 Mass. 200, 202, 57 N.E.2d 558 (1944).

2. *Fixtures*. In the absence of an agreement to prevent the application of the general rule, the question remains whether the Wendell Trust and the Touher places are fixtures or personal property. If "chattel has been so affixed that [*13] its identity is lost, or so annexed that it cannot be removed without material injury to the real estate or to itself," *Stone v. Livingston*, 222 Mass. 192, 194-195, 110 N.E. 297 (1915), then its character as part of the realty "may be established as a matter of law," *Bay State York Co. v. Marvix, Inc.*, 331 Mass. at 411. Conversely, "articles which are manifestly furniture as distinguished from improvements" are personal property. *Stone v. Livingston*, *supra* at 195. See *Consiglio v. Carey*, 12 Mass. App. Ct. at 139 (removal of chattel permitted where removal "causes no material injury to the estate, and where the thing can be removed without losing its essential character or value as a personal chattel").

In the middle lie those cases in which the "intention [of the party who attached the property] is the controlling fact and where such fact is to be determined upon consideration of all the circumstances, including therein the adaptation to the end sought to be accomplished and the means, form and degree of annexation." *Stone v. Livingston*, *supra*. "It is not [the affixing party's] undisclosed purpose which controls, but his intent as objectively manifested by his acts and implied from what is external and visible." *Bay State York Co. v. Marvix, Inc.*, *supra*.¹⁰

10 Thus, looms in a textile mill, each weighing more than one ton, and fastened to the floor by screws to keep [*14] them from "wabbling" [*sic*] and moving around, were chattel and not fixtures, as "the machines were not especially designed for use upon the premises, were not peculiar in their pattern, were easily removable without injury to themselves or to the structure in which they were placed, [and] were equally adapted for

use in any other worsted mill." *Stone v. Livingston*, *supra* at 193, 195. By contrast, a building "of large dimensions, so constructed that it could not be removed from the premises without a change in its structure at great cost; ... built on stone foundations, partly natural and partly artificial, to which it was fastened by iron bolts; [with] a brick furnace and chimney, also resting on a base set in the ground," was a fixture. *Talbot v. Whipple*, 96 Mass. 177, 14 Allen 177, 181 (1867).

The trial judge found that "Touher's expanded home is indeed affixed to the land." It is built on concrete walls, with a large fireplace and a concrete patio, all of which are attached to the bedrock. Touher himself testified that the house was "not built to be moved." The judge found that "[t]he original portion of the Touher home cannot be separated from the new addition without very substantial damage to the home," and that "the remaining concrete foundation and patio could not easily [*15] be removed."

With respect to the Wendell Trust home, the judge observed, "It would be difficult to conceive of anyone building such a substantial three story structure with the intent to later move it." It is affixed to the land "by a series of brick pilings and with a small brick basement which goes into the land and apparently rests upon bedrock," and is attached to two water cisterns. The cisterns would have to be removed, and the brick cellar, dug into the ground, would remain if the structure were moved.

The judge accepted the plaintiffs' expert's testimony that either of these structures could hypothetically be moved, and that it would be possible to repair the significant damage that would be done to the property, although the judge noted that such a process would likely damage the structures as well. We disagree with the plaintiffs' contention that the evidence supports only the conclusion that "both can be moved without material damage to the land or the homes." The judge properly considered all the relevant factors, and his ultimate conclusion that the structures are affixed to the land is neither wrong as a

matter of law nor clearly erroneous as a matter of fact. "It is difficult [*16] to see in what manner a building could be more effectually annexed to the realty than the [two] in controversy." *Talbot v. Whipple*, 96 Mass. 177, 14 Allen 177, 181 (1867).

3. *Unjust enrichment*. Finally, the Wendell Trust and Touher argue that the trial judge erred in rejecting their claims that they are entitled to recover the value of their homes under a theory of unjust enrichment. While we, like the trial judge, have "some sympathy with that argument," the judge did not err. He correctly distinguished the plaintiffs' claim from the circumstances of *Ward v. Perna*, 69 Mass. App. Ct. at 538-540, where the tenants made improvements to their cottage, affixing it to the land, as a result of a misrepresentation that they would be given the opportunity to buy the underlying land.

The town asserts that "[o]ne cannot, merely by erecting a house on the land of another, compel him to pay for it, even if the land is benefited by the erection of the structure." *Salamon v. Terra*, 394 Mass. 857, 860, 477 N.E.2d 1029 (1985), quoting from *O'Conner v. Hurley*, 147 Mass. 145, 148, 16 N.E. 764 (1888). This principle does not apply in full force here, as the plaintiffs' homes were built under agreements with the

town. "[W]hen one has come into possession by license or contract, the relative rights and obligations of the parties may be adjusted, and in legal contemplation are taken to be adjusted and regulated by the terms of the [*17] contract." *Mason v. Richards*, 32 Mass. 141, 15 Pick. 141, 143 (1833).

Here, Touher built and the Wendell Trust bought their homes with eyes wide open, and in the light of the well-established rule that the erection of a building on the land of another makes it a part of the realty. They enjoyed the use of the land and the dwellings for many years; indeed, they continue to do so today. While a claim of unjust enrichment may not require fraud or misrepresentation, in the circumstance of this case, it cannot be said that the town's retention of the structures is "against the fundamental principles of justice or equity and good conscience." *Ward v. Perna*, *supra* at 540 n.11, quoting from *Santagate v. Tower*, 64 Mass. App. Ct. 324, 329, 833 N.E.2d 171 (2005).

Judgment affirmed.

Orders denying motions to alter or amend judgment, or for a new trial or amendment of judgment, affirmed.

**TOWN OF ATHOL vs.
PROFESSIONAL FIREFIGHTERS OF ATHOL, LOCAL 1751, I.A.F.F.**

SJC-11640

SUPREME JUDICIAL COURT OF MASSACHUSETTS

470 Mass. 1001; 18 N.E.3d 322; 2014 Mass. LEXIS 837

October 23, 2014, Decided

PRIOR HISTORY: *Town of Athol v. Prof'l Firefighters, Local 1751*, 84 Mass. App. Ct. 1119, 2013 Mass. App. Unpub. LEXIS 1082, 997 N.E.2d 1220 (2013)

HEADNOTES *Fire Fighter*, Municipality's liability. *Labor*, Fire fighters, Health benefit

plan, Arbitration, Collective bargaining. *Municipal Corporations*, Fire department, Insurance, Collective bargaining. *Public Employment*, Collective bargaining. *Contract*, Collective bargaining contract.

COUNSEL: [***1] *Ian O. Russell* for the defendant.

Albert R. Mason for the plaintiff.

OPINION

[**322] This appeal arises from an action in the Superior Court challenging an arbitrator's determination that the town of Athol (town) violated its collective bargaining agreement (CBA) with the Professional Firefighters of Athol, Local 1751, I.A.F.F. (union) by unilaterally increasing copayment amounts that union members pay for medical services under their health insurance plans. The judge confirmed the portion of the arbitration award compelling the parties to bargain collectively over changes to copayment rates, but vacated two remedial aspects of the award. The Appeals Court affirmed.¹ See *Athol v. Professional Firefighters of Athol, Local 1751, I.A.F.F.*, 84 Mass. App. Ct. 1119, 997 N.E.2d 1220 (2013). We granted the [**323] union's application for further appellate review to address the question whether the Superior Court judge erred in vacating any portion of the award. We reverse in part and remand for the entry of a judgment confirming the award in its entirety.

1 The town did not appeal or cross-appeal from the judgment of the Superior Court. Accordingly, the Appeals Court declined to revisit issues concerning collective bargaining over changes to copayment rates. See *Fortin v. Ox-Bow Marina, Inc.*, 408 Mass. 310, 323, 557 N.E.2d 1157 (1990). We denied the [***2] town's application for further appellate review and, like the Appeals Court, decline to revisit those issues. *Matter of Saab*, 406 Mass. 315, 329 n.15, 547 N.E.2d 919 (1989). See *Boston Edison Co. v. Boston Redev. Auth.*, 374 Mass. 37, 43 n.5, 371 N.E.2d 728 (1977) ("Although a party may defend a judgment on any ground asserted in the trial court, failure to take a cross appeal precludes a party from obtaining a judgment more favorable to it than the judgment entered below").

Background. After the town unilaterally increased copayment amounts for medical services, the union filed a grievance under the parties' CBA. It alleged that health insurance benefits are mandatory subjects of collective bargaining, and that any changes must be brought to successor contract bargaining. An arbitrator concluded that such changes are a mandatory subject of collective bargaining and that the town violated the CBA by making the changes unilaterally. As a remedy, the arbitration award required the town, among other things, to restore the cost and structure of copayments to the status quo ante and to make union members whole for economic losses resulting from the change in copayment rates. The town filed a complaint in the Superior Court [***3] seeking to vacate the award and for other relief.

Discussion. Except in the narrow circumstances described in *G. L. c. 150C, § 11*, a judge may not vacate an arbitrator's award. *Bureau of Special Investi- [*1002] gations v. Coalition of Pub. Safety*, 430 Mass. 601, 603, 722 N.E.2d 441 (2000). In this case, the focus of judicial review was on "whether the arbitrator ... awarded relief in excess of [her] authority." *School Comm. of Waltham v. Waltham Educators Ass'n*, 398 Mass. 703, 705-706, 500 N.E.2d 1312 (1986). See *G. L. c. 150C, § 11 (a) (3)*. As the party challenging the arbitration award, it was incumbent on the town to demonstrate both a factual and a legal basis for its claim that the award was in excess of the arbitrator's authority. See, e.g., *Fazio v. Employers' Liab. Assur. Corp.*, 347 Mass. 254, 257, 197 N.E.2d 598 (1964).

The town alleged that the arbitrator exceeded her authority by directing successor contract collective bargaining. The Superior Court judge rejected that claim but concluded that the arbitrator exceeded her authority in two other respects -- by ordering restoration of prior rates of contribution, and by requiring restitution -- because compliance with those portions of the award would require the town to violate uniformity [***4] provisions of *G. L. c. 32B, § 7A* (requiring uniformity of contribution rates for indemnity health care

plans among employees of a governmental unit). There is no dispute, however, that *G. L. c. 32B*, § 7A, applies only to plans of indemnity health insurance. *General Laws c. 32B*, § 16, applies to health maintenance organization (HMO) plans. See *Yeretsky v. Attleboro*, 424 Mass. 315, 317, 676 N.E.2d 1118 (1997). The parties point to no finding that the plans at issue in this case -- identified as Blue Cross Blue Choice and HMO Blue -- were indemnity plans. The issue apparently was not raised before the arbitrator. Absent a finding that the plans were indemnity plans, there was no basis for the Superior Court judge's conclusion that reinstating prior rates of contribution, or making restitution to the union for economic losses, required the town to do an act prohibited by that statute. It was therefore error to vacate those provisions of the award on that basis.

[**324] Although the town argues that it was not required to engage in successor contract collective bargaining concerning changes to copayment rates, the arbitrator found otherwise, and the Superior Court judge did not find that she exceeded her authority [***5] in that respect. The town did not appeal. We therefore need not, and do not, address that contention, and express no opinion as to the substantive merits of the arbitrator's decision in that regard. See note 1, *supra*.

Conclusion. The portions of the arbitration award ordering a return to the status quo ante and requiring restitution should have been confirmed. We vacate so much of the Superior Court judgment that allowed in part the town's motion for summary judgment, and remand for the entry of a judgment confirming the arbitration award in its entirety. *So ordered.*

TOWN OF BROOKLINE v. LEONARD GOLDER.

14-P-397

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 1121; 30 N.E.3d 135
2015 Mass. App. Unpub. LEXIS 430

May 15, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*

ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

DISPOSITION: Judgment affirmed.

JUDGES: Kantrowitz, Trainor & Fecteau, JJ.
[*1]

OPINION

*MEMORANDUM AND ORDER PURSUANT
TO RULE 1:28*

Leonard Golder appeals from a final judgment of the Land Court foreclosing the right of redemption to the subject property after the town of Brookline (Brookline) conducted a tax taking pursuant to *G. L. c. 60, § 53*, in 2007. Golder now claims that the property was foreclosed without due process of law and that the Land Court should have ordered Brookline to accept a payment plan. We affirm.¹

1 Brookline points out, and they are correct, that Golder's two arguments on appeal were not raised below and are therefore waived. See *Carey v. New England Organ Bank*, 446 Mass. 270, 285, 843 N.E.2d 1070 (2006). We will, however, address briefly the arguments since the outcome remains the same.

Golder claims that a taking pursuant to *G. L. c. 60, § 37*, is invalid if it is based on errors in notice that are "substantial" or "misleading." Golder argues that notice was mailed to him at 60 Old Bolton Road. His actual address is 67 Old Bolton Road and he claims that he did not receive the notice. Golder cites to § 37 which deals with tax takings but the lack of notice he complains of pertained to the filing of the petition to foreclose which is controlled by *section 75*. Notwithstanding this fact, there is nothing [*2] in the record that would indicate that Golder had been prejudiced by this error or that he lacked adequate notice of either the tax taking in 2007 or the complaint to foreclose in 2011. Actually the notice he complains about was not required to be sent

to him at all. *General Laws c. 60, § 75*, as amended, St. 1973, c. 575, § 2, provides only that "Notice of filing the petition shall be recorded in the registry of deeds. . . ." Brookline recorded its notice of filing the petition to foreclose in the Norfolk County Registry of Deeds on March 7, 2012. There was no further requirement that this notice be mailed to anyone. Golder did receive adequate notice of the tax taking as well as the foreclosure, and he actively participated in the foreclosure proceedings in the Land Court. There was no violation of due process requirements.

Finally, Golder argues that the Land Court should have required Brookline to accept his payment plan to redeem the property based on *G. L. c. 60, § 62A*. Actually, *G. L. c. 60, § 65*, provides that the petition for the foreclosure of all rights of redemption cannot be filed until six months from the sale or taking. *General Laws c. 60, § 62*, provides that the town "may extend the time during which proceedings for the foreclosure of all rights of redemption [*3] may not be instituted, for a period not exceeding 2 years beyond the time period provided by *section 65*." (Emphasis added) In addition, the payment plan proposed by Golden would not have paid the amount owed within the two year time frame. There was no obligation on the part of the Land Court to order that Brookline accept the payment plan.

Judgment affirmed.

By the Court (Kantrowitz, Trainor & Fecteau, JJ.²),

2 The panelists are listed in order of seniority.

Entered: May 15, 2015.

DONNA VITALI vs. REIT MANAGEMENT & RESEARCH, LLC.

No. 14-P-1304.

APPEALS COURT OF MASSACHUSETTS

May 8, 2015, Argued
August 21, 2015, Decided

PRIOR HISTORY: [**1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on February 13, 2012.

The case was heard by *Mitchell H. Kaplan*, J., on a motion for summary judgment.

Vitali v. Reit Mgmt. & Research, LLC, 2014 Mass. Super. LEXIS 98 (Mass. Super. Ct., 2014)

DISPOSITION: Judgment reversed.

HEADNOTES

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Labor, Overtime compensation, Wages.
Practice, Civil, Summary judgment.

In a civil action arising from the plaintiff employee's claim that she accrued overtime that was not credited by the defendant employer's timekeeping system, the allowance of summary judgment in favor of the employer was erroneous, where the summary judgment record permitted findings that the employer was armed with at least constructive knowledge that employees were undertaking lunch time work that should have been credited toward overtime and assumed in its own favor that employees were not performing any such work except where they separately reported it through a process the plaintiff was never trained in or even told to use.

COUNSEL: *Stephen S. Churchill* for the plaintiff.

Jennifer B. Furey (*Paul F. Beckwith* with her) for the defendant.

JUDGES: Present: GREEN, MILKEY, & MALDONADO, JJ.

OPINION BY: MILKEY

OPINION

MILKEY, J. The plaintiff, Donna Vitali, worked as a bookkeeper for the defendant, Reit Management & Research, LLC (company), a property management firm. She was paid by the hour, and pursuant to both statute and company policy, she was to be paid overtime at one and one-half times the regular rate for any work done in excess of forty hours in a given week. See *G. L. c. 151, § 1A*. She brought the current action alleging that she accrued overtime that was not credited by the system the company had in place to keep track of employee hours. In a detailed and thoughtful decision, a Superior Court judge allowed the company's motion for summary judgment. Because we conclude that there are material facts in dispute, we reverse.

Standard of review. Our review of the allowance of a motion for summary judgment is de novo. *Deutsche Bank Natl. Trust Co. [*100] v. Fitchburg Capital, LLC*, 471 Mass. 248, 252-253, 28 N.E.3d 416 (2015). Disputed facts are to be read in the light [**2] most favorable to the nonmoving party, in this case, Vitali. *Id.* at 250. "The moving party must affirmatively show that there is no real issue of fact, all doubts being resolved against the party moving for summary judgment." *Shawmut Worcester County Bank, N.A. v. Miller*, 398 Mass. 273, 281, 496 N.E.2d 625 (1986) (quotation omitted). Evidence in the record is considered together with all reasonable inferences to be drawn from the record. *Godfrey v. Globe Newspaper Co.*, 457 Mass. 113, 119, 928 N.E.2d 327 (2010).

Background. 1. The nature of the dispute. Vitali was scheduled to work from nine to five, five days per week, with a paid one-hour lunch break. Both sides agree that lunch breaks do not count toward overtime. They also agree that if an employee has to work during what otherwise would be a lunch break, the employee gets no extra pay for doing so (since she or he is already being paid for that time). However, such worked lunch time can be counted toward the forty-hour overtime threshold, thus potentially indirectly increasing the employee's over-all compensation. Vitali claims that she regularly worked during her lunch breaks even though that time was not recorded in the particular timekeeping system that the company used during the relevant period. She brought this action pursuant to *G. L. c. 151, § 1A*, purportedly as a class action, seeking the extra compensation that [**3] would be due if she and others similarly situated were credited for such lunch time work.¹

1 The complaint also alleged contract and quantum meruit claims, but Vitali -- who was an at-will employee -- abandoned such claims before the summary judgment motion was resolved.

2. The company's timekeeping system. On February 15, 2010, the company implemented a new electronic timekeeping system.² Under this system, which was known as Kronos, hourly employees were required to use their computer terminals to "punch in" when they first arrived on a given day, and to "punch out" when they left. At the center of this case is how the company, relying on Kronos, accounted for employee lunch breaks. As the company acknowledged, when Kronos was first implemented, it did not have the "functionality" to allow employees to punch out for lunch and to punch back in when they returned. The absence of [*101] that feature created a potential discrepancy between the hours that an employee "clocked" using Kronos and the time they actually worked. Thus, for example, if Vitali confined her work to the scheduled nine-to-five work day and took her allotted one-hour paid lunch breaks,

she would clock forty hours even though she actually [**4] worked only thirty-five hours. As a result, if Vitali performed work outside of the ordinary nine-to-five work day, the time automatically would be captured as clocked hours, but any time she spent working during lunch would not similarly be reflected. Thus, regardless of whether Vitali worked through all (or part) of lunch or took her full allotted lunch break, her hours clocked in Kronos would be the same.

2 Prior to that date, the company used a paper-based system. Vitali initially asserted that she was shortchanged overtime under that system as well, but she has since abandoned such claims because of the applicable statute of limitations.

3. The company's practice in calculating overtime. In light of the discrepancy between hours worked and hours clocked, the company adopted a practice of paying overtime to hourly employees only once they clocked forty-five hours for a given week unless the employees separately reported having to work in lieu of lunch. In other words, except to the extent that hourly employees separately recorded their lunch time work, the company assumed that they took their full one-hour lunch breaks. According to Melissa Juppe, the company's payroll supervisor, the [**5] proper protocol for recording lunch time work in Kronos was for employees to access a "drop down" menu on their computer screen through which they could then input the time code "worked hours" for the relevant amount of time.³ In Juppe's own words, employees "would have to log in and then once they're on their timecard, they go to the day they didn't take their lunch, they insert a row and the pay code column they'd do the drop down and there's a code that says working hours, and they would record the time that they worked during their lunch." The extent to which employees were informed of this procedure and instructed that they should use it is reserved for later discussion.

3 The time code for "worked hours" (also referenced in the record as "hours worked") was distinct from the one for "regular work hours."

4. *Vitali's alleged lunch time work.* The exigencies of the company's property management responsibilities sometimes required employees to work beyond their scheduled hours. For those in Vitali's position, the events that required extended work included mass lease terminations, "[m]onthly closes, quarter closes, conference calls for bad debt, [and] audits." As noted, when hourly employees were [**6] required to work outside of the scheduled nine- [*102] to-five work day, Kronos automatically recorded such hours. In those weeks in which Kronos recorded Vitali as having clocked more than forty-five hours, she was paid overtime. For example, during the week of February 28, 2011, Kronos recorded that Vitali clocked 49.75 hours, and she was paid for four and three-quarters hours of overtime.

According to Vitali, her work responsibilities also required her to work during her lunch breaks on average three to four times per week. The employees in her unit did not have specifically scheduled lunch breaks; instead, people took them "when they could." Vitali "always" brought her lunch and "typically" ate it at her desk in her cubicle. While she was taking such breaks, people would bring her assignments that required prompt attention. Vitali provided numerous examples of specific individuals who would bring such assignments and the kinds of tasks that required her to do work during lunch. For example, she identified Carrie Noyes as someone who "would come to [her] with bank reconciliation items that she needed resolved right away for [the company's comptroller and another high ranking manager]." Vitali [**7] also stated that she regularly observed others working during their lunch breaks, and she specifically identified such individuals.

It is uncontested that Vitali never successfully used the Kronos drop down menu protocol to record the lunch time work she claims to have performed,⁴ and that she

did not receive credit for any such work toward the accrual of overtime. Had she been credited for the work, she would have received some additional overtime compensation (in those weeks in which her total worked hours exceeded forty).⁵

4 According to her deposition testimony, Vitali did try to use this protocol on one occasion and was unable to do so. It is not clear exactly when this is alleged to have occurred.

5 Thus, for example, if Vitali were credited for doing a total of two hours of lunch time work in the week that she clocked 49.75 hours in Kronos, she would have been entitled to six and three-quarters hours of overtime (since her clocked time would have included only three hours of lunch breaks, not the five that the company assumed).

5. *The judge's ruling.* The judge concluded that with respect to Vitali's uncorroborated claims to having worked regularly during lunch, "her deposition testimony [**8] to this effect is sufficient to create a jury question on [this issue]." However, he went on to rule in the company's favor on other grounds. Specifically, he [*103] concluded that Vitali had failed to produce evidence upon which reasonable jurors could conclude that the company knew or should have known that Vitali had engaged in uncredited overtime. In this regard, the judge deemed it critical that Vitali had failed to report her lunch time work in accordance with available procedures, even in the face of the company's general policy against paying overtime except where employees had obtained prior approval. The judge also found it significant that -- in contrast to some of the cases that Vitali had cited -- there was no evidence here that the company had pressured Vitali not to report the hours for which she was seeking credit.

Discussion. The payment of overtime is governed by *G. L. c. 151, § 1A*. That statute "was 'intended to be essentially identical' to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 207(a)(1) (2000)." *Mullally v. Waste Mgmt. of Mass., Inc.*, 452 Mass. 526,

531, 895 N.E.2d 1277 (2008), quoting from *Swift v. AutoZone, Inc.*, 441 Mass. 443, 447, 806 N.E.2d 95 (2004). Accordingly, in interpreting the State law, we look to how the FLSA has been construed. See *ibid*. The case law has interpreted the FLSA in a manner that is highly protective of employee [**9] rights. As the United States Court of Appeals for the Second Circuit recently observed, "[i]n service of the [FLSA's] remedial and humanitarian goals, the [United States] Supreme Court consistently has interpreted the [FLSA] liberally and afforded its protections exceptionally broad coverage." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008).

Pursuant to the FLSA, an employee must prove both that he incurred unpaid overtime work, and that the employer "had actual or constructive knowledge that he was working overtime." *Prime Communications, Inc. v. Sylvester*, 34 Mass. App. 708, 709, 615 N.E.2d 600 (1993).⁶ The knowledge inquiry requires an assessment of what the employer knew or should have known, and is to be made in view of the employer's "duty ... to inquire into the conditions prevailing in his business." *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969) (quotation omitted). In other words:

"In reviewing the extent of an employer's awareness, a court [*104] 'need only inquire whether the circumstances ... were such that the employer either had knowledge [of overtime hours being worked] or else had the opportunity through reasonable diligence to acquire knowledge.'"

Reich v. Department of Conservation & Natural Resources, 28 F.3d 1076, 1082 (11th Cir. 1994), quoting from *Gulf King Shrimp Co. v. Wirtz*, *supra*.

⁶ The cases have consistently so held. Nevertheless, Vitali argues that under *G. L. c. 151, § 1A*, an employer should be liable regardless of whether it knew or should have known of [**10] the overtime. In the

alternative, Vitali argues that the employer should have to bear the burden of proof regarding its lack of knowledge. Putting aside that these arguments were not raised in the trial court (and therefore have been waived), Vitali has provided no reason why *G. L. c. 151, § 1A*, should be interpreted at odds with the "essentially identical" FLSA.

To the extent that an employee has reported his hours in accordance with the employer's mandated timekeeping procedures, the employer's knowledge of those hours is not in doubt. Thus, the cases concerning an employer's knowledge all involve employee claims for unreported hours. In such cases, any failure by the employee to use prescribed timekeeping procedures is obviously a point in the employer's favor. However, that failure is not fatal to the employee's claim if he or she is able to marshal other proof that the employer had actual or constructive knowledge of the unpaid overtime. See, e.g., *Holzappel v. Newburgh*, 145 F.3d 516, 524 (2d Cir. 1998) ("[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours"). Thus, even where the employer has expressly prohibited overtime work, if it had reason [**11] to believe that such work was being done, "the employer cannot sit back and accept the benefits without compensating for them." *Reich, supra* at 1082, quoting from 29 C.F.R. § 785.13.⁷ Conversely, if the employee is unable to marshal proof that the employer knew or should have known of the overtime work, the employee cannot prevail. See *Prime Communications, Inc., supra* at 711, quoting from *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (no FLSA liability "where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work").

⁷ As the judge recognized, some cases that have found sufficient evidence of employer

knowledge of unpaid overtime (in the face of timekeeping records to the contrary) rest in part on evidence that the employer pressured employees to underreport their time. See, e.g., *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363-364 (2d Cir. 2011) (employees told not to record their overtime). However, none of these cases holds or even suggests that such bad faith conduct is a prerequisite.

We are mindful that, in reviewing the summary judgment record, we must consider not only any direct evidence of the em- [*105] ployer's knowledge (actual or constructive), but also "all reasonable inferences" [**12] to be drawn from the evidence. *Godfrey v. Globe Newspaper Co.*, 457 Mass. at 119. Indeed, an employer's knowledge, like other "state of mind" inquiries, "is elusive and rarely is established by other than circumstantial evidence." *Blare v. Husky Injection Molding Sys. Boston*, 419 Mass. 437, 439, 646 N.E.2d 111 (1995). Questions such as knowledge and intent often "require[] the jury to weigh the credibility of conflicting explanations." *Id.* at 440. Thus, the determination of what a person knows or should have known under a specific factual situation is typically ill-suited for resolution by summary judgment. *Riley v. Presnell*, 409 Mass. 239, 247-248, 565 N.E.2d 780 (1991).

Turning to the application of these principles here, we first examine whether the record creates a factual dispute regarding whether the company knew or should have known that Vitali did not take her full lunch breaks. We then turn to whether there was sufficient evidence in the summary judgment record that the company knew or should have known that Vitali was not receiving credit for such time.

There was ample evidence upon which jurors could conclude that the company generally was aware that many of its employees sometimes worked during their allotted lunch breaks. For example, as discussed further below, when Kronos was first rolled out, the company's payroll department received multiple employee inquiries about how [**13] to record lunch

time work.⁸ One of the company's own affiants even stated that during the relevant period, she "typically worked through lunch" as a matter of mere personal preference. Indeed, the practice of employees working through lunch apparently became so pervasive that the company on several occasions had to remind employees that they were supposed to take at least a one-half hour lunch break.⁹ Other than those periodic reminders, there is no evidence that the company sought to limit its employees from working during their lunch [*106] breaks. This is hardly surprising given that work done during a lunch break costs the company no extra direct compensation (since the employees were already being paid for that time).¹⁰

8 Eventually, Kronos was upgraded so that employees could -- and were required to -- log out for lunch and log back in when they returned (thus allowing more accurate reporting of the length of the lunch breaks that employees took). The records generated after this upgrade showed a widespread practice of employees not taking their full lunch breaks. Although the Kronos system upgrade took place after Vitali had left the company's employ, there was deposition testimony that employee [**14] lunch patterns were the same both before and after the upgrade.

9 Pursuant to *G. L. c. 149, § 100*, employers are required to provide employees who work at least six-hour shifts a one-half hour lunch break.

10 In pointing out that the company did not have an incentive to discourage lunch time work, we do not mean to suggest that the company therefore was acting in bad faith.

In addition, there was evidence from which reasonable jurors could conclude that the company knew, or had reason to know, that Vitali in particular did not take her full one-hour lunch breaks. Unlike the typical overtime case where the extra work the employee claims to have performed was done off site, the alleged work here was done at her cubicle desk in an office setting.¹¹ It is uncontested that Vitali typically took lunch breaks at her desk, and the company concedes "that, at times, Ms. Vitali received various

work-related assignments throughout her day" from her supervisor.¹² The company has not actually challenged Vitali's specific averments as to the pressing nature of the assignments that she claims prevented her from taking her full lunches.¹³ Especially given that the state of an employer's knowledge is to [*107] be assessed in light of its [**15] duty to inquire into the attendant working conditions, there was ample evidence on which jurors reasonably could have concluded that the company at least had reason to know that Vitali sometimes performed work during her lunch breaks. There was also evidence, discussed *infra*, that the company had actual knowledge of at least one occasion on which Vitali worked through her lunch break.¹⁴

11 In the off-site context, a supervisor may well have little basis for knowing how many hours an employee has worked except to the extent the employee reports them. This tends to put a premium -- for both employer and employee -- on employee compliance with whatever reporting systems are in place. Nonetheless, an employee's failure to report off-site overtime, even while attesting to the accuracy of his time records, is not fatal if the employee can produce evidence that the employer knew or should have known of the overtime. *Reich*, 28 F.3d at 1084. See 29 C.F.R. § 785.12 (making explicit that employer that knows or has reason to know of work performed away from job site must compensate for that time).

12 We note that the Federal regulations issued pursuant to the FLSA address when nominal meal breaks are sufficiently interrupted by work demands to [**16] be considered compensable work time. See 29 C.F.R. § 785.19; *Beasley v. Hillcrest Med. Center*, 78 Fed. Appx. 67, 69 (10th Cir. 2003) (analysis under 29 C.F.R. § 785.19 focuses on "whether the degree of interruption caused [the employees] to spend their meal periods primarily for [the employer's] benefit"). Neither party has addressed the potential relevance of the FLSA regulations to this case, and we do not rely on them.

13 The company accurately points out that Vitali did not produce evidence to "demonstrate[] that a supervisor or other individual ever specifically asked Ms. Vitali

to perform such work during her lunch break." However, such proof is unnecessary, since "an employer can be charged with constructive knowledge even when an employee has not alleged a supervisor's direct knowledge." *Allen v. Board of Pub. Educ.*, 495 F.3d 1306, 1321 (11th Cir. 2007). If the company knew or had reason to know that Vitali was performing the assigned tasks during her lunch breaks, whether anyone specifically directed her to do the work at that time is beside the point.

14 A month into the rollout of Kronos, Vitali informed the payroll department that she was unable to take lunch on a particular day (thus providing the company with direct knowledge that she had performed lunch time work that was not recorded in Kronos). Although Vitali stated that this was the only day [**17] that week in which she worked through lunch, she never represented to the company that it was the only time this had ever or would ever occur. In addition, while the company suggests that Vitali admitted that she took her full one-hour lunch breaks by commenting (in response to criticism about her job performance) that "I am working from the time I come in, excluding lunch until the time I leave," reasonable jurors would not be required to attach such import to that comment.

Seeking to avoid the implication that it had reason to know that Vitali was performing work during her lunch breaks, the company highlights that it had a sternly worded policy in place requiring all employees to obtain specific prior approval before working overtime.¹⁵ See *Newton v. Henderson*, 47 F.3d 746, 749-750 (5th Cir. 1995) (employee cannot thwart clearly enforced policy against working overtime). This argument is unavailing for two reasons. First, the company has not shown that its policy requiring prior approval for overtime work had any application to employees performing work during their lunch breaks. Although lunch time work (like any other work done during the scheduled nine-to-five work day) counts toward the forty-hour threshold that needs to be crossed for [**18] overtime to be due, it does not itself constitute overtime. Thus, an hourly employee who

worked through every lunch break would still not be entitled to any overtime unless she performed additional work outside of the normal nine-to-five work day. Notably, in reminding employees of the need to seek prior approval for overtime work, the written instructions that the company provided for using Kronos specifically equated "working overtime" with "coming in early or staying late."¹⁶ The company was free to adopt a policy requiring employees to obtain [*108] prior approval before performing work on their lunch breaks; it simply did not do so.¹⁷

15 That policy edict was plainly stated in the employment manual that all employees received, and it was widely disseminated to employees through other means as well.

16 The company made no showing that Vitali failed to report her work done before nine or after five. To the contrary, it attempts to make use of the fact that she knew how to report the overtime for which she was paid.

17 In fact, the company's information technology (IT) unit instituted a strict policy that required members of its support services team to obtain a supervisor's approval for any work done [**19] during a lunch break. This was set forth in a memorandum that also explained the relationship between working through lunch and the accrual of overtime hours. As the judge recognized, "[t]here is no evidence in the summary judgment record to suggest that Vitali, who did not work in the IT department, actually received or was aware of [this] memorandum."

Second, there was evidence in the summary judgment record that the company's policy of requiring specific prior approval for overtime was honored in the breach. For example, one of the company's own affiants stated that her supervisor had given her "general blanket approval for overtime" when her department was "unusually busy." Where an employer in practice fails to enforce a formal employment policy limiting overtime work, a jury could infer that the employer knew or should have known that employees were engaged in unauthorized overtime notwithstanding the existence of such a policy. See *Reich*, 28 *F.3d* at 1083

(recognizing that employer must do more than "simply continue to apprise [the employees]" of policy against working overtime).

In addition, the company argues that even if it had reason to know that Vitali at times was not taking her full allotted lunch breaks, [**20] it still had no reason to know that she was not reporting this lunch time work. In making this argument, the company asserts that employees were well informed of the way in which hours worked during lunch were to be recorded in Kronos. The company maintains that it was fair and appropriate to assume that Vitali would have reported any lunch time work through the means that the company made available, especially where employees were required to attest to the accuracy of their recorded time. In short, the company contends that because Vitali failed to comply with reasonable reporting procedures, her case fails as a matter of law. See *White v. Baptist Memorial Health Care Corp.*, 699 *F.3d* 869, 876 (6th Cir. 2012) ("Under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process").¹⁸

18 The company acknowledges that there would be a different result if Vitali were able to show that it pressured employees into underreporting their hours (see note 7, *supra*), but it accurately points out that there was no such evidence presented here.

[*109] There are several problems with this argument. To begin with, "[t]he FLSA makes clear that employers, [**21] not employees, bear the ultimate responsibility for ensuring that employee time sheets are an accurate record of all hours worked by employees." *Skelton v. American Intercontinental Univ. Online*, 382 *F. Supp. 2d* 1068, 1071 (N.D. Ill. 2005). Moreover, "an employer's duty under the FLSA to maintain accurate records of its employees' hours is non-delegable." *Kuebel v. Black & Decker Inc.*, 643 *F.3d* 352, 363 (2d Cir. 2011). The

company has not shown, as a matter of law, that it has satisfied its timekeeping responsibilities here. Although the company maintains that it instructed employees to record lunch time work and provided them an accessible and transparent means of doing so, there plainly was evidence on which reasonable jurors could have concluded otherwise. Explaining this requires a close examination of the instructions that employees received when Kronos was implemented.

During the rollout of Kronos, employees were given two sets of written instructions: a five-page manual and an instructional electronic mail message (email) announcing the "Good News" that Kronos was being implemented. These documents provided discordant advice on the lunch break issue. The manual instructed employees to clock out when they began their lunch breaks and to clock back in when they returned, despite the fact that, as noted, the version of Kronos that the [**22] company initially had installed did not have that functionality.¹⁹ Had Kronos included that feature (as it later did following Vitali's departure, see note 8, *supra*), then the time each hourly employee clocked would have been the same as the time they actually worked (and hence there would have been no need for employees separately to record lunch time work or for the company to make assumptions regarding whether such work took place).

19 Confusingly, the instruction manual included a note that stated in pertinent part: "In most regions, lunch breaks are auto deducted whether you clock out or not -- check with your manager for instruction."

The "Good News" email, meanwhile, instructed that hourly employees "do not have to punch in and out for lunch." What is particularly telling, however, is what the email did not say. Nowhere does it state that employees were required to account for any time they worked during their lunch breaks. Nor did the email explain that employees' failure to do so might affect their [*110]

overtime. In fact, the email did not even explain how employees could record their lunch time work in the Kronos system except for a cryptic notation that "[i]f you are to work through a lunch, [**23] please use the 'hours worked' code and add the amount of in time worked in increments of .25 only."

In distributing the instruction manual and email, the company told employees that if they had problems or follow-up questions, they should contact the payroll department for assistance. Although the email raised the possibility of group training sessions being held, there is no evidence in the record that any were provided. Individual employees in fact did follow up with the payroll department to complain that Kronos was "not user friendly." Multiple employees specifically asked about what they should do about recording lunch time work. The company's payroll supervisor stated that she generally responded to these inquiries by trying to instruct the inquiring individual on the appropriate procedure for recording such time, the drop down menu protocol referenced *supra*.²⁰ The payroll supervisor conceded that she did not necessarily provide such instruction to all individuals who inquired about this subject, and she was unable to explain why she did this in some cases but not others.²¹

20 The company produced affidavits from two current employees who stated that they were told how to navigate the [**24] protocol for recording lunch time work and who averred that they were "not aware of any overtime for which [they had] not been properly paid." Of course, the fact that the company successfully may have trained some employees about how to record lunch time work says nothing about the training it provided to Vitali.

21 Juppe's deposition answers suggest that she may have drawn a distinction between time that employees spent working "through" a lunch (as to which she would tell employees they should use the drop down menu protocol) and time that employees spent addressing "quick work assignment[s]" that they were asked to do while taking lunch at their desks

(as to which she responded that she was "not sure" what employees should do to record their time).

In an email exchange, Vitali herself puzzled over what to do about recording time worked during her lunch hour. Specifically, on March 15, 2010, a month after Kronos was implemented, Vitali sent an email inquiry to the payroll department (as instructed). Vitali noted that she was unable to take lunch that day, and she sought advice on how to "mark" that in Kronos. Her email was forwarded to payroll supervisor Juppe, who responded that "[i]f your physically [**25] worked hours for this week [are] over 40 hours we can discuss how the lunch time for today should be recorded." In response, Vitali stated that it was just that one day [*111] hat week that she had to work through lunch, and she requested that Juppe tell her what she needed to do. Juppe responded that "[t]here is nothing you need to do for this as your total hours for the week do not exceed 45."²² This was the last interchange that Vitali and Juppe had on the subject: there is no evidence that Juppe provided Vitali any guidance about how to report time worked during lunch in weeks where it could make a difference, nor that Vitali made any further inquiries about this.

22 Although the judge concluded that Juppe's response "would not have been misleading," he recognized that in fact it "was mathematically inaccurate."

In sum, reasonable jurors could make the following factual findings based on the summary judgment record. When the company moved to Kronos, it did not require that employees record any lunch time work or even explain to them how their not recording that time might affect their over-all compensation. Although the company did provide a method through which employees could record lunch time work, [**26] the written instructions that it provided about

doing so were contradictory, confusing, and incomplete. Moreover, at least by the time its payroll department received the follow-up inquiries from individual employees regarding the use of Kronos, the company at least had reason to know both that many employees were performing work during their lunch breaks and that they were confused as to what to do about recording such time. The company did not provide training to Vitali on how to record lunch time work even when she specifically had sought advice on the issue. Instead, the payroll department advised her that there was nothing that she needed to do at that time, while leaving her in the dark as to what the proper procedure would be where her lunch time work could make a difference.²³ In short, armed with at least constructive knowledge that employees were undertaking lunch time work that should have been credited toward overtime, the company went ahead and assumed in its favor that employees were not performing any such work except where they separately reported it through a process that Vitali was never trained in, or even told to use. Under these circumstances, the judge erred in [**27] concluding that the company was entitled to [*112] judgment as a matter of law.²⁴

23 In recounting the summary judgment record in the light most favorable to Vitali for purposes of the current appeal, we of course do not mean to suggest that the company necessarily knew or should have known that Vitali was due unpaid overtime. That question will be for the jury to decide based on the trial record.

24 Because the judge allowed the company's motion for summary judgment, he had no occasion to consider whether the case properly could be maintained as a class action. We express no view on that issue.

Judgment reversed.

**JOSEPH W. HIGGINBOTTOM, JR., PLAINTIFF, vs. CITY OF BOSTON,
DEFENDANT.**

MISCELLANEOUS CASE NO. 01 MISC 271339 (RBF)

MASSACHUSETTS LAND COURT

2015 Mass. LCR LEXIS 17

February 17, 2015, Decided

JUDGES: [*1] Foster, J.

shall enter vesting title in the three parcels with Higginbottom.

OPINION BY: Foster

Procedural History

OPINION

**MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

The Plaintiff's Complaint for Declaratory Judgment under Chapter 231A was filed on April 23, 2001. On May 1, 2001, the Defendant, City of Boston (City), filed a Motion to Dismiss and the Plaintiff's Application for Preliminary Injunction was argued and taken under advisement. The Order Granting Plaintiff's Motion for Preliminary Injunction was entered on May 4, 2001. The Plaintiff's Amended Complaint was filed on December 7, 2012. The Answer of the Defendant, City of Boston, was filed on January 22, 2013. The Defendant's Motion for Summary Judgment, Memorandum in Support of the City of Boston's Motion for Summary Judgment, Statement of Material Facts in Support of its Motion for Summary Judgment, Affidavit of Counsel, and Appendix were filed on February 28, 2014. The Plaintiff's Opposition to Defendant City of Boston's Motion for Summary Judgment, Memorandum in Support of Opposition to Defendant City of Boston's Motion for Summary Judgment, Response to Defendant City of Boston's Rule 4 Statement of Undisputed Facts and Plaintiff's Additional Material Facts were filed [*3] on March 31, 2014, along with the Plaintiff's Motion for Summary Judgment, Memorandum in Support of his Motion for Summary Judgment, Statement of Material Facts Not in Dispute, Affidavit of Plaintiff's Counsel, and Plaintiff's Record Appendix. The City of

In 1975 and 1976, the City of Boston took three parcels on Thornton Street in Roxbury for nonpayment of taxes. In 1977, Joseph W. Higginbottom, Jr., who lives next door to the parcels, began to adversely possess the three vacant parcels, clearing them, fencing them for a time, gardening on them, hosting neighborhood parties, and parking on them personal vehicles and the trucks and equipment for his business. While the City obtained judgments foreclosing the right to redeem the parcels in 1989 and 1994, it took no action that could be interpreted as interrupting Higginbottom's possession of the three parcels until 1999 at the earliest. Higginbottom and the City have both moved for summary judgment on the issue of whether Higginbottom has established that he holds title to the parcels by adverse possession. Because the undisputed facts establish that Higginbottom openly, notoriously, continuously, actually and adversely used the parcels for twenty years between 1977 and 1999 and, as a matter of law, the tax foreclosures did not interrupt Higginbottom's adverse use, Higginbottom's summary judgment motion is allowed [*2] and the City's motion is denied. Judgment

Boston's Memorandum of Law in Reply to Plaintiff's Opposition and Cross-Motion for Summary Judgment and Motion to Redeem the Thornton Street Parcels and the City of Boston's Response to Plaintiff's Statement of Additional Material Facts were filed on April 18, 2014. The motions for summary judgment were heard on April 29, 2014 and taken under advisement.

Summary Judgment Standard

Summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission...together with the affidavits...show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Mass. R. Civ. P. 56(c)*. In viewing the factual record presented as part of the motion, the court is to draw "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203, 581 N.E.2d 475 (1991). "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving [*4] party, all material facts have been established and the moving party is entitled to judgment as a matter of law.'" *Regis College v. Town of Weston*, 462 Mass. 280, 284, 968 N.E.2d 347 (2012), quoting *Augat Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991). Where the non-moving party bears the burden of proof, the "burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711, 575 N.E.2d 734 (1991); see *Regis Coll.*, 462 Mass. at 291-292.

Facts

The court finds that the following facts are undisputed:

1. The plaintiff, Joseph W. Higginbottom, Jr., is an individual residing

at 140 Thornton Street, Roxbury, Suffolk County, Massachusetts, 02119. Defendant's Appendix, Exhibit 1, p. 9.

2. The defendant, City of Boston (City), is a municipality with a principal place of business at Boston City Hall, Boston, Suffolk County, Massachusetts, 02201.

3. Higginbottom resides at 140 Thornton Street with his wife, Mrs. Margaret Higginbottom, and two of his children. Defendant's Appendix, Exhibit 1, p. 10, 12.

4. Mrs. Higginbottom is the record owner of 140 Thornton St., as evidenced by the Deed executed on September 11, 1991, recorded with the Suffolk County Registry of Deeds on September 24, 1991 at Book 17049, Page 329. Defendant's Appendix, Exhibit 2.

5. 136, 144 and 146 Thornton Street (Thornton Street Parcels) surround [*5] the house at 140 Thornton Street at both sides. Defendant's Appendix, Exhibit 1, p. 14-15.

6. The City acquired a tax lien on 136 Thornton St. by taking 136 Thornton St. for non-payment of real estate taxes, by an Instrument of Taking executed on August 1, 1975, and recorded with the Suffolk County Registry of Deeds (registry) on August 15, 1975 at Book 8811, Page 178. Defendant's Appendix, Exhibit 4.

7. The City acquired a tax lien on 144 Thornton St. by taking 144 Thornton St. for non-payment of real estate taxes, by an Instrument of Taking executed on June 18, 1976, and recorded with the registry on July 16, 1976 at Book 8888, Page 612. Defendant's Appendix, Exhibit 5.

8. The City acquired a tax lien on 146 Thornton St. by taking 146 Thornton St. for non-payment of real estate taxes, by an Instrument of Taking executed on June 18, 1976, and recorded with the registry on July 16, 1976 at Book 8888, Page 611. Defendant's Appendix, Exhibit 6.

9. Without anyone's permission, Higginbottom took possession of the

Thornton Street Parcels in 1977 and began utilizing and maintaining them by cutting high weeds, cleaning the lots of debris and removing burned and abandoned cars.

10. In 1977, Higginbottom [*6] cleared and leveled the Thornton Street Parcels. Plaintiff's Appendix, Exhibit A, p. 28.

11. On a regular basis from 1977 to the present, Higginbottom cut the grass on the Thornton Street Parcels and kept them maintained and cleaned. He also planted a garden with green beans, cherry tomatoes, corn and other vegetables. Plaintiff's Appendix, Exhibit A, p. 25; Exhibit B, p. 5.

12. Using his equipment Higginbottom has regularly removed snow from the Thornton Street Parcels. Plaintiff's Appendix, Exhibit A, p. 26.

13. Every year, Higginbottom and his family have held gatherings on the Thornton Street Parcels that were attended by family, friends and strangers. Defendant's Appendix, Exhibit 1, p. 30.

14. Higginbottom put up a steel chain around each of the Thornton Street Parcels in 1977; the chains were taken down within a ten-year period. Plaintiff's Appendix, Exhibit 1, p. 34-35.

15. Around 1978, Higginbottom took further measures to secure the Thornton Street Parcels. He put up a partial fence on 136 Thornton Street, he added to a partial fence on 144 Thornton Street, and he put up a fence on 146 Thornton Street. He also installed gates at each property. These enclosures were removed by [*7] Higginbottom within a ten year period of 1977. The dates in which these enclosures were added or removed are not clear from the record. Plaintiff's Appendix, Exhibit 1, p. 31-37.

16. Higginbottom owns a business that kept its trucks, machinery and heavy equipment parked on the Thornton Street Parcels from 1977 to 1999. Plaintiff's Appendix, Exhibit 1, p. 39-40, 43.

17. Higginbottom posted signs with his trucking business's name on the fence located at 144 and 146 Thornton St. Plaintiff's Appendix, Exhibit A, p. 45.

18. Higginbottom has parked family cars and personal vehicles on 136, 144 and 146 Thornton St. since 1977. Plaintiff's Appendix, Exhibit A, p. 44, 69.

19. As of December 13, 2013, Higginbottom had continued to park his remaining commercial vehicles on 144 and 146 Thornton Street. Plaintiff's Appendix, Exhibit A, p. 60.

20. Higginbottom contacted the City on several occasions to find out how to pay taxes, beginning within five years of 1977 and ending three or four years prior to the BEST inspection in 1999, discussed below. He contacted the City on several occasions to find out how to acquire the Thornton Street Parcels in the 1970's and 1980's. Plaintiff's Appendix, Exhibit [*8] 1, p. 50-51.

21. On March 3, 1989, the Land Court entered a Judgment in favor of the City of Boston foreclosing all rights of redemption against Roxbury Action Program, Inc., with respect to 144 and 146 Thornton St. Defendant's Appendix, Exhibit 7.

22. On December 1, 1994, the Land Court entered a Judgment in favor of the City of Boston foreclosing all rights of redemption against Roxbury Action Program, Inc., with respect to 136 Thornton St. Defendant's Appendix, Exhibit 8.

23. On November 30, 1999, the City of Boston Environmental Strike Team (BEST) conducted an inspection of the Thornton Street Parcels to determine whether the owner of 140 Thornton St. was operating an unsanitary truck repair facility and construction yard on City property and to order those materials to be removed if they were found. Defendant's Appendix, Exhibit 9, Affidavit of Jack Tracy (Tracy Affidavit) ¶¶ 11, 13.

24. BEST consisted of inspectors from the Police Department, the Fire Department, Inspectional Services Department, Public Health Commission, the Code Enforcement Police, the Environmental Department, and the Boston Water and Sewer Commission. It was responsible for responding to complaints made by the [*9] public regarding those sites in the City of Boston that posed a serious hazard to the public health, safety and environment. Tracy Affidavit ¶¶ 8, 9.

25. BEST entered the Thornton Street Parcels and found them to be in an unclean and unsanitary condition. There were numerous pieces of debris and solid waste material, including junk truck and auto parts and junk construction equipment on the parcels. Tracy Affidavit ¶ 14 and Exhibit A; Defendant's Appendix, Exhibit 10.

26. After the inspection, Senior Health Inspector Jack Tracy drafted a Notice to Abate on behalf of BEST and the Boston Public Health Commission (BPHC), citing the violations of law and the hazardous conditions found in the basement of 140 Thornton Street and on the land surrounding the home, and sent it to the record owner of 140 Thornton Street. Tracy Affidavit ¶ 18 and Exhibit B.

27. Additionally, notices of violations of the state building code, state sanitary code, the state fire code and the state environmental code were presented to the record owner of 140 Thornton Street. Tracy Affidavit ¶ 19 and Exhibit C.

28. The violation notices, including the BPHC Notice to Abate, were addressed to Mrs. Higginbottom because 140 [*10] Thornton Street was the only residential address on record at the site of the November 30, 1999 inspection. Tracy Affidavit ¶ 20.

29. BEST conducted re-inspections of the Thornton Street Parcels in 2000 and 2001. Defendant's Appendix, Exhibit 11.

30. Higginbottom received the BPHC Notice to Abate and the other City violation notices and cleaned the Thornton Street Parcels. Defendant's Appendix, Exhibit 1, p. 52-56.

31. After the 1999 BEST inspection, Higginbottom moved the equipment for his family trucking business off of the parcels, taking it to Smithfield, Rhode Island. Defendant's Appendix, Exhibit 1, p. 40.

32. Higginbottom ceased operations of his family business on the Thornton Street Parcels on the day that BEST concluded its inspection. Defendant's Appendix, Exhibit 1, p. 40.

33. Higginbottom's employees ceased working for the family business after the BEST inspection. Defendant's Appendix, Exhibit 1, p. 43.

34. In the spring of 2012, Higginbottom received a notice from the City's Department of Neighborhood Development ordering him to remove a parked car from the Thornton Street Parcels within three days, on the grounds that it was illegally parked on City property. Plaintiff's [*11] Am. Compl., Exhibit B.

Discussion

The City has moved for summary judgment on Higginbottom's counts of adverse possession and prescriptive easement, claiming that both counts fail as a matter of law, and therefore summary judgment is appropriate. The City argues that Higginbottom cannot meet any of the elements of adverse possession or prescriptive easement. Higginbottom cross-moves for summary judgment in his favor, and argues that he has met his burden of proof with respect to both claims.

"Title by adverse possession can be acquired only by proof of nonpermissive use which is actual, open, notorious, exclusive, and adverse for twenty years." *Ryan v. Stavros*, 348 Mass. 251, 262, 203 N.E.2d 85 (1964). The person claiming title by adverse

possession has the burden of proving each element. *Lawrence v. Town of Concord*, 439 Mass. 416, 421, 788 N.E.2d 546 (2003). The elements for prescriptive easement are the same as those for adverse possession, except that the claimant need not prove exclusive use. *Boothroyd v. Bogartz*, 68 Mass. App. Ct. 40, 44, 859 N.E.2d 876 (2007). Based on the undisputed facts and drawing inferences in the City's favor, Higginbottom is able to meet his burden of proof as to adverse possession. There is, therefore, no need for a discussion of prescriptive easement.

A. The Adverse Possession Period Runs Against a Municipality after a Tax Taking.

The City argues that [*12] Higginbottom cannot prove adverse possession of the Thornton Street Parcels for a consecutive twenty-year period because the foreclosure of a tax title interrupts the period of his adverse use. The tax takings of the Thornton Street Parcels were recorded in 1975 and 1976. Higginbottom began his possession of the parcels in 1977. In 1989, the Land Court entered a decree foreclosing all rights of redemption for 144 and 146 Thornton Street; in 1994, a similar decree was entered for 136 Thornton Street. Relying on *Town of Sandwich v. Quirk*, 409 Mass. 380, 566 N.E.2d 614 (1991), the City argues that these foreclosures reset the adverse possession period for the Thornton Street Parcels. This is a misreading of *Town of Sandwich*. In that case, the SJC held that the "statute of limitations starts to run against a municipality, if it runs at all, when it *takes adversely possessed land for nonpayment of taxes.*" *Id.* at 385 (emphasis added). This is because "prior to the tax taking, a municipality had no right to challenge the trespass." *Id.* A tax foreclosure pursuant to *G.L. c. 60, § 64*, on the other hand, does not interrupt the adverse possession period; rather, it "extinguishes only the interests of any party claiming rights 'through the record owner, such as mortgagees, lienors, [*13] or attaching creditors.'" *Buk Lhu v. Dignoti*,

431 Mass. 292, 296, 727 N.E.2d 73 (2000), quoting *Town of Sandwich*, 409 Mass. at 384; see *Harrison v. Dolan*, 172 Mass. 395, 396, 52 N.E. 513 (1899). "The purpose of absolute title under § 64 is to clear the new title of all encumbrances placed on the property by the prior record owner." *Buk Lhu*, 431 Mass. at 296. An adverse possession claim is not an encumbrance placed on the property by the prior record owner, and a person claiming adverse possession is not, by definition, claiming rights through the record owner but rather is adverse to the record owner. To interrupt an adverse possession period after a taking, the municipality must take some action apart from the foreclosure to possess the property. *Harrison*, 172 Mass. at 396. Following the tax takings, the City had a right to challenge any trespass on those properties. The foreclosures of 1989 and 1994 did not challenge the trespass of Higginbottom, and therefore do not interrupt the adverse possession period.¹

1 The City has not claimed that, after the tax takings or the foreclosures, it held the Thornton Street Parcels for a "public purpose" that would make it immune from Higginbottom's adverse possession claim. *G.L. c. 260, § 31*; see *1148 Davol St. LLC v. Mechanic's Mill One LLC*, 86 Mass. App. Ct. 748, 752-753, 21 N.E.3d 547 (2014).

B. The Undisputed Facts Establish the Elements of Adverse Possession By Higginbottom.

1. Adverse Use

Higginbottom claims that his use of the Thornton Street Parcels was nonpermissive. [*14] The City does not dispute this, and there is no evidence suggesting that the City gave Higginbottom permission to use the properties.

2. Continuous Use

Adverse possession requires adverse use for a period of twenty years. *Ryan v. Stavros*, 348 Mass. 251, 262, 203 N.E.2d 85

(1964). Higginbottom's twenty year period of adverse use began in 1977. Since the tax foreclosures in 1989 and 1994 do not interrupt the adverse possession period, and drawing inferences in the City's favor, the adverse possession period ended no earlier than November 30, 1999 when BEST first entered the parcels. Higginbottom claims that he continued his uses of the Thornton Street Parcels throughout this period; the City does not dispute this. Since Higginbottom's period of adverse use began in 1977 and ended no earlier than 1999, Higginbottom has met his burden of proof to establish twenty continuous years of use.

3. Actual Use

When evaluating actual use, "a judge must examine the nature of the occupancy in relation to the character of the land." *Peck v. Bigelow*, 34 Mass. App. Ct. 551, 556, 613 N.E.2d 134, quoting *Kendall v. Selvaggio*, 413 Mass. 619, 624, 602 N.E.2d 206 (1992). The question is whether Higginbottom made "changes upon the land" that "constituted such a control and dominion over the premises as to be readily considered acts similar to those which are usually and ordinarily associated [*15] with ownership." *LaChance v. First Nat'l Bank & Trust Co.*, 301 Mass. 488, 491, 17 N.E.2d 685 (1938). The court must consider all of the activities that Higginbottom engaged in on the Thornton Street Parcels in order to determine whether they together show control and dominion. *Peck*, 34 Mass. App. Ct. at 557.

In 1977, when he began using the Thornton Street Parcels, Higginbottom cut the high weeds, cleared the parcels of debris, and removed burned and abandoned vehicles. He also cleared and leveled the Thornton Street Parcels. From 1977 to the present, Higginbottom has maintained the Thornton Street Parcels by cutting the grass, removing snow in the winter, and keeping the property clean. He has also kept a vegetable garden. Every year, Higginbottom held family gatherings on holidays and

birthdays on the Thornton Street Parcels. These activities weigh in favor of a finding of adverse possession. See *Collins v. Cabral*, 348 Mass. 797, 206 N.E.2d 84 (1965) (activities of harvesting fruit and rhubarb, clearing the locus of poison ivy and mowing the grass, and holding picnics on the locus were used to support a finding of adverse possession); *Lebel v. Nelson*, 29 Mass. App. Ct. 300, 301-302, 560 N.E.2d 135 (1990) (clearing of the disputed area and the maintenance of a lawn supported adverse possession). While some of these activities are seasonal (removing snow, cutting grass), "seasonal uses may establish adverse possession." [*16] *Id.* at 302, citing *Kershaw v. Zecchini*, 342 Mass. 318, 320-321, 173 N.E.2d 624 (1961).

The strongest indicator of Higginbottom's control and dominion over the Thornton Street Parcels is his use of the parcels as a storage and parking area for his business. From 1977 to 1999, Higginbottom kept vehicles and equipment necessary to the operation of his site-work business, including heavy machinery and trucks, on the Thornton Street Parcels. The use of the Thornton Street Parcels in this manner is of a type usually and ordinarily associated with ownership. See *Masa Builders, Inc. v. Hanson*, 30 Mass. App. Ct. 930, 930, 568 N.E.2d 636 (1991) (that the disputed land was used as a lot to serve Hanson's auto repair business weighed in favor of adverse possession). Higginbottom has also used the Thornton Street Parcels to park commercial and personal vehicles, and from 1977 to 1999, his employees parked on the parcels as well. See *id.* (use of the property by defendant to park vehicles for his automobile repair business supported a finding of adverse possession); *Lebel*, 29 Mass. App. Ct. at 301 (use of the property to store boats and to park vehicles counted in favor of adverse possession). Together, these uses show the requisite control and dominion necessary to prove actual use of the Thornton Street Parcels. *LaChance*, 301 Mass. at 491.

4. Open and Notorious Use

Adverse possession that is open and notorious [*17] places "the true owner 'on notice of the hostile activity of the possession so that he, the owner, may have an opportunity to take steps to vindicate his rights by legal action.'" *Lawrence*, 439 Mass. at 421, quoting *Ottavia v. Savarese*, 338 Mass. 330, 333, 155 N.E.2d 432 (1959). There is no requirement that actual notice be given to the true owner. *Id.* In order for an adverse use to be open, it must "be made without attempted concealment." *Footman v. Bauman*, 333 Mass. 214, 218, 129 N.E.2d 916 (1995). Here, the record is undisputed that Higginbottom's adverse use of the Thornton Street Parcels was open.

Notorious use "must be sufficiently pronounced so as to be made known, directly or indirectly, to the landowner if he or she maintained a reasonable degree of supervision over the property." *Boothroyd*, 68 Mass. App. Ct. at 44. It "is not necessary that the use be actually known to the owner for it to meet the test of being notorious." *Footman*, 333 Mass. at 218. The question is whether Higginbottom's adverse use of the Thornton Street Parcels was sufficiently pronounced so as to be made known by a landowner maintaining a reasonable degree of supervision over the property. The City argues that the Thornton Street Parcels have remained undeveloped since 1977, and therefore Higginbottom's use was not notorious enough to put the City on constructive notice. The City compares the current situation [*18] to that of *Boothroyd*, where the Appeals Court found that the plaintiff's recreational use of trails was not notorious, due to the fact that the property on which the trails traveled through was thickly wooded and covered with dense brush, and had remained unchanged throughout the twenty year period in question. *Boothroyd*, 68 Mass. App. Ct. at 45. The character of the land physically obscured the use to the extent that a landowner maintaining a reasonable degree of supervision of the property would not

have received constructive notice. *Id.* That is not the case here. In 1977, Higginbottom cleared and leveled the property. From 1977 to 1999, Higginbottom kept vehicles and equipment necessary to the operation of his site-work business, including heavy machinery and trucks, on the Thornton Street Parcels. Higginbottom also put company signs on the fences on 144 and 146 Thornton Street. A landowner maintaining a reasonable degree of supervision over the property would have received constructive notice as a result of these uses. Therefore, Higginbottom has met his burden on this element.

5. Exclusive Use

Exclusive use requires the "exclusion not only of [the record] owner but of all third persons to the extent that the owner [*19] would have excluded them." *Peck*, 34 Mass. App. Ct. at 557. There is no evidence that the City made use of the Thornton Street Parcels from 1977 to November 1999. The question is whether Higginbottom excluded third persons from the parcels to the extent that the owner would have excluded them. The first issue to consider is enclosure, since "[a]cts of enclosure...are evidence of adverse possession." *Labounty v. Vickers*, 352 Mass. 337, 349, 225 N.E.2d 333 (1967).

When Higginbottom began his period of adverse use of the Thornton Street Parcels in 1977, he put steel chains around the parcels to secure the area. About a year later, Higginbottom took further measures to secure the Thornton Street Parcels. He put up a partial fence on 136 Thornton Street, he added to a partial fence on 144 Thornton Street, and he put up a fence on 146 Thornton Street. He also installed gates at each property. The dates in which these enclosures were added or removed are not clear from the record, but within ten years of 1977 Higginbottom had removed all barriers to access to the Thornton Street Parcels.

The City argues that Higginbottom cannot show exclusive use throughout the

adverse possession period because the enclosures were taken down about ten years prior to 1997. The question is whether Higginbottom's [*20] adverse use can be deemed exclusive without the enclosures present. The City argues that it cannot, and relies on the fact that "strangers" attended the various gatherings held by Higginbottom on the Thornton Street Parcels. There is no evidence that "strangers" ever utilized the Thornton Street Parcels outside of these gatherings, which were hosted by Higginbottom. See *Bikofsky v. Liverman*, 13 LCR 141, 142 (2005) (that the record owner defendants attended parties hosted by the plaintiffs on the disputed area did not defeat the plaintiffs' claim for adverse possession). Since the defendants in *Bikofsky* were on the disputed area only upon invitation by the plaintiffs, and under the assumption that the plaintiffs owned the disputed area, their attendance at parties was not enough to show that the plaintiffs did not enjoy exclusive use. *Id.* The fact that the defendants never used the property independently of the plaintiff's permission was essential. *Id.* Higginbottom held gatherings at the Thornton Street Parcels each year, and he allowed people in the neighborhood to attend. While Higginbottom might not have invited the "strangers" to the Thornton Street Parcels for his gatherings, they were present with his assent.

Higginbottom's [*21] other uses of the property included the storage of equipment for his business, and the parking of heavy machinery, trucks, commercial vehicles, and personal vehicles. He continued these activities throughout the entire adverse possession period. It is important that no one else used the Thornton Street Parcels for parking in any capacity, other than Higginbottom's employees. See *Johns Bldg. Supply Co. v. Safe Storage Mass., LLC*, 16 LCR 318 (2007) (that employees of another company sometimes plowed snow and parked in the disputed parking area meant there was not exclusive use by the

plaintiffs). Higginbottom and his family were the only people to do maintenance work on the parcels, including cutting grass and removing snow. There is no evidence that anyone used the Thornton Street Parcels in any capacity without the assent of Higginbottom between 1977 and November 1999. As a result, Higginbottom has met his burden to establish exclusive use.

Conclusion

Based on the undisputed facts and drawing inferences in the City's favor, Higginbottom has established that he adversely possessed the Thornton Street Parcels openly, notoriously, and exclusively for a continuous twenty-year period between 1977 and 1999. Higginbottom's Cross-Motion for Summary Judgment [*22] is ALLOWED. The City of Boston's Motion for Summary Judgment is DENIED. Judgment shall enter declaring that Higginbottom has title by adverse possession to the Thornton Street Parcels.

SO ORDERED

By the Court (Foster, J.)

Dated: February 17, 2015

JUDGMENT

Joseph W. Higginbottom, Jr. (Higginbottom) filed his complaint in this action on April 23, 2001. A preliminary injunction was entered on May 4, 2001. Higginbottom filed his amended complaint on December 7, 2012. Higginbottom's amended complaint is a claim for title by adverse possession to three parcels of land taken by the defendant City of Boston (City) for nonpayment of taxes.

The City's Motion for Summary Judgment and Higginbottom's Cross-Motion for Summary Judgment came on to be heard on April 29, 2014. In a Memorandum and Order on Cross-Motions for Summary Judgment of even date, the court (Foster, J.) has denied the Motion for Summary

Judgment and allowed the Cross-Motion for Summary Judgment.

In accordance with the court's Memorandum and Order on Cross-Motions for Summary Judgment issued today, it is

ORDERED, ADJUDGED and DECLARED that Higginbottom holds title by adverse possession to all the land consisting of the property known and [*23] numbered as 136 Thornton Street, Boston, Suffolk County, Massachusetts, as more fully described in the Instrument of Taking dated August 1, 1975 and recorded in the Suffolk County Registry of Deeds (registry) at Book 8811, Page 178, on August 15, 1975. It is further

ORDERED, ADJUDGED and DECLARED that Higginbottom holds title by adverse possession to all the land consisting of the property known and numbered as 144 Thornton Street, Boston, Suffolk County, Massachusetts, as more fully described in the Instrument of Taking

dated June 18, 1976 and recorded in the registry at Book 8888, Page 612, on July 16, 1976. It is further

ORDERED, ADJUDGED and DECLARED that Higginbottom holds title by adverse possession to all the land consisting of the property known and numbered as 146 Thornton Street, Boston, Suffolk County, Massachusetts, as more fully described in the Instrument of Taking dated June 18, 1976 and recorded in the registry at Book 8888, Page 611, on July 16, 1976. It is further

ORDERED, ADJUDGED and DECLARED that upon payment of all required fees, this Judgment or a certified copy of this Judgment may be recorded at the registry and marginally referenced on all relevant documents. [*24]

By the Court. (Foster, J).

Dated: February 17, 2015.