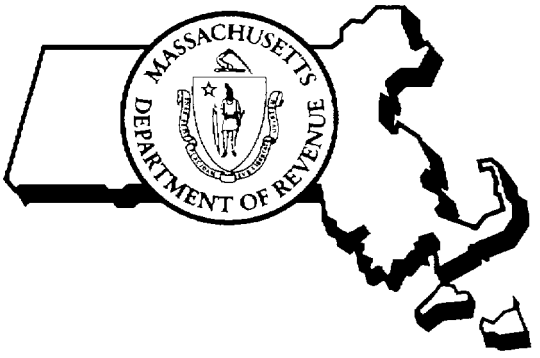
Massachusetts Department of Revenue
Division of Local Services

# Current Developments in Municipal Law




2006

## Court Decisions

Book 2

Alan LeBovidge, Commissioner
Gerard D. Perry, Deputy Commissioner

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# Court Decisions

## Table of Contents

### Book 2

**EUGENIA AARON n1 vs. BOSTON REDEVELOPMENT AUTHORITY.**

n1 Upon motion filed with this court, Eugenia Aaron, the successor in interest to the original plaintiff, Mbadiwe Okongwu, has been substituted as a party as of this date.

**No. 05-P-1115**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 804; 850 N.E.2d 1105; 2006 Mass. App. LEXIS 792***

**April 19, 2006, Argued**
**July 21, 2006, Decided**

**SUBSEQUENT HISTORY:** As corrected August 18, 2006.

**PRIOR HISTORY:** **[***1]** Suffolk. Civil action commenced in the Land Court Department on November 19, 2004. The case was heard by Leon J. Lombardi, J., on a motion for summary judgment.

**DISPOSITION:** Judgment affirmed.

**HEADNOTES:** Real Property, Adverse possession. Municipal Corporations, Adverse possession. Adverse Possession and Prescription. Urban Renewal. Redevelopment Authority. Redevelopment of Land.

**COUNSEL:** John E. Heraty for the plaintiff.

Saul A. Schapiro for the defendant.

**JUDGES:** Present: Cypher, Berry, Green, JJ.

**OPINION BY:** BERRY

**OPINION:**

**[*804]** **[**1106]** BERRY, J. The question presented in this appeal is whether the provisions of *G. L. c. 260, § 31*, in effect, insulate against an adverse possession claim, land held by the Boston Redevelopment Authority (BRA) for the purposes of effectuating an urban renewal plan. n2 We hold that, under *G. L. c. 260, § 31*, **[**1107]** land so **[*805]** held for urban renewal purposes by the Commonwealth, or one of its political subdivisions (here, by and through the BRA) n3 is held for "a public purpose" within the meaning of this statute. Therefore, under *G. L. c. 260, § 31*, the superior land recovery rights of the Commonwealth preclude the claim of adverse possession made by the plaintiff.

n2 *General Laws c. 260, § 31*, as amended by St. 1987, c. 564, § 54, provides 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 thereto first accrued, or within twenty years after it or those under whom it claims have been seized or possessed of the premises; . . . provided . . . 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."

**[***2]**

n3 For ease of reference, the Commonwealth and its political subdivisions will collectively be referred to as "the Commonwealth." It is not disputed in this appeal that the BRA was the developing agency for housing and urban development projects in the city of Boston, and is to be considered as within the class of the Commonwealth's

political subdivisions. Therefore, that agency will, as appropriate in context, either be referenced by the initials BRA, or shall be deemed to be included in the general collective reference to the Commonwealth.

1. Background. The following facts were determined by the Land Court to be not in dispute. In early 1963, the BRA proposed the Washington Park Urban Renewal Plan (Washington Park Plan) for the Roxbury neighborhood of Boston. The Washington Park Plan's goal was "to stimulate and to facilitate public, private and institutional development efforts in the area in such a way as (1) to preserve the neighborhood, (2) to assure the public health and safety, (3) to strengthen the physical pattern of neighborhood activities, (4) to reinforce the fabric of family **[***3]** and community life, and (5) to provide a more wholesome framework of environmental conditions better suited to meet the requirements of contemporary living."

Before we turn to *G. L. c. 260, § 31*, it is helpful to place that section in the larger context of the General Laws, including the major legislative enactment governing urban development in the Commonwealth. *General Laws c. 121B* sets forth a comprehensive scheme for urban renewal and housing development. *General Laws c. 121B, § 48*, sets the framework for the process of approval of an urban renewal project, such as **[*806]** the Washington Park Plan, by the Boston City Council, the mayor, and the Commonwealth, through its Department of Housing and Community Development (DHCD).

The Washington Park Plan was originally approved in 1963 with a forty-year effective period, to reach an anticipated completion date in February, 2003, which later was extended through April, 2015. n4 Under the terms of the Washington Park Plan, the BRA, by eminent domain, took title to a number of properties in the Roxbury area of Boston. Among the properties taken by the BRA was a parcel of land of approximately **[***4]** 4,950 square feet located at 100 Ruthven Street (locus). The BRA acquired the locus in 1968, and at the time of that taking, the locus was cleared. It remained a vacant lot for nearly forty years. n5 In June, 2003, in connection with housing to be constructed on the locus as a part of the Washington Park Plan, the BRA issued a request **[**1108]** for proposals for the sale of the locus to a private developer for construction of a residential building. The proposed residential building to be constructed on the locus is a two-family home, with parking spaces and improved open space. A developer was designated by the BRA in February, 2004.

n4 In December, 2002, the BRA approved a two-year extension of the Washington Park Plan, through February 18, 2005, which extension was approved by the DHCD. In December, 2004, the BRA voted to extend the term of the Washington Park Plan through April, 2015. The submission of this additional BRA extension to DHCD for further approval would have occurred after the compilation of the summary judgment record; that later procedural event does not affect the legal issue presented in this appeal.

**[***5]**

n5 The delay in developing the land, even for nearly forty years, does not alter the legal analysis set forth herein. "It is not unreasonable for [a government entity] to refrain from developing property unless and until there is a need to do so. To require town boards in control of land to do otherwise would encourage unnecessary or premature development and preclude careful planning for future needs." *Harris v. Wayland, 392 Mass. 237, 242, 466 N.E.2d 822 (1984).*

The residential building and appurtenances proposed by the BRA would span a strip of land that lies within the locus. The disputed strip of land, over which the plaintiff claims title by adverse possession, is situated in the middle of the locus and is separated from the rest of the locus by a chain-link fence. The plaintiff's property, located at 197-203 Humboldt Avenue, abuts the rear of the locus. The plaintiff claims that the disputed strip **[*807]** of land has, for more than twenty years -- adverse to the BRA's holding -- been openly and notoriously used as a driveway to access the rear of the plaintiff's property for parking and deliveries. **[***6]** The plaintiff points to his n6 own acts of adverse possession and seeks to tack adverse possession usage by predecessors in title.

n6 We refer here to the original plaintiff and therefore use the male pronoun.

The plaintiff commenced this action in the Land Court in November, 2004, seeking a declaration that his adverse use established a prescriptive easement over the subject strip of land. The BRA moved for summary judgment on the basis that the plaintiff could never validly hold any clear record right, title, or interest in this strip of land by adverse possession or prescriptive easement because the BRA at all times, as provided in *G. L. c. 260, § 31*, maintained a right to recover the strip of

land. The Land Court granted the BRA's motion for summary judgment. We affirm.

2. The statutory rights of the Commonwealth to recover land. In order to comprehend the effect of *G. L. c. 260, § 31*, on a claim of adverse possession such as advanced here, the positive **[***7]** grant to the Commonwealth of the right to recover land under *G. L. c. 260, § 31*, must also be considered -- almost in reverse mirror view -- in terms of its negative effect upon third parties who would assert countervailing claims of right, title, or interest adverse to the Commonwealth. The positive, and the negative, effects of the Commonwealth's rights under *§ 31*, to recover land appear in two clauses in *§ 31*, yielding different time frames, which may be described as follows. Viewed in the positive, the first clause of *§ 31* states that the Commonwealth may institute litigation to recover land within twenty years after the occurrence of the adverse acts which necessitate the Commonwealth commencing an action to recover the land subject to the adverse claims. n7 If the Commonwealth does not act within twenty years, the Commonwealth loses its rights to recover the subject land. This means that, under the first clause of *§ 31*, the negative effect upon third-party claimants is limited to twenty years. Thus, under the first clause of *§ 31*, a third party could assert a claim of adverse possession against the Commonwealth, **[*808]** if the Commonwealth did not commence **[***8]** an action to recover the land within twenty years after such adverse possession began.

n7 See note 2, supra.

The second clause in *G. L. c. 260, § 31*, however, carves out an exception to the twenty-year limitation on the Commonwealth's recovery rights for land held for "conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose" (emphasis added). Accordingly, if the Commonwealth is holding land for the purposes outlined, the negative effect on third-party **[**1109]** claimants is that they will not be able to sustain a claim against the Commonwealth's superior right to the land even after twenty years. It is this second clause of *§ 31* and more particularly the last three words, for "other public purpose," which is at issue in this appeal.

More precisely stated, the issue in this case is whether the holding of land by the BRA for urban renewal purposes, including, but not limited to, housing development, under the Washington Park Plan, constitutes **[***9]** an "other public purpose" within the meaning of *G. L. c. 260, § 31*. n8 If so, the plaintiff's claim of adverse possession is negatived by the second clause in *§ 31*, because the plaintiff's claim cannot stand against the superior right of the Commonwealth under *§ 31* to recover the land, which extends the Commonwealth's right of recovery beyond the twenty-year limitations period governing adverse possession. In ultimate effect, if the BRA's holding of the locus falls within the second clause of *§ 31*, then the plaintiff's adverse possession claim in the disputed strip of land would be extinguished.

n8 As there are no disputed material facts, and as this case presents a pure issue of statutory construction, it was an appropriate candidate for summary judgment. See *Annese Elec. Servs., Inc. v. Newton, 431 Mass. 763, 764 n.2, 730 N.E.2d 290 (2000)* ("statutory interpretation is a question of law for the court to decide").

3. Urban renewal as a public purpose within the *§ 31* exception **[***10]** . In determining whether an urban renewal project such as the Washington Park Plan is for a public purpose, we begin with a consideration of *G. L. c. 121B*, the urban renewal statute, pursuant to which the Washington Park Plan was formulated and approved by the city of Boston. In enacting *c. 121B*, the Legislature determined that urban renewal **[*809]** programs, including housing development, are necessary for the public interest. *G. L. c. 121B, § 45*. The importance to the public in the redevelopment of blighted areas and in housing construction is similarly recognized in judicial precedent. "Taking for redevelopment an area which is a 'blighted open area' as defined by *G. L. c. 121B, § 1*, is a public purpose." *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence, 403 Mass. 531, 539-540, 531 N.E.2d 1233 (1988)*. "[H]ousing authorities and other public housing bodies are public instrumentalities carrying out public purposes. . . ." *Cameron v. Zoning Agent of Bellingham, 357 Mass. 757, 761, 260 N.E.2d 143 (1970)*. n9

n9 The Washington Park Plan envisioned that land acquired by the BRA in this urban renewal project would be sold to private developers for construction under the Plan. The law is clear that the sale to a private developer in an urban renewal project does not negate a plan's public purpose. "Disposition to a private redeveloper of property acquired pursuant to a valid plan may be necessary to achieve the public purpose." *Benevolent & Protective Order of Elks, Lodge No. 65, 403 Mass. 531, 551, 531 N.E.2d 1233 (1988)*. See also *Kelo v. New London, 125 S. Ct. 2655, 2663-2664, 162 L. Ed. 2d 439 (2005)*.

**[***11]**

Notwithstanding the legislative determination and judicial precedent holding urban renewal and development under *G. L. c. 121B* is for a "public purpose," the plaintiff argues that the term "public purpose," as appearing in *G. L. c. 260, § 31*, is more narrowly circumscribed and does not include the purposes of urban renewal. As support for this narrowed reading of the term "other public purpose" in *§ 31*, the plaintiff urges that we apply the doctrine of ejusdem generis to *§ 31* -- a doctrine outlined as follows: "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding **[**1110]** specific words." *Banushi v. Dorfman, 438 Mass. 242, 244, 780 N.E.2d 20 (2002)*, quoting from 2A N.J. Singer, Sutherland Statutory Construction § 47.17 at 273-274 (6th ed. rev. 2000).

The plaintiff quotes the list of purposes enumerated in the second part of *§ 31*, extending beyond twenty years the Commonwealth's recovery rights, namely, "conservation, open space, parks, recreation, water protection, and wildlife protection . . . ." Based on the foregoing list, **[***12]** the plaintiff argues that the last phrase, "or for other public purpose" must be of the **[*810]** same ilk as the enumerated list and should not encompass urban renewal. The argument is unpersuasive. "That canon of construction [ejusdem generis] is not to be applied mechanistically whenever [and simply because] a string of terms is separated by commas . . . . Rather, it is designed to narrow broad language when the literal meaning of that language does 'not fairly come within [a statute's] spirit and intent.'" *Perlera v. Vining Disposal Serv., Inc., 47 Mass. App. Ct. 491, 496, 713 N.E.2d 1017 (1999)*, quoting from *Kenney v. Building Commr. of Melrose, 315 Mass. 291, 295, 52 N.E.2d 683 (1943)*.

For the foregoing reasons we determine that urban renewal, concerned, as it is, with the improvement of the environment and surroundings in which the people of the Commonwealth live, is within the meaning of the words "other public purpose" as found in *G. L. c. 260, § 31*, and is fully consonant with the other public purposes outlined therein. n10 The improvement of what is now a vacant lot by construction of a modern two-family home with parking and outdoor space will not **[***13]** only enhance the neighborhood, it will further the important public purpose of increasing the supply of housing in the Commonwealth.

n10 We note that, in addition to providing housing stock, urban renewal projects, including the Washington Park Plan, often include proposals to use acquired land for the specifically enumerated public purposes of *G. L. c. 260, § 31*, e.g., parks, recreational areas, and open spaces. In this instance, the Washington Park Plan listed the following objective: "to provide sites for new and improved schools, play areas and other open spaces and essential community facilities." See *G. L. c. 121B, § 45*, as inserted by St. 1969, c. 751, § 1 (declaring as a public use and benefit urban renewal's provision of "streets, parks, recreational areas and other open spaces").

The plaintiff conceded at oral argument that if the BRA had intended to use the locus as a park, the adverse possession claims would fail under *§ 31*. It would lead to absurd results if the BRA, holding land for use in an urban renewal project, could be subject to losing its rights depending solely on the particular subproject within an urban renewal plan for which that land was to be dedicated.

**[***14]**

The housing shortage has a long history in the Commonwealth. Indeed, as far back as 1966, the Legislature declared that the "shortage [of housing] is inimical to the safety, health, morals and welfare of the residents of the commonwealth and the sound growth of the communities therein." St. 1966, c. 708, § 2. More recently, a study by Northeastern University's **[*811]** Center for Urban and Regional Policy attributed the Commonwealth's declining population and lackluster job growth to the high cost of living, and, specifically, the lack of affordable housing. n11 It cannot be gainsaid that the continued development of the area served by the Washington Park Plan through the construction of modern homes promotes the public purpose -- including but not limited to the particular **[**1111]** definition of public purpose in *G. L. c. 260, § 31* -- by benefitting the immediate community the Plan was intended to serve, and by advancing the welfare of the Commonwealth as a whole.

n11 Bluestone, Executive Summary, Sustaining the Mass Economy: Housing Costs, Population Dynamics, and Employment, May 22, 2006, available for download at http://www.curp.neu.edu/publications/reports.htm # sustaineconomy (last visited July 7, 2006).

**[***15]**

Judgment affirmed.

447 Mass. 1, *; 848 N.E.2d 1197, **;
2006 Mass. LEXIS 327, ***; 98 Fair Empl. Prac. Cas. (BNA) 912

**WILLIAM DeROCHE vs. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another. n1**

n1 Wakefield Municipal Gas & Light Department (department).

**SJC-09619**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***447 Mass. 1; 848 N.E.2d 1197; 2006 Mass. LEXIS 327; 98 Fair Empl. Prac. Cas. (BNA) 912***

**April 6, 2006, Argued**
**June 12, 2006, Decided**

**SUBSEQUENT HISTORY:** As Corrected July 5, 2006. As Corrected June 29, 2006.

**PRIOR HISTORY:** **[***1]** Middlesex. Civil actions commenced in the Superior Court Department on October 15 and October 17, 2003. After consolidation, the cases were heard by Geraldine S. Hines, J., on motions for judgment on the pleadings, and a motion for attorney's fees and costs was heard by Stephen E. Neel, J. The Supreme Judicial Court granted an application for direct appellate review.

**HEADNOTES:** Employment, Discrimination, Retaliation. Emotional Distress. Anti-Discrimination Law, Employment, Age, Attorney's fees. Damages, Emotional distress, Interest, Attorney's fees. Massachusetts Commission Against Discrimination. Interest. Governmental Immunity. Massachusetts Tort Claims Act. Practice, Civil, Attorney's fees.

**COUNSEL:** Nicholas J. Scobbo, Jr. (Ann Ryan-Small with him) for Wakefield Municipal Gas & Light Department.

Seth H. Hochbaum for the plaintiff.

Beverly I. Ward for Massachusetts Commission Against Discrimination.

The following submitted briefs for amici curiae:

Thomas F. Reilly, Attorney General, & Peter Sacks, Assistant Attorney General, for the Commonwealth.

James S. Weliky for National Employment Lawyers' Association, Massachusetts Chapter.

**JUDGES:** Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ.

**OPINION BY:** GREANEY

**OPINION:**

**[*3]** **[**1199]** GREANEY, J. This appeal arises out of a decision by the Massachusetts Commission Against Discrimination (commission) that the Wakefield Municipal Gas & Light Department (department) unlawfully retaliated against the plaintiff for filing a complaint with the commission claiming **[***2]** that the department had discriminated against him on the basis of his age in violation of *G. L. c. 151B, § 4 (4)*. The commission ordered the department to pay the plaintiff damages in the amount of $ 260,000, including $ 50,000 to compensate him for emotional distress, but failed to provide for interest on the damages. The plaintiff and the department both sought judicial review of the commission's decision pursuant to *G. L. c. 151B, § 6*. After a hearing in accordance with standards set forth in *G. L. c. 30A, § 14*, a judge in the Superior Court entered a judgment affirming the commission's determination that the department had committed retaliatory employment action and the commission's award of damages, and, in addition, declaring that interest be assessed on the damages. A second judge in the Superior Court denied the plaintiff's motion for reasonable attorney's fees and costs for services performed during the *G. L. c. 30A* proceedings in the Superior Court.

Both parties have appealed. The department does not contest its liability under *G. L. c. 151B*, but claims that the judge lacked authority to assess **[***3]** interest on the damages awarded the plaintiff and, further, that the award of $ 50,000 in damages for emotional distress is unsupported by the plaintiff's evidence. The plaintiff, in turn, asserts his entitlement to reasonable attorney's fees and costs incurred in connection with successfully defending the commission's decision before the Superior **[**1200]** Court. We allowed the plaintiff's application for direct appellate review and, for reasons set forth in

this opinion, conclude that the plaintiff is entitled to (1) no damages for emotional distress for the department's retaliatory conduct; (2) prejudgment interest, at the rate of twelve per cent per annum, assessed on the damages for back pay, calculated from May 6, 1996, the date of the retaliatory conduct, until June 1, 2005, the date judgment entered in his favor; and (3) reasonable attorney's fees and costs incurred during the appeal to the Superior Court of the commission's award in connection with those issues on which **[*4]** he ultimately prevailed. We remand the case to the Superior Court for modification of the judgment in accordance with this opinion.

The background of the case may be summarized as follows. The department is a municipal **[***4]** electric department established by the voters of the town of Wakefield (town), pursuant to *G. L. c. 164, § 34*, to operate the light plant owned by the town. The plaintiff was employed at the department from 1950 until 1993, when he retired (believing that his retirement was mandatory) at age sixty-five. The town retirement board processed the plaintiff's application for retirement without informing him that, due to a change in the public employee retirement statute, *G. L. c. 32*, he was not required to retire until he was seventy years of age. Approximately two years later, a manager at the department notified the plaintiff of the change in *G. L. c. 32*. The plaintiff responded to this unexpected news, first, by requesting a financial settlement to compensate for his premature retirement and, later, by requesting from the department reinstatement to his former position and reimbursement of lost wages and overtime pay. The plaintiff sought answers from the department and the retirement board as to how such a mistake could happen, but his attempts to pinpoint responsibility in the matter proved fruitless.

On February 15, 1996, the plaintiff filed a complaint **[***5]** with the commission alleging that the town retirement board and the department had "forced" his retirement, thereby unlawfully discriminating against him on account of his age, in violation of *G. L. c. 151B*. n2 In response to the plaintiff's complaint, the department offered to reinstate the plaintiff to his former position. The plaintiff returned to work in May, 1996, but resigned, after only one day, on learning that he had been assigned to the position of lead lineworker in a line crew, which was a more dangerous and physically demanding position than the one he left in 1993, which was lead lineworker in a home **[*5]** service crew. The plaintiff then amended his complaint with the commission to add a claim of retaliation.

n2 The plaintiff's complaint to the commission also charged the town of Wakefield (town) and the Wakefield Retirement Board (board) with age discrimination. The commission's hearing officer dismissed the claim against the town, but concluded that the board had discriminated against the plaintiff when it had processed his retirement in 1993 without informing him that his retirement was not mandatory. These charges are not part of this appeal.

**[***6]**

After a hearing, a commission hearing officer determined that the department's failure to inform the defendant that he was not required to retire at age sixty-five did not constitute discrimination under *G. L. c. 151B*, but that the department's conduct in assigning the plaintiff to the line crew rather than the home service crew upon his May, 1996, return to employment was adverse action in retaliation for the plaintiff's having filed a complaint with the commission. The hearing officer ordered the department to pay the plaintiff compensatory damages in the sum of $ 260,000, representing $ 210,000 in damages for back **[**1201]** and front pay and $ 50,000 in damages for emotional distress. Under the authority of a decision of the Appeals Court, see *Boston v. Massachusetts Comm'n Against Discrimination, 39 Mass. App. Ct. 234, 654 N.E.2d 944 (1995)*, the hearing officer denied the plaintiff's request to assess interest against the department. n3 On appeal to the full commission, brought by both the department and the plaintiff, the hearing officer's decision was affirmed in all respects. n4

n3 The decision relied on by the hearing officer, *Boston v. Massachusetts Comm'n Against Discrimination, 39 Mass. App. Ct. 234, 654 N.E.2d 944 (1995)*, has since been overruled by *Trustees of Health & Hosps. of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 65 Mass. App. Ct. 329, 339 n.12, 839 N.E.2d 861 (2005)*.

**[***7]**

n4 The commission also awarded the plaintiff the sum of $ 48,890.40 in reasonable attorney's fees and costs, denying the plaintiff's request for a fifty per cent enhancement. The attorney's fees and costs awarded by the commission are not at issue in this appeal.

Both the department and the plaintiff sought judicial review of the commission decision, and the cases were consolidated in the Superior Court. The department challenged the commission's finding of retaliation and its award of emotional distress damages. The plaintiff appealed from that part of the order which denied the as-

sessment of interest on the award. Prior to the hearing before the judge in the Superior Court, the commission, which had taken the position that the department's status as a public entity rendered it exempt from paying interest on damages awarded under *G. L. c. 151B*, joined the plaintiff's efforts to reverse its own decision on that point.

**[*6]** Considering the parties' motions for judgment on the pleadings, a judge in the Superior Court affirmed the commission's decision that the department had retaliated against the **[***8]** plaintiff and its award of damages. The judge, however, reversed the commission's decision with respect to the imposition of interest, based on her determination that the department is not a public entity and, therefore, not protected by principles of sovereign immunity. Accordingly, the judge denied the department's motion for judgment on the pleadings and allowed the plaintiff's motion for judgment on the pleadings with respect to the assessment of interest on the damages award of front and back pay. The department's motion for reconsideration of the judge's order was denied, and the department thereafter filed an appeal from the judge's orders. n5 The judge subsequently issued a "corrected judgment on finding of the court" clarifying that the department is to pay the plaintiff the sum of $ 308,890.40 (the total sum awarded by the commission, representing $ 210,000 in front and back pay damages, $ 50,000 in emotional distress damages, and $ 48,890.40 for reasonable attorney's fees and costs, see note 4, supra), with interest in the amount of $ 290,119.80 (reflecting a rate of twelve per cent assessed on the total amount of damages from February 15, 1996, to June 1, 2005), and **[***9]** ordering postjudgment interest to accrue from and after June 1, 2005 (the date the original judgment entered). n6

n5 As has been indicated, the department no longer contests the order affirming the commission's determination of retaliation by the department.

n6 The department contends that the modification effected by the corrected judgment, assessing interest on the award of emotional distress damages as well as on lost wages, was substantive, and claims on appeal that the judge lacked authority to make this modification in the absence of a motion filed by either the plaintiff or the commission, pursuant to *Mass. R. Civ. P. 59 (e)*, 365 Mass. 827 (1974), requesting alteration or amendment of the judgment, or *Mass. R. Civ. P. 60 (b)*, 365 Mass. 828 (1974), requesting relief from the judgment. In view of our conclusion that the plaintiff is not entitled to emotional damages, it is not necessary to address this claim.

**[**1202]** The **[***10]** plaintiff filed a motion for attorney's fees and costs incurred in connection with the *G. L. c. 30A* review of the commission's decision. This motion was considered by a second judge in the Superior Court who, after a hearing, concluded that there is no statutory authority for the award of the requested fees. The plaintiff appealed from the denial of his request for **[*7]** reasonable attorney's fees and costs, and as has been mentioned, we granted the plaintiff's application for direct appellate review.

1. We first address the commission's award of $ 50,000 in emotional distress damages. In *Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 575-577, 808 N.E.2d 205 (2004)*, we clarified the standards governing an award by the commission for damages to compensate a plaintiff for emotional distress caused by an employer's discriminatory conduct and enumerated factors a reviewing judge should consider in determining whether such an award may stand. A critical point expressed in our Stonehill decision was that a finding by the commission of discrimination, or retaliation, is insufficient by itself, as matter of law, to permit an inference of emotional harm. See **[***11]** *id. at 576*, citing Equal Employment Opportunity Commission: Policy Guide on Compensatory and Punitive Damages under 1991 Civil Rights Act (July 7, 1992), reprinted in Fair Empl. Prac. Man. (BNA) 405:7091-405:7102. We emphasized that emotional distress, to be compensable, must be proved by substantial evidence of the emotional suffering that occurred, as well as substantial evidence of a causal connection between the complainant's emotional distress and the respondent's unlawful act. See *id. at 576-577*. Factors to be considered include "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." *Id. at 576*. The factual basis for emotional distress damages awarded by the commission must be clear on the record, and a reviewing judge must set aside (or remit to an appropriate amount) awards that are not supported by substantial evidence. See *id. at 576-577*; *G. L. c. 30A, § 14* **[***12]** . An emotional distress damage award may not be imposed as a substitute for punitive damages (which the commission is not authorized, under *G. L. c. 151B, § 5*, to award). See *id. at 575-576*.

The hearing officer found that the plaintiff, his wife, and his daughter presented "sincere, credible, and compelling" testimony about the emotional impact on the plaintiff resulting from his original retirement in Sep-

tember, 1993. The plaintiff **[*8]** described his work at the department as "his whole life." His wife testified that the plaintiff "dreaded" the approach of his sixty-fifth birthday and was "shattered" that he had to give up his job after forty-three years when he did not feel physically or mentally ready to retire. The plaintiff's daughter used the words "despondent," "devastated," and "very depressed" to describe the plaintiff in the days leading up to his retirement. She stated that her father, on learning of the mistake that had occurred with respect to his mandatory retirement age, was "brokenhearted" and "couldn't understand and still can't understand how (a) something like this could happen and (b) no one could give him an explanation." According **[***13]** to his wife, the plaintiff felt "devastated" and "angry" at the manner in which the department and **[**1203]** the retirement board "shuffled him back and forth" and described the plaintiff's outrage that he was not treated with dignity or respect after forty-three years of service to the department. The plaintiff testified that his attempts to assign responsibility, and obtain redress, for the mistake, made him feel like a "yo-yo going back and forth." When asked specifically how he felt on being assigned to the line crew, the plaintiff responded, "I just couldn't understand the line of reasoning." The department argues that this evidence does not support the commission's award of $ 50,000 in damages for emotional distress. We agree.

The award appears to be a classic example of what the principles set forth in our Stonehill decision were intended to discourage. The evidence presented at the hearing with respect to the plaintiff's distressed emotional state relates either to emotions experienced by the plaintiff in the months and weeks leading up to his impending retirement in 1993, or to the plaintiff's reaction after being informed of the mistake, in the fall of 1995, and lacks any causal **[***14]** connection with the finding of retaliation against the department. n7 According to the plaintiff's testimony, his over-all health had been exemplary since 1996. The plaintiff stated that he never had to seek medical help, or take medication, **[*9]** for symptoms related to emotional distress. There was no testimony that the plaintiff experienced physical manifestations of distress, such as loss of appetite or difficulty in sleeping, or that the plaintiff was compelled to curtail his life activities in any way due to stress from the department's retaliatory action. The only evidence offered by the plaintiff on his mental state after his assignment to the line crew in May, 1996, was his testimony that he "couldn't understand" the reasoning that led to the assignment. This testimony falls far below the factual basis for an emotional distress award deemed sufficient in our Stonehill decision and cannot constitute substantial evidence to support the commission's determination that such an award was warranted. n8 The commission's award of emotional distress damages, award of emotional distress damages, therefore, cannot stand. n9

n7 We note that the commission also awarded the plaintiff $ 50,000 in damages to be paid by the retirement board as compensation for emotional distress caused by its failure to inform the plaintiff that his retirement at age sixty-five was not mandatory.

**[***15]**

n8 At the conclusion of the plaintiff's testimony, the hearing officer inquired whether the plaintiff had anything else that he wanted to add. The plaintiff responded: "Well, [it] just kind of overwhelms me. I -- you know, I just wanted to go back to work. I didn't expect all these things to happen. This, you know, just overwhelms me. This is all new. I didn't know these things went on. That's about it, I guess." Based on these words in the transcript, the judge in the Superior Court attributed to the plaintiff the state of mind that he felt "overwhelm[ed] by losing his job for a second time." The plaintiff never specifically stated that he felt overwhelmed by losing his job for a second time.

n9 It is of no significance to the present issue that our decision in *Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 576, 808 N.E.2d 205 (2004)*, was released after the commission affirmed the award.

2. We next address the department's challenge to the imposition of interest on the damages awarded the plaintiff. In *Boston v. Massachusetts Comm'n Against Discrimination, 39 Mass. App. Ct. 234, 245-246, 654 N.E.2d 944 (1995)*, **[***16]** the Appeals Court recognized that *G. L. c. 151B* is silent on the subject of interest on awards against the Commonwealth or its instrumentalities. Relying on decisions of this court addressing the issue of interest under the Massachusetts Tort Claims Act, *G. L. c. 258*, see *Onofrio v. Department of Mental Health, 411 Mass. 657, 659, 584* **[**1204]** *N.E.2d 619 (1992)*, and under the statute providing compensation to victims of violent crimes, *G. L. c. 258A*, see *Gurley v. Commonwealth, 363 Mass. 595, 600, 296 N.E.2d 477 (1973)*, the Appeals Court held that interest could not permissibly be imposed on an award under *G. L. c. 151B* against a public entity. See *Boston v. Massachusetts Comm'n Against* **[*10]** *Discrimination, supra.* In a later case, *Salem v. Massachusetts Comm'n Against Discrimi-*

*nation, 44 Mass. App. Ct. 627, 693 N.E.2d 1026 (1998)*, the Appeals Court reiterated the rule, explaining that the rule "presents an application of the doctrine of sovereign immunity." *Id. at 646*. On appeal, the commission and the plaintiff take the position that the Boston decision, supra, was wrongly decided and that *G. L. c. 151B, § 5*, creates a waiver **[***17]** of sovereign immunity with respect to interest. The department, on the other hand, argues that (a) it is a public entity, and (b) therefore, not subject to the assessment of interest under *G. L. c. 151B*; but (c) to the extent that interest may be assessed, it should not be computed at twelve per cent per annum, but at the floating interest rate set forth in *G. L. c. 231, § 6I*, and (d) should be calculated only on that portion of the damage award representing back pay and (e) from the date of the retaliatory action and not from the date that the plaintiff filed his original complaint with the commission. n10

n10 Our conclusion that the plaintiff is not entitled to an award of emotional distress damages obviates the need to consider the department's claim that the Superior Court judge erred in assessing interest on that award.

(a) We agree with the department that it is a public entity. The citizens of the town voted to create the department, *G. L. c. 164, § 55* **[***18]** , and the department's board of commissioners (board) is comprised of members elected by those same citizens. Id. It is the town that owns the light plant that the department operates. *G. L. c. 164, § 34*. The manager of the department, who has "full charge of the operation and management of the plant," is appointed by the board. *G. L. c. 164, § 56*.

The Legislature has specifically placed the department in the class of entities subject to the Tort Claims Act, thereby reflecting its view that the department is in that class of entities afforded the protections of sovereign immunity. See *G. L. c. 258, § 1* ("[p]ublic employer" means "any . . . town . . . and any department . . . thereof . . . including a municipal gas or electric plant"). The department is subject to the requirements of *G. L. c. 39, § 23B* (open meeting law), and *G. L. c. 66, § 10* (public records statute), which apply only to public entities. See *G. L. c. 39, § 23A*. See also *G. L. c. 4, § 7, Twenty-sixth*.

The plaintiff directs attention to **[***19]** **[*11]** *Middleborough v. Middleborough Gas & Elec. Dept., 422 Mass. 583, 664 N.E.2d 25 (1996)*, and asserts that our decision in that case compels the conclusion that the department is an institution financially and politically distinct from the town. We do not agree. The question presented in the Middleborough case was whether a town and its electric department are sufficiently independent from each other to allow a suit by the town against its electric department for losses caused by a fire. See *id. at 585*. We answered that question in the affirmative. See *id. at 588*. Our conclusion today that the department is, nonetheless, a public entity in no way undermines what was said in the *Middleborough* decision. The department's independence from the town includes the power to contract on behalf of itself, to enter into collective bargaining agreements, and to make its own employment decisions. It is a self-funded, profit-making **[**1205]** entity that sets its own budget and pays its own expenses from the revenues it generates and, unlike other town departments, does not depend on appropriations from the town. Although its employees are paid through the town treasurer's **[***20]** office by town-issued paychecks, the department maintains a separate account with the town treasurer. The statutory framework permits the department a significant degree of autonomy from the town. However, as a legal and practical matter, the department is a department of the town and, like the town, is a public entity.

(b) The department's status as a public entity does not, however, necessarily entitle it to immunity from the imposition of interest on damages assessed against it under *G. L. c. 151B*. The Appeals Court recently reconsidered that question, in light of our decision in *Bain v. Springfield, 424 Mass. 758, 678 N.E.2d 155 (1997)*, clarifying the principle of sovereign immunity and stating that "immunity is still in effect unless consent to suit has been 'expressed by the terms of the terms of a statute, or appears by necessary implication from them,'" *id. at 763*, quoting *C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 392, 486 N.E.2d 54 (1985)*, and held that prejudgment interest may properly be awarded by the commission against the Commonwealth under *G. L. c. 151B*. See *Trustees of Health & Hosps. of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 65 Mass. App. Ct. 329, 336-338,* **[*12]** *839 N.E.2d 861 (2005)*. **[***21]** n11 The question is an important one, and we consider it today for the first time. n12

n11 In so holding, the Appeals Court overruled its earlier decisions of *Boston v. Massachusetts Comm'n Against Discrimination, 39 Mass. App. Ct. 234, 654 N.E.2d 944 (1995)*, and *Salem v. Massachusetts Comm'n Against Discrimination, 44 Mass. App. Ct. 627, 693 N.E.2d 1026 (1998)*. See note 3, supra.

n12 In *Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 839 N.E.2d 314 (2005)*, we noted our agreement with the Appeals Court's conclusion that the plaintiff in that case was entitled to prejudgment and postjudgment interest on

an award of compensatory damages against the Massachusetts Bay Transportation Authority (MBTA) for discriminatory conduct in violation of *G. L. c. 151B*. See *id. at 624 n.11*. The interest allowed in the Clifton decision was based on express language in *G. L. c. 161A, § 38*, which provides that the MBTA shall be liable in tort "in the same manner as though it were a street railway company" and sets no cap on the amount of damages recoverable. See *Clifton v. Massachusetts Bay Transp. Auth., 62 Mass. App. Ct. 164, 178, 815 N.E.2d 614 (2004)*. What was said in the Clifton decision, therefore, does not apply to the present case.

**[***22]**

The general rule of law with respect to sovereign immunity is that the Commonwealth or any of its instrumentalities "cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed . . . [by] statute." *General Elec. Co. v. Commonwealth, 329 Mass. 661, 664, 110 N.E.2d 101 (1953)*, quoting *Glickman v. Commonwealth, 244 Mass. 148, 149-150, 138 N.E. 252 (1923)*. The Legislature has expressly waived sovereign immunity of the Commonwealth "and all political subdivisions . . . thereof" by including them in the statutory definition of persons and employers subject to the statute. See *G. L. c. 151B, § 1 (1)* and *(5)*. There is no express authorization under the statute, however, for imposition of interest on a damage award against a public employer. See *G. L. c. 151B, § § 5, 6*. Nor does *G. L. c. 258* (the primary statutory basis for the waiver of sovereign immunity) contain any provision permitting the recovery of prejudgment or postjudgment interest against the Commonwealth. We have repeatedly stated that the "rules **[***23]** of construction governing **[**1206]** statutory waivers of sovereign immunity are stringent." *C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 392, 486 N.E.2d 54 (1985)*, quoting *Woodbridge v. Worcester State Hosp., 384 Mass. 38, 42, 423 N.E.2d 782 (1981)*. See *Broadhurst v. Director of the Div. of Employment Sec., 373 Mass. 720, 722-723, 369 N.E.2d 1018 (1977)*. Absent statutory language that indicates by express terms a waiver of sovereign immunity, the Legislature's intent to subject the Commonwealth **[*13]** to liability may be found only when such an intent is clear "by necessary implication" from the statute's terms. See *Woodbridge v. Worcester State Hosp., supra*.

The fact that the Legislature did not specifically authorize interest on *G. L. c. 151B* damage awards against the Commonwealth, therefore, does not preclude the imposition of interest on the damages awarded the plaintiff based on the necessary implication of the statute's terms. We reasoned in *Bain v. Springfield, supra*, that although the statute does not definitively provide for an award of punitive damages against the Commonwealth or its subdivisions, the express provision for the imposition **[***24]** of actual and punitive damages against "persons" and "employers" subject to the statute, *§ 9*, logically read in conjunction with *§ 1 (1)* and *(5)*, lead to the inevitable conclusion that the Legislature must have chosen to subject public employers to punitive, as well as actual, damages. We apply the same reasoning to this case.

*General Laws c. 151B, § 5*, empowers the commission to "take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay . . . as, in the judgment of the commission, will effectuate the purposes of this chapter." This language "represents a significant delegation of discretion and authority by the Legislature to the administrative agency established to enforce the Commonwealth's anti-discrimination laws." *Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303, 316, 358 N.E.2d 235 (1976)*. We have interpreted this language to permit the commission to award prejudgment interest (against private employers) in conformity with *G. L. c. 231, § 6B*, n13 on a back pay award from the commencement of the proceedings, **[***25]** on the basis that such an award furthers the goal of remedying the wrongs of discrimination and making complainants whole for their injuries. See *New York & Mass. Motor* **[*14]** *Serv., Inc. v. Massachusetts Comm'n Against Discrimination, 401 Mass. 566, 583, 517 N.E.2d 1270 (1988)*; *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass 156, 170, 508 N.E.2d 587 (1987)*. See also *Loeffler v. Frank, 486 U.S. 549, 557-558, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988)* (prejudgment interest traditionally considered part of back pay remedy because necessary to make victim whole); *Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 570-575, 808 N.E.2d 205 (2004)* (reaffirming commission's broad authority to award "make whole" relief). Because *G. L. c. 151B, § 5*, authorizes the remedy of prejudgment interest, and public employers are, by virtue of *§ 1 (1)* and *(5)*, subject to the mandates of the statute, we are satisfied that the Legislature has expressed its intention, **[**1207]** manifest through a natural and ordinary reading of the statute, that sovereign immunity with respect to the imposition of interest on a **[***26]** *G. L. c. 151B* damage award has been waived. See *Trustees of Health & Hosps. of Boston v. Massachusetts Comm'n Against Discrimination, supra at 338-339*. This conclusion is in accordance with the broad authority granted the commission by the Legislature to order a full range of remedies that will further the purpose of eradicating the evil of discrimination, authority which provides overarching

guidance for this court in virtually all of our decisions involving discrimination cases, most recently in *Gasior v. Massachusetts Gen. Hosp., 446 Mass. 645, 653-656, 846 N.E.2d 1133 (2006)*. n14

n13 *General Laws c. 231, § 6B*, provides: "In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damages to property, there shall be added by the clerk to the amount of damages interest thereon at the rate of twelve per cent per annum from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law."

**[***27]**

n14 The plaintiff and the commission suggest that our recent decision in *Brookfield v. Labor Relations Comm'n, 443 Mass. 315, 324-326, 821 N.E.2d 51 (2005)*, in which we examined broad remedial provisions contained in *G. L. c. 150E, § 11*, and determined that the Legislature has, by necessary implication, waived sovereign immunity with respect to awards of prejudgment interest on damages awarded against public entities by the Labor Relations Commission, virtually compels a similar conclusion with respect to the commission's authority under *G. L. c. 151B*. Although there are relevant similarities between the two statutory schemes, see, e.g., *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, 401 Mass. 566, 581 n.14 (1988)*; *Conway v. Electro Switch Corp., 825 F.2d 593, 601 (1st Cir. 1987)* (noting that *G. L. c. 150E* is "virtually identical" to *G. L. c. 151B* with regard to scope of its remedial provision), there are enough significant dissimilarities between the two statutes to make us wary of adopting the *Brookfield* decision as authority for our conclusion that the commission is authorized to award prejudgment interest on the back pay damage award against the department.

**[***28]**

(c) This court long ago approved the commission's assessment of interest on back pay awards in conformity with the **[*15]** statutory rate of twelve per cent provided for in *G. L. c. 231, § 6B*. See *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 583-584*; *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, supra at 169-170*. Our approval was based, primarily, on the Legislature's grant of broad discretionary authority to the commission to fashion remedies for victims of discrimination. See *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, supra*. See also *Conway v. Electro Switch Corp., 402 Mass. 385, 390-391, 523 N.E.2d 255 & n.7 (1988)* (observing that commission's twelve per cent interest award was appropriate exercise of agency discretion). Modification of the commission's award to impose the twelve per cent rate was well within the authority of the judge, pursuant to *G. L. c. 30A, § 14*, where the commission had denied interest based on an error of law. n15

n15 We reject the department's argument that our decision in *Secretary of Admin. & Fin. v. Labor Relations Comm'n, 434 Mass. 340, 749 N.E.2d 137 (2001)*, in which we determined that the floating rate set forth in *G. L. c. 231, § 6I*, was the appropriate rate to be applied to awards under *G. L. c. 150E*, requires that we apply the floating rate of interest here. We alluded to major differences between the commission and the Labor Relations Commission in note 14, supra. These differences include the fact that the latter adjudicates collective bargaining violations by agencies of the Commonwealth involving employees of the Commonwealth, see *G. L. c. 150E, §§ 1, 11*, while the commission adjudicates cases involving both private and public employers, see *G. L. c. 151B, § 1 (1)* and *(5)*. Complainants before the Labor Relations Commission do not enjoy a commensurate right of removal to the Superior Court. We decline to equate the two statutory schemes for purposes of setting a rate of interest the commission must impose against public employers found to have violated *G. L. c. 151B*.

**[***29]**

**[**1208]** (d) We also have spoken clearly on the issue of the interest on front pay awards in discrimination cases. In *Conway v. Electro Switch Corp., supra at 390*, we stated that there was "no justification for adding interest to damages which, by definition, are for losses to be incurred in the future." We decline to revisit this issue. While the plaintiff is entitled to prejudgment interest on the back pay damage award, he is not entitled to prejudgment interest on the front pay award. n16

n16 The department had moved to modify an earlier corrected judgment claiming "error or

> oversights in that interest should have been computed only on the sum of $ 210,000, representing the damages awarded to [the plaintiff] for front and back pay." This motion is somewhat inconsistent with the position the department now argues on appeal: interest does not apply to front pay. We nevertheless do not consider the matter waived, a point not argued by the parties.

(e) The commission awarded the plaintiff back pay **[***30]** damages **[*16]** from May 6, 1996, the date the department assigned him to the line crew. The judge ordered that interest be assessed on this award from February 15, 1996, the date the plaintiff filed his original complaint of discrimination with the commission. The department contends that there is no justification for calculating interest from a date that precedes the unlawful retaliatory act. We agree. The commission has broad authority and discretion to fashion appropriate remedies to make victims whole for their damages, including the imposition of interest to "compensate a damaged person for the loss of use or the unlawful detention of money." *Conway v. Electro Switch Corp., supra at 390.* As has been stated, the judge also had broad authority, pursuant to *G. L. c. 30A, § 14*, to modify the commission's award to include interest assessed against the department. The statute to which the commission has looked for guidance in determining the appropriate rate of interest provides for prejudgment interest to be calculated "from the date of commencement of the action." *G. L. c. 231, § 6B.* We have, accordingly, upheld awards **[***31]** by the commission of interest on back pay damages calculated from the date of the filing of the original complaint with the commission, even where much of the back pay had not accrued until after that initial date. See *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 583*; *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, supra at 169-170*, citing *Gill v. North Shore Radiological Assocs., 385 Mass. 180, 182-183, 430 N.E.2d 1210 (1982)* (*G. L. c. 231, § 6B*, to be "taken literally"). In this case, however, we see no justification for calculating interest on an award of back pay over a period of time that predates entirely that period of time for which the back pay was awarded. See *Conway v. Electro Switch Corp., supra at 390.* We conclude, therefore, that the assessment of interest on the award of back pay should commence on the date the back pay began to accrue, May 6, 1996.

3. We turn to the issue of the plaintiff's entitlement to reasonable **[*17]** attorney's fees and costs incurred in pursuing an administrative appeal, **[***32]** and in defending against the department's administrative appeal, of the commission's final decision to the Superior Court. Neither *§ 5* nor *§ 6 of G. L. c. 151B* specifically authorizes an award of reasonable attorney's fees and costs for an administrative appeal. *Section 5* provides for the commission to award reasonable attorney's fees and costs to any prevailing complainant before it, and *§ 6*, which provides for an administrative **[**1209]** appeal pursuant to *G. L. c. 30A*, is silent on attorney's fees altogether. In *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 675-677, 729 N.E.2d 1068 (2000)*, we held that a prevailing plaintiff is entitled to reasonable attorney's fees incurred both in proceedings before the commission and in connection with the employer's appeal to this court from the decision of a judge in the Superior Court affirming the commission's decision. Although the plaintiff in that case had been awarded attorney's fees by the Superior Court judge in connection with the administrative appeal, that award was not challenged on appeal, and therefore, we had no occasion to consider the question whether such an award was proper. See *id. at 658 n.5.* **[***33]** Considering that question now, we have difficulty understanding why a plaintiff would be able to recover reasonable attorney's fees and costs incurred in proceedings before the commission, see *G. L. c. 151B, § 5*, and reasonable attorney's fees and costs incurred in appellate proceedings before an appellate court, see *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, supra at 677*, yet be denied the ability to recover reasonable attorney's fees and costs incurred in the middle, yet necessary, step of administrative review before the Superior Court. Such a result would appear consistent with neither logic nor law. See *Yorke Mgt. v. Castro, 406 Mass. 17, 19, 546 N.E.2d 342 (1989)* (prevailing plaintiff entitled to appellate attorney's fees in action under *G. L. c. 93A, § 9*, because "statutory provisions for a 'reasonable attorney's fee' would ring hollow if it did not necessarily include a fee for the appeal"). See also *Twin Fires Investment, LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 432-433, 837 N.E.2d 1121 (2005)* (prevailing plaintiff entitled to appellate attorney's fees and **[***34]** costs under *G. L. c. 93A, § 11*).

**[*18]** The Appeals Court recently considered the identical issue as presented here and held that "[e]ntitlement to an award of attorney's fees is . . . inherent in a claim brought under [*G. L. c. 151B*] and extends to appellate fees." *Lowell v. Massachusetts Comm'n Against Discrimination, 65 Mass. App. Ct. 356, 357, 840 N.E.2d 553 (2006).* We agree with the Appeals Court and now conclude that the language of *G. L. c. 151B, § 5*, providing that a prevailing party before the commission is entitled to reasonable costs and attorney's fees, supports an award of reasonable attorney's fees and costs to a prevailing plaintiff in an administrative appeal pursuant to *G. L. c. 151B, § 6.* To hold otherwise would discourage private attorneys from pursuing claims beyond the administrative stage of the proceedings and contravene

the legislative purpose of vindicating the rights of victims of unlawful discrimination. See *McLarnon v. Jokisch, 431 Mass. 343, 350, 727 N.E.2d 813 (2000)* (prevailing appellants in action under *G. L. c. 231, § 59H*, entitled to recover reasonable **[***35]** appellate attorney's fees or statute's provisions regarding award of fees would "ring hollow"). n17

n17 The department's claim of sovereign immunity in connection with an award of reasonable attorney's fees and costs was not raised before the commission or the judge in the Superior Court. We nonetheless consider the claim and reject it on the merits, essentially, for the reasons set forth in part 2 of this opinion. Indeed, the department's claim of immunity as to attorney's fees is less persuasive than its claim of immunity as to awards of interest. This is so, primarily, because *G. L. c. 151B, § § 5* and *9*, contain express statutory authority for an award of reasonable attorney's fees and costs to a prevailing complainant. We find this to be a clear indication of the Legislature's intent to make all "persons" and "employers" subject to the statute (including public entities such as the department) responsible for payment of reasonable attorney's fees and costs incurred in connection with a claim of discrimination by a victim of their unlawful actions. See *Bain v. Springfield, 424 Mass. 758, 763-764, 678 N.E.2d 155 (1997)*. This case thus is instantly distinguishable from cases cited by the department.

**[***36]**

**[**1210]** The plaintiff's motion in the Superior Court requesting reasonable attorney's fees and costs for work done in that court was entirely appropriate. A judge in that court may consider the motion and award that amount of the requested attorney's fees and costs that he or she deems reasonable. n18 The plaintiff is, of course, entitled to compensation only for those attorney's fees **[*19]** and costs incurred in connection with those issues on which he prevailed in the Superior Court.

n18 We reject the plaintiff's assertion that the judge in the Superior Court was authorized to award reasonable attorney's fees and costs incurred between the filing of his petition for attorney's fees and costs with the commission and the issuance of the commission's decision affirming the decision of the hearing officer. The proper forum in which to bring such a request is the commission. See *G. L. c. 151B, § 5*.

4. We remand this case for modification of the judgment entered against the department in a manner consistent with parts 1 and 2 **[***37]** of this opinion as follows:

(a) striking the award for damages for emotional distress;

(b) striking the award for prejudgment interest on the damages awarded for back and front pay and entering an award for prejudgment interest on the damages awarded for back pay only, from May 6, 1996, until June 1, 2005.

We also vacate the separate judgment entered denying the plaintiff's request for reasonable attorney's fees and costs incurred in connection with his administrative appeal to the Superior Court, and remand the matter to the Superior Court for proceedings in accordance with part 3 of this opinion. n19

n19 The department has presented no independent argument as to why, if sovereign immunity has been waived in connection with prejudgment interest, that part of the judgment allowing postjudgment interest should not be affirmed. What has been said with respect to sovereign immunity thus applies to both prejudgment and postjudgment interest, for purposes of this opinion. We reject the plaintiff's request, contained in a footnote of his brief, for an assessment of postjudgment interest on the monetary amount on which he and the department settled the latter's appeal of the decision of the judge in the Superior Court affirming the commission's determination of retaliation and the monetary amount to be paid the plaintiff for attorney's fees and costs incurred in connection with proceedings before the commission.

**[***38]**

The plaintiff has requested in his brief an award of appellate attorney's fees and costs in connection with this appeal. He is entitled to such an award, based on the time and funds reasonably expended on those issues on which he ultimately prevailed before this court. He may file a petition for reasonable attorney's fees and costs in accordance with the procedure set forth in *Fabre v. Walton, 441 Mass. 9, 10-11, 802 N.E.2d 1030 (2004)*.

So ordered.

64 Mass. App. Ct. 802, *; 836 N.E.2d 1097, **;
2005 Mass. App. LEXIS 981, ***; 178 L.R.R.M. 2431

**MAUREEN C. GUSTAFSON vs. WACHUSETT REGIONAL SCHOOL DISTRICT & another. n1**

n1 Town of Rutland.

**No. 04-P-1003**

**APPEALS COURT OF MASSACHUSETTS**

***64 Mass. App. Ct. 802; 836 N.E.2d 1097; 2005 Mass. App. LEXIS 981; 178 L.R.R.M. 2431***

**June 3, 2005, Argued**
**October 20, 2005, Decided**

**PRIOR HISTORY:** **[***1]** Worcester. Civil action commenced in the Superior Court Department on February 11, 2000. The case was heard by John P. Connor, Jr., J.

**DISPOSITION:** Judgment affirmed.

**HEADNOTES:** Public Employment, Sick leave benefits, Collective bargaining. School and School Committee, Regional school district, Collective bargaining. Labor, Public employment. Contract, School teacher, Regional school district, Employment, Construction of contract.

**COUNSEL:** Paul M. Cranston for town of Rutland.

David E. Ashworth for the plaintiff.

**JUDGES:** Present: Laurence, Duffly, & Katzmann, JJ.

**OPINION BY:** LAURENCE

**OPINION:**

**[*802]** **[**1098]** LAURENCE, J. After a bench trial, a judge of the Superior Court entered judgment in favor of the plaintiff, Maureen C. Gustafson, and ordered the town of Rutland to reimburse her **[*803]** for accumulated sick leave benefits she claimed to have earned while employed by Rutland. Rutland appeals, arguing that the judge erred in awarding her payment for these sick leave benefits because Gustafson was not employed by Rutland for fifteen years, as required by the terms of her collective bargaining agreement. We affirm the judgment.

Gustafson worked for Rutland, principally as an elementary school teacher, from January, 1981, to June 30, 1994. During that period, her union (the Rutland Teachers Association) and Rutland negotiated a collective bargaining agreement (the "Town Agreement"), in effect (according to the parties' stipulation) from September 1, 1993, through August 31, 1994, which provided **[***2]** in relevant part:

> "Upon retirement with at least 15 years in the Rutland Public School System, a teacher, after notifying the Superintendent [one] year prior to their [sic] retirement, will be reimbursed for [one-half] of any unused accumulated sick leave."

On July 1, 1994, after a vote of the member towns (Holden, Paxton, Princeton, Sterling, and Rutland), the Wachusett Regional School District (WRSD), which already ran the regional high school for the towns, assumed jurisdiction over students in prekindergarten through grade eight, and the separate school systems in the constituent towns ceased to exist. (Of those systems, only Rutland's had provided for an accumulated sick pay benefit.) Accordingly, at that time Gustafson, like all other elementary school teachers, became an employee of WRSD.

The December, 1993, agreement (the "Authorization Agreement") pursuant to which the participating towns effected the regionalization of their primary schools had contained, inter alia, the following provision ( § 18.2):

> "Terminal benefits due to professional staff and personnel formerly employed by an individual member town, shall remain the financial obligation **[***3]** of the individual member town, upon severance of service of the employee . . . ." n2

n2 The words "terminal benefits" were not defined in the Authorization Agreement and appear nowhere in the statute governing regionalization, *G. L. c. 71*. The term "terminal compensation" is used in *§ 42B of c. 71*, and has been held to be the equivalent of "terminal benefits" as used in § 18.2 of the Authorization Agreement and to include unused sick pay benefits. See *Wachusett Regional Sch. Dist. v. Rutland, 54 Mass. App. Ct. 911, 912, 765 N.E.2d 265 (2002)*.

**[*804]** In June, 1995, WRSD and the Wachusett Regional Education Association, Inc. (WREA), entered into a so-called "Bridge Agreement" to govern collective bargaining issues between WRSD and the teachers in the constituent towns retroactively to September 1, 1994, pending agreement on a more permanent collective bargaining agreement. The aspect of the Bridge Agreement pertinent to this case is contained in the preamble:

> "The provisions of this Agreement listed **[***4]** below shall supersede and take precedent [sic] over any and all like provisions in collective bargaining agreements between individual town(s), committees, collaboratives, and associations representing employees covered by the Recognition clause and included in the Regionalization Agreement adopted December 28, 1993. All other provisions of local agreements shall prevail for their individual locations until **[**1099]** such time as a successor agreement is ratified by the Committee and the Association."

The Bridge Agreement contained no provisions concerning sick leave or any other retirement benefits due employees.

Gustafson completed fifteen years of teaching service in early 1996, as a WRSD employee, while the Bridge Agreement was in effect. She retired from teaching on December 31, 1998, and upon retiring made demand upon Rutland for payment of her accumulated sick leave, amounting to $ 14,098.79 for 102.5 days. Gustafson also sought $ 2,000 from WRSD, representing fifty days of sick leave at forty dollars per day, pursuant to the collective bargaining agreement between WREA and WRSD effective September 1, 1997, through August 31, 2000 (the "District Agreement"), which succeeded **[***5]** the Bridge Agreement and provided that:

> "Any member of the bargaining unit having completed fifteen (15) continuous years of service to the district or its predecessors shall be able to receive payment for fifty (50) **[*805]** of their accumulated sick leave days as of the date of retirement or death. . . . All members of the bargaining unit shall receive payment for each day at the rate of $ 40 per day."

Although Gustafson received the $ 2,000 under the District Agreement, Rutland denied her any reimbursement for accumulated sick leave under the Town Agreement. n3 She brought suit against Rutland and WRSD for payment of the 102.5 days of accumulated sick leave she had acquired, and WRSD filed a cross claim against Rutland.

n3 On November 17, 1994, the WRSD personnel department sent Gustafson a letter informing her that as a former employee of the Rutland public schools she would be entitled to a sick leave buy-out as a "terminal benefit" upon her retirement from the regional system and that her "sick leave accrual" then amounted to almost $ 8,000. On April 3, 1998, however, she was informed by that department that the November 17, 1994, letter had been sent in error and that she was not eligible for the Rutland sick leave benefit because she had less than fifteen years of service in the Rutland public school system.

**[***6]**

After a bench trial, a judge of the Superior Court held that Rutland was obligated to pay Gustafson $ 14,098.79 in accumulated sick leave benefits and dismissed WRSD's cross claim. Construing the relevant agreements as "not ambiguous . . . [with] no essential terms omitted," the judge ruled that since the Bridge Agreement made no specific reference to accumulated sick leave (or any other employee benefit), but stated that the provisions of the local collective bargaining agreements governing matters not mentioned in the Bridge Agreement were not superseded but "shall prevail" until the more comprehensive collective bargaining agreement was negotiated by WREA and WRSD, "whatever preexisting benefits (that] were not addressed by the Bridge Agreement would remain in place until the adoption of a future agreement."

The judge consequently held "that for all purposes [Gustafson] is to be treated as an employee with more than 15 years of service and is entitled to those benefits that accrued while a Rutland employee, specifically the

102.5 days of accumulated unused sick leave." His reading of *G. L. c. 71, § 42B*, as amended through St. 1993, c. 71, § 46, **[***7]** confirmed him in this result, particularly the following language (emphasis supplied):

> "School personnel . . . whose positions are superseded **[*806]** by reasons of the establishment and operation of a regional school district, shall be employed with the same status by the regional school district.
>
> **[**1100]** ". . .
>
> "Such . . . personnel shall also be given credit by the regional school district committee for all accumulated sick leave and accumulated sabbatical leave years of service while employed with such status and for terminal compensation due such school personnel on the termination of such service."

The judge concluded by ruling that the language in § 18.2 n4 of the Authorization Agreement, quoted supra, "leaves no doubt" that Rutland (and not WRSD) must pay Gustafson for accumulated unused sick leave.

> n4 Section 18.2 was numbered 18.1 at the time of trial, and was referred to as such in the judge's memorandum of decision. See *Wachusett Regional Sch. Dist. v. Rutland, 54 Mass. App. Ct. at 912* & n.2.

**[***8]**

While we do not share the judge's view that the relevant agreements were unambiguous, we conclude, as did the judge, that Gustafson is entitled to reimbursement from Rutland for her accumulated unused sick leave. There is no dispute that Gustafson's entitlement to sick leave benefits arose from the Town Agreement, which for the first fourteen years of her teaching service was the document that controlled the determination of her benefits as a union member. By the express terms of the Bridge Agreement, all provisions of the Town Agreement not having a counterpart in the Bridge Agreement were to "prevail n5 for their individual locations until such [future] time as a successor [regional collective bargaining] agreement is ratified." In the words of David P. Trainor, who was chief labor relations and personnel officer for WRSD and involved in negotiation of the Bridge Agreement, "the contract [i.e., the Town Agreement, which on its face had an effective life from September 1, 1990, through August 31, 1993] was extended by the Rutland **[*807]** School Committee by letter through June 30, 1994 and was further extended . . . by operation of the Bridge Agreement." n6

> n5 "Prevail," as used in this context, manifestly means "to be effective" or "to be in force or effect." See American Heritage Dictionary 982 (2d ed. 1982); Webster's Third New Intl. Dictionary 1797 (1993).

**[***9]**

> n6 The parties' stipulation of facts stated that the Town Agreement was "in effect through August 31, 1994," and that the Bridge Agreement "ran from September 1, 1994 through August 31, 1997." The commencement of the Bridge Agreement as of September 1, 1994, immediately upon the extended formal expiration of the Town Agreement on August 31, 1994, clearly demonstrates the intimate relationship between the two agreements reflected in the preamble to the Bridge Agreement, i.e., the latter either superseded or continued the several provisions of the former.

One of the provisions of the Town Agreement without an analogue in the Bridge Agreement was that governing reimbursement for unused accumulated sick leave pay, which consequently continued to "prevail" until at least a year after Gustafson had completed her fifteenth year of teaching service in 1996, surviving until the execution of the District Agreement in 1997. n7 Gustafson therefore enjoyed **[**1101]** fifteen years of teaching Rutland students while the Town Agreement's sick leave benefit provision was in effect, and she thereby became entitled to that **[***10]** benefit as one due her when she eventually retired.

> n7 Rutland at several points states that it was not a signatory to the Bridge Agreement, thereby implying that it was not bound by that agreement. That implication is not, however, sustained by any coherent argument supported by reasoning and authorities, and we need not address it. See *Mass.R.A.P. 16(a)(4)*, as amended, 367 Mass. 921 (1975). In any event, Rutland's suggestion makes no sense in light of its status as a constituent and financially supportive member of WRSD with representation on the regional school committee responsible for negotiating labor contracts

and other employment matters. Rutland's position is ultimately premised on its ignoring the intent and effect of the Bridge Agreement, particularly the key concept of local collective bargaining agreements continuing to "prevail" to the extent not addressed by the Bridge Agreement (regarding which it offers no interpretation or explanation whatsoever). Despite its lip service acknowledgment of the validity of the judge's interpretation of the several agreements herein involved as a whole and in light of each other, Rutland's position treats as superfluous and therefore renders meaningless the very provision of the Bridge Agreement upon which this controversy hinges, contrary to established principles of contract law. See *Computer Sys. of America, Inc. v. Western Reserve Life Assurance Co., 19 Mass. App. Ct. 430, 437-438, 475 N.E.2d 745 (1985)*, and cases cited ("every word and phrase of a contract should, if possible, be given meaning, and . . . none should be treated as surplusage if any other construction is rationally possible").

**[***11]**

Rutland's principal argument against Gustafson's entitlement is that by virtue of the "Miscellaneous d" section of the Town Agreement, the parties "agreed" that the provisions of the Town **[*808]** Agreement would "terminate" and "would no longer be in force" if and when regionalization occurred. n8 The "Miscellaneous d" section provides:

> "The parties hereto understand that a regionalization of all or of any portion of the present school system of the Town of Rutland will terminate this agreement as to those staff members affected by such regionalization, but if any portion of the system remains unregionalized, the provisions hereof shall remain in full force and effect as to those staff members retained in the remaining portion of the Rutland School System."

We disagree with Rutland's interpretation. The operative word used in that section, "understand," is not a term of agreement. n9 In context, it amounted to a mere prediction or anticipation of future events and was distinguishable from a manifestation of intention to be bound or an enforceable promise or agreement. See *Restatement (Second) of Contracts § 2 comment f* (1981). n10

n8 Rutland's secondary argument, based upon a literal reading of the Town Agreement, is that Gustafson never satisfied the condition that she work fifteen years in "the Rutland Public School System" in order to become vested -- a condition that was impossible to satisfy because the system ceased to exist before she reached her fifteenth year of teaching. This strained contention makes sense only by disregarding the existence, or at least the effect, of the Bridge Agreement, which, as noted above, preserved her right and eventual entitlement to the unused sick leave benefit until execution of the District Agreement in 1997, well after she had completed her fifteenth year of service.

**[***12]**

n9 See Webster's Third New Intl. Dictionary 2490 (1993), giving as principal meanings of "understand": "to know, consider, or accept as a fact, truth, or principle without further mention or explanation or without utter certainty"; "to consider as a possible fact: infer or come to regard as plausible or probable without certain knowledge or proof."

n10 By contrast, when the parties to the Town Agreement desired to manifest their intention to create binding and enforceable obligations, they knew how to do so, as evidenced by the immediately preceding section, "Miscellaneous c," which forthrightly states: "The [Rutland Teachers] Association agrees that it will not . . . strike . . . [and] the Association and its members, individually and collectively agree that . . . [members who strike] will . . . be subject to disciplinary action . . . [that] shall not be arbitrable" (emphasis supplied). See also "Miscellaneous f" ("All employees by this Agreement who do not [now] pay Association dues shall be required to make payment . . . of an Agency Service Fee to the Association" [emphasis supplied]); and "Miscellaneous e" ("The parties hereto for the life of this agreement each voluntarily and unqualifiedly waive the right . . . to bargain collectively [as to any subject addressed in the Town Agreement] . . . . This provision is not to be interpreted so as to prevent commencement and maintaining [sic] of discussions for a successor agreement as called for in the Duration Clause." [Emphasis supplied.])

**[***13]**

**[*809]** **[**1102]** In fact, the prediction or anticipated state of affairs reflected in "Miscellaneous d" proved to be erroneous and was superseded by events. Regionalization occurred on July 1, 1994, but the Town Agreement did not then terminate, instead continuing in effect by ongoing collective bargaining through August 31, 1994, with significant sections thereof -- including the unused sick leave benefit -- remaining in effect until September 1, 1997, by virtue of the Bridge Agreement, collectively bargained on behalf of both Rutland and its teachers. n11

> n11 In this connection, we take note of the special nature of collective bargaining agreements. See, e.g., *Boston Teachers Union, Local 66 v. Boston, 44 Mass. App. Ct. 746, 754-755, 694 N.E.2d 33 (1998)* ("Professor Cox reminds us: 'The governmental nature of a collective bargaining agreement should have predominant influence in its interpretation. The generalities, the deliberate ambiguities, the gaps, the unforseen contingencies, the need for a rule although the agreement is silent -- all require a creativeness quite unlike the attitude of one construing a deed or a promissory note or a three-hundred page corporate trust indenture.' Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 25 [1958]. There is need to take account both of the practical necessity to avoid uncontracted-for gaps of time between bargaining agreements and of the often uncomfortable and sometimes unpredictable passage of time while steps of ratification are taken: hence parties assure continuity by contractual provision for retroactivity. The city [of Boston] would have the 1986-1989 contract 'expire' on August 31, 1989, and the new contract take on life only when funded in March, 1990. But life continued between these dates: teachers were working and received their salaries and insurance coverage as governed by the old contract; the only open question was the rates of increase in salaries [and incidentals]. Bargaining on that question continued and the solution, when reached, was made retroactive to the commencement date of the new contract coinciding with the rest of the agreement. On this view the insurance contribution provisions, as carried over continuously from the earlier bargaining agreement, were grandfathered . . . . A contrary result appears inequitable . . . ." [Footnote omitted.]) A similar solution was reflected in the Bridge Agreement, which, although finally negotiated in 1995, was made retroactive to September 1, 1994, to avoid any gap between agreements.
>
> Another labor law technique for avoiding gaps is the use of a "rollover" or "evergreen" clause common in collective bargaining agreements. Such a provision typically states that even after the expiration of the term of the agreement, its provisions will continue in force until changed by the parties or until the negotiation of a new agreement. Compare *Boston Lodge 264, Intl. Assn. of Machinists v. Massachusetts Bay Transp. Authy., 389 Mass. 819, 820-821, 452 N.E.2d 1155 (1983)*; *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Authy., 414 Mass. 323, 325-327, 607 N.E.2d 1011 (1993)*; *Massachusetts Bay Transp. Authy. v. Local 589, Amalgamated Transit Union, 20 Mass. App. Ct. 418, 426-427, 480 N.E.2d 1044 (1985)*. The copy of the Town Agreement in the record lacks several pages that might contain such a clause, but the "successor agreement" language of "Miscellaneous e" (quoted in note 10, supra) suggests that some type of rollover or successor language existed in the missing "Duration Clause." It is likely that one existed, given the explicit "rollover" language of the last sentence of the preamble to the Bridge Agreement ("All other provisions of local agreements shall prevail for their individual locations until such time as a successor agreement is ratified by the [Regional School] Committee and the [Regional Education] Association"). The District Agreement, which succeeded the Bridge Agreement, contained just such a provision, Article 2A (which was not in the record on appeal but was provided to the court by consent of the parties).

**[***14]**

**[*810]** The operation of the Bridge Agreement also renders Rutland's final argument without force. Rutland points to the word "due" in both § 18.2 of the Authorization Agreement ("terminal benefits due") and *G. L. c. 71, § 42B* ("terminal compensation due"), and asserts that nothing was ever "due" Gustafson because she never performed the requisite fifteen years of service as a Rutland public school system **[**1103]** teacher. Again, Rutland's argument necessarily assumes that the Town Agreement entirely expired on August 31, 1994, and that the Bridge Agreement does not apply to Gustafson's claim for the sick leave benefit, both of which are assumptions without basis in fact or law. As discussed above, by virtue of the carry-over provision of the Bridge Agreement, Gustafson became entitled to reimbursement for unused sick leave once she completed fifteen years of

teaching service, n12 at which time that benefit "accrued," see *Allison v. Whittier Regional Vocational High Sch. Dist., 15 Mass. App. Ct. 944, 946, 445 N.E.2d 625 (1983)*, n13 and was legally **[*811]** "due" her upon her retirement, in the accepted meaning of the word. See Black's Law Dictionary 538 (8th ed. 2004).

n12 By operation of the Bridge Agreement, Gustafson became "eligible" within the meaning of *Wachusett Regional Sch. Dist. v. Rutland, 54 Mass. App. Ct. at 912*, wherein this court affirmed a judgment declaring that § 18.2 of the Authorization Agreement was enforceable and that under it Rutland was obligated to pay the sick leave benefits due to the teacher in that case (who had over fifteen years of service prior to regionalization), "and to any other eligible former employee of Rutland who retires from the [regional school] district in the future . . . ."
**[***15]**

n13 In *Allison, 15 Mass. App. Ct. at 945-946*, we observed that the "general import" of *G. L. c. 71, § 42B*, "is that a city school teacher whose functions are 'superseded' by his employment by a regional school district is not to be reduced in compensation by the change of employer. . . . [A] 'superseded' city teacher is to carry with him or her to district employment an accrued claim to all the benefits . . . of which that teacher had become the beneficiary as a consequence of city employment."

Rutland's argument that, under Allison, only regional districts, and not individual school districts, remain obligated to pay 'superseded' teachers' benefits, is unavailing. In *Allison*, we determined that, pursuant to *§ 42B*, the regional district was obligated to pay the employee's retirement benefits. The former city employer, Haverhill, was dismissed from the case. Rutland, however, ignores the fact that, as Haverhill was not a member of the WRSD, the Authorization Agreement at issue here was not implicated. See note 12, supra.

Judgment affirmed **[***16]** .

# TOWN OF HOLDEN vs. WACHUSETT REGIONAL SCHOOL DISTRICT COMMITTEE & others. n1

n1 Towns of Rutland, Paxton, Princeton, and Sterling.

**SJC-09438**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***445 Mass. 656; 840 N.E.2d 37; 2005 Mass. LEXIS 766***

**September 8, 2005, Argued**
**December 29, 2005, Decided**

**SUBSEQUENT HISTORY:** **[***1]** As Corrected April 21, 2006.

**PRIOR HISTORY:** Worcester. Civil action commenced in the Superior Court Department on August 28, 2002. The case was heard by Kenneth J. Fishman, J., on motions for summary judgment, and entry of judgment was ordered by John S. McCann, J. The Supreme Judicial Court granted an application for direct appellate review. *Town of Holden v. Wachusett Reg'l Sch. Dist. Comm., 2003 Mass. Super. LEXIS 114 (Mass. Super. Ct., 2003)*

**DISPOSITION:** Judgment affirmed.

**HEADNOTES:** School and School Committee, Regional school district. Education Reform Act.

**COUNSEL:** John O. Mirick for the plaintiff.

Jane L. Willoughby, Assistant Attorney General, for Department of Education.

Brian W. Riley for town of Rutland.

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

**OPINION BY:** MARSHALL

**OPINION:**

**[*656]** **[**38]** MARSHALL, C.J. This case lays bare the tensions between education reform measures enacted by the Legislature in 1993 (the Education Reform Act, St. 1993, c. 71, which established a wholly new system for public school finance and governance in **[*657]** the Commonwealth) and agreements reached by small towns that joined together (sometimes decades ago) to form regional school districts to provide a quality education beyond their capacity to provide individually. The Education Reform Act encompasses the Legislature's determination that wealthier towns in the Commonwealth pay a higher proportionate share of the costs of educating **[***2]** their students than less affluent towns. At issue here is an attempt by four of five towns in the Wachusett Regional School District (Wachusett district) to redress what they view as an undue financial benefit that the fifth town receives under the Education Reform Act.

The Wachusett district comprises all grades from prekindergarten through grade twelve for its five participating member towns, including Holden and Rutland. n2 It is governed by the Wachusett Regional School District Agreement (Wachusett agreement). Under the Education Reform Act, the commissioner of the Department of Education (commissioner) sets wealth-based minimum required local contributions from each town. See *G. L. c. 70, 2, 6.* In 2002, four of the Wachusett member towns (all but Rutland) approved a proposed amendment to the Wachusett agreement changing the manner in which the Wachusett district would assess to each member town amounts that the district opted to spend in excess of the annual contributions required by the commissioner. If implemented, the proposed amendment would require the least affluent town (Rutland) to pay almost all of the additional **[***3]** assessment, while a wealthier town (Holden) would pay none. On his review of the proposed amendment, the commissioner declined to approve it.

n2 The other participating towns are Paxton, Princeton, and Sterling.

Holden initiated this lawsuit and moved for summary judgment to challenge the commissioner's authority

to review the proposed amendment, as well as his substantive determination declining to approve it. Rutland opposed the motion and moved for summary judgment. As we shall later describe in more detail, a judge in the Superior Court entered summary judgment in favor of Rutland. We affirm, but for reasons different from those of the judge.

1. Background. The relevant facts are not disputed. The **[*658]** Wachusett agreement was first approved by the member towns, the Department of Education (department), and the Emergency Finance Board in 1951, pursuant to *G. L. c. 71, § 14B*. That statute provides for the establishment of regional school districts and **[**39]** agreements to govern such districts, **[***4]** and requires, inter alia, that each regional school district agreement include "the method by which the agreement may be amended," and "any other matters, not incompatible with law, which the said [regional district planning] board may deem advisable." n3 The record reflects that the Wachusett agreement was amended at least three times, in 1977, 1993, and 1998. n4 In both 1993 and 1998, i.e., on the two occasions since the enactment of the **[*659]** Education Reform Act, the amendments were submitted to and approved by the commissioner. n5

n3 *General Laws c. 71, § 14B*, requires, in relevant part, that any such agreement include:

"(a) The number, composition, method of selection, and terms of office of the members of the regional district school committee.

"(b) The town or towns in which, or the general area within the regional school district where, the regional district school or schools are to be located.

"(c) The type of regional district school or schools. . . .

"(d) The method of apportioning the expenses of the regional school district, and the method of apportioning the costs of school construction, including any interest and retirement of principal of any bonds or other obligations issued by the district among the several towns comprising the district, and the time and manner of payment of the shares of the several towns of any such expense.

"(e) The method by which school transportation shall be provided, and if such transportation is to be furnished by the district, the manner in which the expenses shall be borne by the several towns.

"(f) the terms by which any city or town may be admitted to or separated from the regional school district . . . .

"(g) The method by which the agreement may be amended.

"(h) The detailed procedure for the preparation and adoption of an annual budget.

"(i) Any other matters, not incompatible with law, which the said board may deem advisable."

In 1951, when the Wachusett agreement was initially approved, the statute provided that "copies of such agreement shall be submitted to the emergency finance board . . . and the department of education, and, subject to their approval, to the several towns for their acceptance." *General Laws c. 71, § 14B*, was amended in 2003 to delete the reference to the Emergency Finance Board. St. 2003, c. 46, § 75.

**[***5]**

n4 The record does not reflect whether the agreement has otherwise been amended, although the Wachusett agreement itself provides for review and possible amendment every five years. Specifically, § 14.1 of the agreement provides that "the Wachusett Regional School District Agreement shall be reviewed every five years by the Wachusett Regional School District Committee. The Committee shall hold a public hearing to receive comment and proposed changes from the citizens of the member towns. The Committee shall prepare and submit a written report to the Boards of Selectmen of the member towns."

n5 The record does not reveal whether the 1977 amendment was submitted to the commissioner for his approval.

As required by *G. L. c. 71, § 14B*, the Wachusett agreement contains a procedure for enacting amendments: "This Agreement may be amended by recommendation of the [Wachusett] Regional School District Committee n6 [committee] and approval of the member towns of the District by majority vote at an annual or special town meeting provided that not more than one town disagrees. **[***6]** " As is also required by *G. L. c. 71, § 14B*, the Wachusett agreement contains a proce-

dure for apportioning expenses: "Payment of all operating costs shall be apportioned among the member towns on the basis of **[**40]** their respective previous five year average total enrollment as of October 1st of each year of the preceding five fiscal years."

n6 The Wachusett Regional School District Committee (committee) consists of members elected by each of the five member towns. The number of members from each town fluctuates based on each town's population. The least populous town has two seats on the committee, with other towns having proportionately more seats on the committee.

The 1993 Education Reform Act "made significant changes to the governing structure and financing of the Massachusetts public school systems." *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 765 n.3, 767 N.E.2d 549 (2002).* The new system of school finance, codified in *G. L. c. 70*, requires the commissioner **[***7]** annually to establish a minimum required local contribution from each city or town toward the operation of its public schools. See *G. L. c. 70, § § 2, 6.* The complex formula used to calculate each city and town's minimum required contribution is wealth based, and requires relatively wealthier towns to make greater contributions than relatively less affluent towns. Id. As is the case with the Commonwealth as a whole, towns in regional school districts that have higher property values, higher income levels, and a greater ability to raise revenue have a relatively larger required **[*660]** contribution than towns in which the converse is true. Id. See *Hancock v. Commissioner of Educ., 443 Mass. 428, 437, 822 N.E.2d 1134 (2005)* (Marshall, C.J., concurring) (Education Reform Act "eliminated the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources, and unable to rely on sufficient or predictable financial or other assistance from the Commonwealth").

In instituting the new funding scheme, the Legislature specifically provided that the minimum required local **[***8]** contributions supersede the assessments as calculated under a regional school district agreement. n7 Then in 1996, three years after the Education Reform Act, the Legislature provided that members of a regional school district could, with the approval of every district member, agree not to be bound by the funding formulas established by the Education Reform Act, but could instead "elect to reallocate the sum of their required local contributions to the district in accordance with the regional agreement." *G. L. c. 71, § 16B.* In the absence of a unanimous election, the Education Reform Act limits a regional agreement's apportionment formula to allocating assessments, if any, in excess of the minimum required local contributions. To that end, *G. L. c. 70, § 6*, provides: "The district may choose to spend additional amounts; such decisions shall be made and such amounts charged to members according to the district's required agreement."

n7 Specifically, *G. L. c. 70, § 6*, provides: "Notwithstanding the provisions of any regional school district agreement, each member municipality shall increase its contribution to the regional district each fiscal year by the amount indicated in that district's share of the municipality's minimum regional contribution in that fiscal year."

**[***9]**

In March, 2002, the committee voted to recommend amending the Wachusett agreement by eliminating the provision that apportioned excess costs among the five towns on a per capita basis, and substituting a new method of allocating any excess costs the Wachusett district opted to spend. The proposed amendment was designed to work as follows: first, each member town's per capita assessment of the excess spending amount would be calculated. Then, if a member town had paid more **[*661]** under the Commonwealth's system of wealth-based required minimum local contributions than it would have under the per capita system, it would receive a "credit" of the difference, while a town that paid less than it would have under that system would receive a "debit." These debits and credits would be taken into account in establishing the apportionment **[**41]** of the excess costs the committee voted to spend each year.

Although the proposed amendment ostensibly concerned only the apportionment of costs above the minimum local contributions required by the commissioner, the effect of the amendment ensured that the member town with the smallest per student contribution set by the commissioner (Rutland) would be required **[***10]** to pay far more than its per student share of the excess amount that the committee voted to spend each year, while the towns with a relatively greater per student required local contribution (e.g., Holden) would be required to pay far less or even nothing of the excess recommended by the committee. The Wachusett district's proposed 2004-2005 budget starkly illustrates this disparity. According to Holden, the committee voted to spend $ 3,091,369 to educate the Wachusett district's

children beyond the money available from other sources, including the minimum local contributions required by the commissioner. The proposed amendment would require Rutland (the poorest town) to pay approximately $ 3 million of that amount, while Holden would be required to pay none of it. The other three member towns, Paxton, Sterling, and Princeton, would pay the remaining small amount.

Holden readily acknowledges that the purpose of the proposed amendment was the outcome described above; that is, to require Rutland to pay by far the largest share of the excess because under the wealth-based formula established by the Education Reform Act, Rutland, a less affluent town, was required to pay far less than **[***11]** Holden on a per student basis. As Holden explained: "It is unfair for Rutland to pay significantly less than Holden on a per student basis, particularly when the [Wachusett district] was created on the concept of an equal per student payment from each member town."

At their respective town meetings held during April, May, and June, 2002, Holden, Paxton, Princeton, and Sterling each **[*662]** voted to adopt the proposed amendment, while Rutland voted not to adopt the proposed amendment. The committee then forwarded the proposed amendment to the commissioner, although the record does not indicate when or for what purpose. n8

n8 The commissioner states that the committee submitted the proposed amendment to him for his approval pursuant to *603 Code Mass. Regs. § 41.03(3)*. See note 10, infra.

On June 10, 2002, in a letter to the chairman of the committee, the commissioner declined to approve the proposed amendment. The commissioner explained that the proposed amendment "contravened the **[***12]** intent of [*G. L. c. 71, § 16B*]," n9 created an "unreasonable and unjustifiable burden on a minority of [town] members," and was "arithmetically ambiguous." The commissioner further noted that "to become effective, the amendment must be approved by at least four of the five member towns and by the Commissioner of Education" (emphasis added). He additionally stated that the exercise of his approval served "as a check and balance against unreasonable acts by the majority" of the towns, and that his "approval authority is pursuant to the . . . regulations on regional school districts," citing specifically *603 Code Mass. Regs. § 41.03* (1997) n10 and *G. L. c. 71, § 14B*.

n9 As discussed earlier, *G. L. c. 71 § 16B*, requires the consent of all towns in a regional school district before an agreement's apportionment of costs may supersede the required minimum local contributions as determined by the commissioner.

n10 Title *603 Code Mass. Regs. § 41.03(3)* (1997) provides, in relevant part: "The Commissioner shall approve or disapprove a Regional District Agreement, and any subsequent amendments to the Agreement, based on review and recommendation by the Department that the Agreement meets the standards in 603 [Code Mass. Regs. § ] 41.00 and applicable law. The decision of the Commissioner shall be final." Title *603 Code Mass. Regs. § 41.00* governs regional school districts.

**[***13]**

**[**42]** Following receipt of the commissioner's letter, the committee refused to implement the proposed amendment. Holden then commenced this action, n11 and shortly thereafter moved for summary judgment, seeking an order "declaring that the amendment **[*663]** was duly approved and should be implemented." Rutland cross-moved for summary judgment. A judge in the Superior Court allowed the department's assented-to motion to intervene as a defendant, and the department filed an opposition to Holden's motion for summary judgment.

n11 Holden named as defendants the committee, as well as Rutland, Paxton, Princeton, and Sterling, but alleged that Paxton, Princeton, and Sterling "supported" Holden's position. In their respective answers to Holden's complaint, Paxton, Princeton, and Sterling each indicated "support" for Holden's position. The committee answered that, on September 18, 2002, it had voted not "to take a position at this time but [to] defer to the decision of the Court."

The judge denied Holden's motion for summary judgment **[***14]** and allowed Rutland's cross motion for summary judgment. He concluded that, although the proposed amendment appeared "on its face" to conform with the funding procedures mandated by the Legislature, "its actual effect, and its admitted purpose, [was] to offset the minimum regional contribution in a manner that negates the statutorily mandated differential funding and reinstates funding solely on the basis of the regional

agreement without unanimous agreement of the member towns." The judge determined that the proposed amendment violated the intent of both the Education Reform Act, specifically *G. L. c. 70, § 6*, and the Regional School District Act, specifically *G. L. c. 71, § 16B*. Holden appealed, and we granted its application for direct appellate review.

2. Discussion. We consider first Holden's challenge to the authority of the commissioner to approve or disapprove every amendment to a regional school district agreement. Holden argues that neither the Wachusett agreement itself nor the applicable statutes give the commissioner such authority, positing three rationales. First, it contends that *G. L. c. 71, § 14B* **[***15]** , authorizes the department initially to approve a regional school district agreement, including its method of amendment, but not the content of any subsequent amendment to the agreement, provided the amendment is enacted in accordance with the agreement's provisions. When the department initially approved the Wachusett agreement in 1951, it did not reserve the right to review and approve all subsequent amendments. Therefore, Holden continues, the commissioner cannot now assert the right to do so. Next, Holden contends that the provision of *603 Code Mass. Regs. § 41.03*, on which the commissioner relies, applies only to amendments that encompass the "reorganization" of a regional school district, which is not at issue here. Third, to the extent that *603 Code Mass. Regs. § 41.03* grants the commissioner broad authority to approve amendments to regional school **[*664]** district agreements, Holden argues that the regulation is invalid as promulgated without statutory authority. None of these arguments is persuasive, and we therefore conclude that the commissioner has the authority to approve or disapprove amendments to regional school **[***16]** district **[**43]** agreements, and that he properly exercised that authority in declining to approve the proposed amendment to the Wachusett agreement.

The commissioner grounded his approval authority on *G. L. c. 71, § 14B*, and 603 Code Mass. Regs. § 41.03. We consider the validity of his position, keeping in mind that "an express grant [of authority] carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred," and that the Legislature "need not enumerate or specify, definitely and precisely, each and every ancillary act that may be involved in the discharge of an official duty." *Scannel v. State Ballot Law Comm'n, 324 Mass. 494, 501, 87 N.E.2d 16 (1949)*. We must also apply "all rational presumptions in favor of the validity of the administrative action." *Thomas v. Commissioner of the Div. of Med. Assistance, 425 Mass. 738, 746, 682 N.E.2d 874 (1997)*, quoting *American Family Life Assur. Co. v. Commissioner of Ins., 388 Mass. 468, 477, 446 N.E.2d 1061*, cert. denied, *464 U.S. 850, 104 S. Ct. 160, 78 L. Ed. 2d 147 (1983)*. "A highly deferential standard of review governs **[***17]** a facial challenge to regulations promulgated by a government agency." *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 771, 767 N.E.2d 549 (2002)*.

Since its enactment in 1949, *G. L. c. 71, § 14B*, has provided for the establishment of regional school districts, and requires that the department, as well as the member towns, approve any regional school district agreement. As noted earlier, *§ 14B* further provides that every agreement must include, inter alia, a method for amending the agreement, and may include "any other matters, not incompatible with law, which the said [regional district planning] board may deem advisable." *G. L. c. 71, § 14B (g), (i). Section 14B* apparently was enacted in response to a 1949 legislative report supporting the creation of regional school districts. See 1949 House Doc. No. 2300. The report specifically considered the role of the department with respect to such districts and concluded that the department's approval of every regional school district agreement was advisable **[*665]** because "there may be a state-wide interest which could not be specifically developed by **[***18]** local considerations alone." See id. at 21. Approval by the department, the report continued, "might be desirable to guarantee that the plans proposed in any area were educationally sound, or that the interests of the children or of the taxpayers had been considered with some degree of uniformity throughout the State." Id. at 21-22. Implicit in the entire statutory scheme enacted in response to the report is the authority of the department to review proposed changes to regional school district agreements precisely to ensure that any proposed plans are educationally sound. Such plans of necessity encompass arrangements that go to the heart of public education, for example, "the method of apportioning the expenses of the regional school district." *G. L. c. 71, § 14B (d)*. We have no hesitation in concluding that, even before the enactment of the 1993 Education Reform Act, the department retained considerable authority to approve plans proposed by a regional school district. See *Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 113, 653 N.E.2d 589 (1995)* ("it is a well-established canon of statutory construction that a strictly **[***19]** literal reading of a statute should not be adopted if the result will be to thwart or hamper the accomplishment of the statute's obvious purpose, and if another construction which would avoid this undesirable result is possible").

**[**44]** To the extent that the commissioner's authority was implicit in the 1949 legislation, it was made explicit in the 1993 Education Reform Act, which substantially increased the commissioner's authority over all

school districts, including regional school districts. See, e.g., *G. L. c. 69, § 1A*. n12 As the commissioner explained in his letter to the committee, to permit a majority of the towns of a regional school district to amend an agreement in a manner that is detrimental to a minority would be inconsistent with the financial structure imposed by the Education Reform Act, and "the Commonwealth, which has ultimate responsibility for the quality of public elementary and **[*666]** secondary education, has a significant interest in the stable and effective operation of regional school districts."

n12 *General Laws c. 69, § 1A*, which details the commissioner's duties, was substantially rewritten in 1993 in connection with the passage of the Education Reform Act. The twelfth paragraph of that statute specifically encompasses the duties of the commissioner with respect to regional school districts.

**[***20]**

The committee itself apparently recognized that all amendments to the Wachusett agreement must now be submitted to the commissioner for his review and approval. In both 1993 and 1998, the committee submitted proposed amendments to the Wachusett agreement to the commissioner, to which he gave his approval. The committee apparently did so again in 2002. See note 8, supra. The challenge to the commissioner's authority arose only when the commissioner declined to give his approval to a proposed amendment.

As to the regulation at issue, we conclude that *603 Code Mass. Regs. § 41.03(3)* is fully consistent with *G. L. c. 71, § 14B*, and *G. L. c. 69, § 1A*, and was properly promulgated. The regulation provides that the commissioner "shall approve or disapprove" a regional school district agreement and "any subsequent amendments" to such an agreement. See note 10, supra. The commissioner's determination is based on a review and recommendation by the department "that the Agreement meets the standards in [*603 Code Mass. Regs. § 41.00*] n13 and applicable law." We reject Holden's contention that the regulation **[***21]** applies only where an amendment encompasses a "reorganization" of a regional school district.

n13 Title *603 Code Mass. Regs. § 41.00*, entitled "Regional School Districts," contains four subparts that regulate various aspects of regional school districts.

Title *603 Code Mass. Regs. § 41.03*, entitled "Department of Education Approval," includes several subparts. Sections 41.03(1) and 41.03(2) pertain to a regional school district's process for submitting reorganization plans to the commissioner for review. Section 41.03(3), however, provides for the commissioner's broad and nonappealable review of a regional school district agreement and "any subsequent amendments" to such an agreement. The department represents that it has consistently interpreted this regulation to require the commissioner to approve all amendments to regional school district agreements. n14 **[*667]** We, of course, **[**45]** give substantial deference to an agency's interpretation of its own regulations. See *Felix A. Marino Co. v. Commissioner of Labor & Indus., 426 Mass. 458, 461, 689 N.E.2d 495 (1998)* **[***22]** ("Once the [department] made an interpretative ruling, [it] resolved the ambiguity that might otherwise have prompted us to construe this statute narrowly . . .").

n14 Title *603 Code Mass. Regs. § 41.03(3)* was amended in 1996, effective February 1997. Prior to the amendment, this regulation did not require department approval of amendments to regional school district agreements unless the amendments expanded grade structures or added member towns. See *603 Code Mass. Regs § 41.00* (as of February 12, 1993). As explained by the department, important proposed changes to regional school district agreements, which could implicate the purposes of the Education Reform Act, might go unreviewed by the department. The regulation was amended to address this appropriate concern.

Holden argues that the regulation itself is invalid because the Board of Education (board) lacked the statutory authority to promulgate **[***23]** it. It correctly notes that *G. L. c. 69, § 1B*, twenty-fourth par., provides: "The board shall establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters fifteen, seventy, seventy-one A, seventy-one B, and seventy-four . . . ." Because *G. L. c. 71* (which governs, inter alia, regional school districts) is not among the provisions enumerated, Holden posits that the Legislature intended to deny the board the authority to issue regulations concerning amendments to regional school district agreements. We do not agree.

*General Laws c. 69, § 1B*, was enacted as part of the Education Reform Act of 1993. St. 1993, c. 71, § 29. Pursuant to *G. L. c. 69, § 1B*, first par., the board is required to "establish policies relative to the education of students in public early childhood, elementary, secondary, and vocational-technical schools." This broad legislative grant of authority gives the board far-reaching power "to withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the operation of the public schools or any regulation" **[***24]** and requires the board to ensure "that all school committees comply with all laws relating to the operation of the public schools." *G. L. c. 69, § 1B*, seventh and eighth pars. Schools which comprise a regional school district are not exempt from the board's authority, nor are regional school district committees.

Consistent with this extensive grant of authority is the board's authority to promulgate regulations "as necessary to fulfill [its] **[*668]** purposes." *G. L. c. 69, § 1B*, twenty-fourth par. Additionally, pursuant to *G. L. c. 69, § 1A*, twelfth par., "the commissioner shall encourage and facilitate the adoption of regional [school] districts to improve the delivery of a quality public education in an economical manner." While we have been unable to ascertain why *G. L. c. 69, § 1B*, does not contain a specific cross-reference to *G. L. c. 71*, the board's promulgation of regulations regarding regional school districts is consistent with both *G. L. c. 71, § 14B*, and the department's statutory authority generally. The promulgation of *603 Code Mass. Regs. § 41.03* **[***25]** was a valid exercise of the board's authority. See *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 773-774, 767 N.E.2d 549 (2002)*, and cases cited (administrative agency "has the authority to promulgate regulations giving effect to legislative mandates"); *Grocery Mfrs. of Am., Inc. v. Department of Pub. Health, 379 Mass. 70, 75, 393 N.E.2d 881 (1979)* (regulatory authority need not be pinpointed to specific statutory language). See also *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 421 Mass. 570, 583, 659 N.E.2d 710 (1996)* (administrative agency "has jurisdiction to establish regulations that bear a rational relation to the statutory purpose"); *Beth Israel Hosp. Ass'n v. Board of Registration in Med., 401 Mass. 172, 176, 515 N.E.2d 574 (1987)* ("regulation may be authorized though not traceable to specific statutory language, [and] powers granted include those reasonably implied").

Holden additionally argues that the terms of the proposed amendment to the **[**46]** Wachusett agreement comply with both *G. L. c. 71, § 16B*, and the intent of the Education Reform Act. In his June, 2002, letter to the committee, the **[***26]** commissioner commented that "regional school districts are very important in the Commonwealth's educational system." The Legislature and the board have provided a means for communities to form regional school districts, while maintaining an important and expanded role for the commissioner to review regional school district agreements and all amendments to those agreements to ensure compliance with applicable law and to protect minority towns from overreaching by the majority. Upon his review of the proposed amendment, the commissioner concluded that four towns in the Wachusett district had sought to impose an unfair and unreasonable burden on Rutland. The commissioner's **[*669]** review and disapproval of the proposed amendment was a lawful exercise of his authority. n15 We therefore need not and do not consider Holden's challenge to the substance of the commissioner's decision.

n15 Holden makes no claim that the exercise of the commissioner's authority, if valid, was an abuse of discretion.

Judgment affirmed. **[***27]**

66 Mass. App. Ct. 905, *; 845 N.E.2d 1141, **;
2006 Mass. App. LEXIS 396, ***

**LISA L. KUPPERSTEIN, individually and as trustee, n1 & another n2 vs. PLANNING BOARD OF COHASSET.**

n1 Of Villa Lisa II Realty Trust and Villa Lisa III Realty Trust.
n2 Eric S. Kupperstein.

**No. 05-P-781**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 905; 845 N.E.2d 1141; 2006 Mass. App. LEXIS 396***

**April 10, 2006, Decided**

**HEADNOTES:** Subdivision Control, Approval of plan. Statute, Construction.

**COUNSEL:** **[***1]** Eric S. Kupperstein for the plaintiffs.

Kimberly M. Saillant for the defendant.

**OPINION:**

**[*905]** **[**1142]** This action came before the Superior Court on the plaintiffs' complaint, captioned "Petition for Writ of Mandamus." The plaintiffs sought an order requiring the planning board for the town of Cohasset (board) forthwith to endorse a plan as "approval under the subdivision control law not required," and an order that the town clerk forthwith issue a certificate to the same effect. There is no dispute as to the facts, which are succinctly stated by the judge in his memorandum of decision and order on the plaintiffs' motion for judgment on the pleadings. *Mass.R.Civ.P. 12(c)*, 365 Mass. 754 (1974).

The judge ruled that, pursuant to *G. L. c. 41, § 81P*, and the local rules and regulations of the board, the plaintiffs "are entitled to a constructive endorsement or approval of their plan." However, the judge denied relief to the plaintiffs, stating that "permitting a constructive endorsement of [approval not required] status for a subdivision in this instance, on these facts, does not serve the underlying purpose of the subdivision **[***2]** control law."

The plaintiffs appeal, arguing that the judge had no authority to rule that the plan was constructively approved, but deny, as a matter of discretion, the practical relief that they sought. There was no appeal by the town from the judge's statement that the plaintiffs "are entitled to a constructive endorsement." The record establishes that entitlement.

The board argues that the judge had discretion to deny the plaintiffs' relief and was justified in considering the underlying purpose of the subdivision control law in denying that relief. We disagree.

The statute, *G. L. c. 41, § 81P*, is clear, and the Legislature utilized the mandatory word shall in several instances. The statute directs that the planning board shall give written notice of its determination to the clerk, and if not, the board "shall be deemed to have determined that approval . . . is not required, and it shall . . . make such endorsement on [the] plan, and [upon] its failure to do so . . . [the municipal] clerk shall issue a certificate to the same effect" (emphases supplied). *G. L. c. 41, § 81P*. In the event of a plan's **[***3]** constructive approval, the action of the board, or of the municipal clerk, is mechanical, and the landowner's entitlement to the endorsement and certificate is mandatory. The suggestion that a landowner must take some further action, beyond the type of action taken by the plaintiffs in this case, is unsupported in law. The plaintiffs are entitled, forthwith, to endorsement of the plan or to a certificate from the clerk. There is no other available or adequate remedy. The **[*906]** appellees' repeated insistence that mandamus is a discretionary remedy is misplaced in these circumstances. See *Kay-Vee Realty Co. v. Town Clerk of Ludlow, 355 Mass. 165, 243 N.E.2d 813 (1969)*; *Lutheran Service Assn. of New England, Inc. v. Metropolitan Dist. Commn., 397 Mass. 341, 344, 491 N.E.2d 255 (1986)*; *Foley v. Commonwealth, 437 Mass. 1016, 1017, 770 N.E.2d 989 (2002)*; *Zaltman v. Town Clerk of Stoneham, 5 Mass. App. Ct. 248, 251, 362 N.E.2d 215 (1977)*; *J & R Inv., Inc. v. City Clerk of New Bedford, 28 Mass. App. Ct. 1, 6-8, 545 N.E.2d 1173 (1989)*. Compare **[**1143]** *Craig v. Planning Bd. of Haverhill, 64 Mass. App. Ct. 677, 681, 835 N.E.2d 270 (2005)*.

The judgment is vacated, and a new judgment shall **[***4]** enter directing the board to act in accordance with this opinion.

So ordered.

**ROBIN W. MAY'S CASE.**

**No. 05-P-1517**

**APPEALS COURT OF MASSACHUSETTS**

***2006 Mass. App. LEXIS 909***

**June 12, 2006, Argued**
**August 24, 2006, Decided**

**PRIOR HISTORY:** **[*1]** Suffolk. Appeal from a decision of the Industrial Accident Reviewing Board.

**COUNSEL:** William C. Harpin (Teresa Brooks Benoit with him), for the employee.

Patricia G. Noone, for the employer.

**JUDGES:** Present: Green, Dreben, & Grainger, JJ.

**OPINION BY:** DREBEN

**OPINION:**

Workers' Compensation Act, Injuries to which act applies, Emotional distress. Words, "Predominant," "Primary."

DREBEN, J. This case involves the standard or definition of causation for purposes of receiving benefits for mental or emotional injuries under the workers' compensation act. The act provides that "[p]ersonal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment." *G. L. c. 152, § 1(7A)*, as amended through St. 1991, c. 398, § 14. In describing the employee's disabilities, the impartial medical examiner, Dr. Zamir Nestelbaum, stated in his report and on deposition that the work events at issue were "the major" or "the primary" cause of the employee's major depression and that it is "more probable than not that it was the work incidents that, essentially, caused this **[*2]** woman to become disabled." The reviewing board of the Department of Industrial Accidents (board) ruled that the employee did not meet the statutory standard of *§ 1(7A)* for emotional work injuries because "'the predominant contributing cause' means the work cause(s) must be greater than the sum of all non-work-related causes" (emphasis original). The board affirmed the decision of the administrative judge denying benefits to the employee. We reverse.

The employee had worked as a correction officer at the Massachusetts Correctional Institution, Framingham, for fifteen years. She claimed that after two separate incidents, one in 1999 and one in 2000, when officers were disciplined as a result of her reports of rule violations to superiors, she was harassed, called a "rat" by her coworkers, and told to rely on the convicts, not staff, for her personal safety. By 2002, she no longer was able to withstand the verbal abuse and harassment. She stopped working on June 21, 2002. These facts, as told by the employee, were recounted by Dr. Nestelbaum in his report, and he accepted them. He also wrote in his report:

> "Regarding causality, although there were other factors that seemed **[*3]** to affect Ms. May during 1999 and 2000 such as her mother's diagnosis with Alzheimer's Disease, her being put into a nursing home and then her death as well as Ms. May's building a house, it seems the major factor for causing her major depressive episode was her hostile work environment . . . . Another factor which should be considered is Ms. May's apparent reliving of her father's experience at being hounded out of jobs for no fault of his own, just for being black despite his doing a good job like Ms. May. She feels that like her father she's been out of a job for doing her job well and like her father suspects that it's not her job performance but her race, gender, and sexual orientation may be factors. She believes that she was treated unfairly like her father."

In his deposition, on cross-examination, Dr. Nestelbaum, was asked:

"[I]s it more probable than not that it was the work incidents that, essentially, caused this woman to become disabled?"

He answered: "Yes, I think it -- After I thought about these different factors, I felt like the primary cause was the work incident."

In denying the employee benefits, the administrative judge ruled:

> "Even if the employee's **[*4]** testimony is accepted in full, as it was by the impartial physician, this would be a case where the employee would fall just short of the standard. While Dr. Nestelbaum suggests that hostile work environment is a major cause of the emotional disability, he also identifies at least three other factors adding to the level of stress. . . .
>
> "As outlined by the reviewing board in *Siano v. Specialty Bolt and Screw Co., 16 Mass. Workers' Comp. Rep. 237 (2002)*, while it is possible that there can be multiple 'major' causes of medical disability, there can be by definition but one 'predominant' cause. In this case, the hostile work environment, while identified as a major cause, seems to be one of several causes that also play a role in the emotional disability."

Although the board acknowledged that the administrative judge erroneously referred to the doctor's opinion as stating that the employee's work environment was "a major" rather than "the major" cause of her disability, it quoted the foregoing reasoning of the judge, stating that "'[m]ajor' does not necessarily mean 'predominant.'" It noted that "the doctor never characterized the work events as 'the predominant **[*5]** contributing cause' of the disability" and the "employee's counsel did not ask [him] whether the employment events were the predominant contributing cause of her client's emotional disability."

As indicated earlier, the board concluded that "'the predominant contributing cause' means the work cause(s) must be greater than the sum of all non-work-related causes" (emphasis original). The board went on to say, citing *Siano's Case, 16 Mass. Workers' Comp. Rep. 237, 240 (2002)*:

> "We therefore reject the employee's argument that medical testimony establishing the work incidents as 'the major' or 'the primary' satisfied, as a matter of law, the 'predominant contributing cause' standard for emotional injuries, where, as here, the employment was only one of several acknowledged contributing causes. . . . 'By definition there can be but one "predominant" cause . . . . There may, however, be multiple "major" causes.'"

We consider the board's interpretation of the statutory standard incorrect. It does not accord with precedent or with ordinary lexical definitions. The board's reliance on *Siano's Case, 16 Mass. Workers' Comp. Rep. 237 (2002)*, **[*6]** is misplaced. In construing a different sentence of *G. L. c. 152, § 1(7A)*, n1 the board in that case noted the contrast in the statute between the words "major" and "predominant" and specifically found "instructive" that the statute used the word "a" before the word "major." *Id. at 240*. Cf. *Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 221 n.8, 846 N.E.2d 415 (2006)*. We take this to imply that had the word "major" been preceded by the word "the," the board would not have held that there could be several major, but only one predominant cause. Indeed, in Myers's Case, 19 Mass. Workers' Comp. Rep. 22, 24 (2005), the board stated, "Only one cause can be 'the major' cause, because use of the definite article 'the' means that the cause is greater in importance than all others."

> n1 That sentence reads: "If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment."

**[*7]**

The board's present definition is also not in accord with the ordinary lexical meanings of the words "predominant" and "primary." In Webster's Third New International Dictionary of the English Language Unabridged 1786 (1993), "predominant" is defined as "having superior strength, influence, authority, or position," while "primary" is defined as "first in rank or importance." Id. at 1800. Similarly, in the American Heritage Dictionary of the English Language 1427 (3d ed. 1996), "predominant" is defined as "[h]aving greatest ascendancy, importance, influence, authority, or force," and "primary" is defined as "[f]irst or highest in rank, quality, or importance, principal." Id. at 1438. Other similar definitions are set forth in the margin. n2

n2 In the Oxford Pocket American Dictionary of Current English 620 (2002), "predominant" is defined as "being the strongest or main element" while "primary" is defined as "of the first importance, chief." Id. at 626-627. See also Black's Law Dictionary 1177 (6th ed. 1990), where "predominant" is defined as "[s]omething greater or superior in power and influence to others with which it is connected or compared" and "primary" is defined as "[f]irst, principal; chief; leading." Id. at 1190. We have not found a definition of the term "the major" in any of the primary or major dictionaries.

**[*8]**

We consider the distinctions in definition between "predominant" and "primary" of no significance in determining the requisite causal relationship for purposes of receiving benefits for mental or emotional injuries. In sum, we think Dr. Nestelbaum's use of the terms "the major cause" and "the primary cause" were substantially equivalent to the statutory term and provided the proper standard. See *Robinson's Case, 416 Mass. 454, 460, 623 N.E.2d 478 (1993)* (exact wording not necessary for proper application of standard).

The employee also raises a second issue, raised below but not explicitly treated by the board. She argues that the administrative judge improperly applied an objective standard in determining whether the events were stressful. After stating the statutory standard, "the predominant contributing cause of such disability," the judge opined that he did "not find the events at work to be at such a level as to meet that standard." He also stated, "While I do not doubt the sincere belief of the employee today that her problems stem from work rather than from the other stressors in her life, I do not find the work events she describes to be as egregious as she now believes **[*9]** them to be."

The administrative judge's view of the severity of the stressful incidents at work is an impermissible consideration. "[T]here is nothing in the statute to suggest that emotional disability is compensable only if it resulted from 'an unusual and objectively stressful or traumatic event.' . . . The finding that the employee's disability was causally related to a series of events at work is sufficient as long as those events [meet the required causal standard] bringing about the employee's disability." *Robinson's Case, 416 Mass. at 460.*

We reject the Commonwealth's argument that the employee should not, in any event, prevail, on the ground that the administrative judge discredited her testimony. The record does not support this claim. The judge did not find that the events recounted by the employee did not occur (indeed, he credited the evidence that the employee caused two supervisors to be disciplined), nor did he state that he disbelieved Dr. Nestelbaum. Under *G. L. c. 152, § 11A*, in the absence of contradictory medical evidence, the impartial physician's determination whether an employee's disability has as its predominant **[*10]** contributing cause an injury arising out of the course of the employee's employment must be accepted as true. See *Young's Case, 64 Mass. App. Ct. 903, 904, 833 N.E.2d 646 (2005).*

The decision of the board is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

**CHRISTOPHER McCARTHY'S CASE.**

**No. 05-P-1164**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 541; 849 N.E.2d 228; 2006 Mass. App. LEXIS 653***

**April 3, 2006, Argued**
**June 15, 2006, Decided**

**PRIOR HISTORY:** **[***1]** Suffolk. Appeal from a decision of the Industrial Accident Reviewing Board.

**DISPOSITION:** Decision of the reviewing board affirmed.

**HEADNOTES:** Insurance, Workers' compensation insurance. Workers' Compensation Act, Insurer. Penalty. Statute, Construction.

**COUNSEL:** Stephen W. Sutton (Gregory G. Skouteris with him) for the employer.

Joseph M. Burke for the employee.

**JUDGES:** Present: Kantrowitz, Cohen, & Green, JJ.

**OPINION BY:** KANTROWITZ

**OPINION:**

**[*541]** **[**229]** KANTROWITZ, J. Today we hold that a self-insurer may not disregard an order of payment, pursuant to *G. L. c. 152, § 34*, and fashion its own remedy even if it theoretically fully compensates the injured employee. When faced with the situation in which it found itself, the employer, rather than unilaterally imposing its own payment plan, in contravention of a clear and unequivocal order, should have presented its alternate plan to the administrative judge for his consideration. Its failure to do so has resulted in adverse rulings before all tribunals, including ours.

Background. The Massachusetts Bay Transportation Authority (MBTA), the employer and self-insurer herein, appeals **[*542]** pursuant to *G. L. c. 152, § 12(2)*, from a decision of the reviewing board of the Department of Industrial Accidents (reviewing board) affirming the decision of an **[***2]** administrative judge, including the imposition of a penalty, under the provisions of *G. L. c. 152, § 8(1)*, for the employer's late payment of benefits awarded pursuant to *G. L. c. 152, § 10A*.

Facts. The employee, Christopher McCarthy, a forty-six year old father of five, has worked for the MBTA since 1982 and is a track maintenance supervisor for the Green Line. On September 6, 2002, while working the night shift, around 1:00 A.M., McCarthy fell, twisted his knee, and hit it on a railroad tie. Although his knee became sore and swollen, he continued his shift in pain before reporting the injury to the clerk and his supervisor in the morning. Several days later, he sought medical attention from his orthopedic surgeon, Dr. Lester Sheehan. Despite his ongoing discomfort, McCarthy continued to work. A magnetic resonance image (MRI) revealed that McCarthy suffered a torn cartilage, for which Dr. Sheehan recommended surgery. McCarthy applied to the MBTA for coverage for the procedure, but his request was denied based upon an independent medical evaluation by Dr. Robert Chernack that concluded that the injury was not work related, **[***3]** but caused by an underlying arthritic condition. n1

n1 The administrative judge ultimately decided that the injury was work related.

Despite this stance, on February 12, 2003, McCarthy elected to have the surgery. As a result, he remained out of work from that date until May 7, 2003, returning to work on May 8, 2003, without further incident. While recovering from surgery, he filed, on April 18, 2003, a claim for workers' compensation benefits, which was denied by the MBTA on April 24. While he remained out of work, he used sick leave and vacation days to maintain his income. n2

n2 In his decision, the administrative judge noted that McCarthy used forty-seven sick days and twenty-five vacation days. McCarthy's payroll records indicate, however, that from February 12 to May 7, 2003, he used thirty-nine sick days and twenty-one vacation days. As the parties do

not dispute the figures the judge used, we need not address any discrepancies.

**[***4]**

**[**230]** On July 16, 2003, after a conciliation and a conference pursuant to *G. L. c. 152, § 10A*, the administrative judge issued an **[*543]** order of payment instructing the MBTA to pay McCarthy temporary total incapacity compensation under *G. L. c. 152, § 34*, for the period of February 12 to May 7, 2003, n3 at the rate of $ 815.91 per week, based upon McCarthy's average weekly wage of $ 1,359.85, for a total of $ 10,132.19, including interest. In addition, the judge ordered the payment of medical benefits pursuant to *G. L. c. 152, § 30*, as well as counsel fees and expenses.

n3 There is some inconsistency as to the dates in question. The administrative judge, in his original July 16, 2003, order, authorized *G. L. c. 152, § 34*, benefits from February 11 to May 8, 2003. In his findings of June 24, 2004, the pertinent period is noted as February 12 to May 7, 2003. In his findings, the administrative judge found that McCarthy had surgery on February 12 and was totally disabled until May 8. However, he notes elsewhere that McCarthy returned to work May 8. McCarthy's payroll records indicate that his first day of absence was February 12 and that he returned to work on May 8, 2003.

**[***5]**

In response to the order of payment, the MBTA's payroll department informed its workers' compensation department that McCarthy had already been paid in full for the period in question in that he had used his sick and vacation time to maintain his income. n4

n4 McCarthy collected $ 16,590.06 in sick and vacation time for the period, accounting for 100% of his salary. The judge's order of workers' compensation benefits amounted to $ 10,132.19, including interest. Thus, the MBTA contends that McCarthy was overpaid. The MBTA acknowledges that it allows employees who receive workers' compensation to supplement the sixty percent of their salary received through workers' compensation with sick time (but not vacation time) for the remaining forty percent, resulting in an injured employee recovering his full salary.

At this point, a dilemma presented itself. On the one hand there was an order to pay McCarthy a set amount of money (sixty percent of his salary). See *G. L. c. 152, § 34*. However, **[***6]** that money and more (his full salary) had already been paid to McCarthy. Rather than return to the administrative judge to address the issue, n5 Kevin Sullivan, the MBTA's senior manager of payroll accounting instructed the workers' compensation department **[*544]** (1) to withhold $ 9,596.65 or sixty percent of what the employee had received from the workers' compensation payment; and (2) in return, to reimburse McCarthy's sick bank for that same amount, $ 9,596.65 (35.14 sick days). This procedure was followed, and within fourteen days of the conference order McCarthy received a check for $ 535.54, which represented a small discrepancy in the payments. n6

n5 Months later, on November 19, 2003, the MBTA requested an emergency status conference with the administrative judge to address its problem with the July 16, 2003, order. The MBTA also sent a letter to McCarthy's counsel addressing the "double recovery" issue, indicating that the "double" recovery ordered in this case was contrary to MBTA payroll procedure, although it is not addressed in the collective bargaining agreement. The MBTA indicated to McCarthy's counsel that it was willing to enter into a *§ 19* agreement pursuant to *G. L. c. 152, § 19*, with McCarthy or it would initiate recoupment proceedings, which it never did.

**[***7]**

n6 This sum represented the $ 10,132.19 ordered minus the $ 9,596.65 reimbursed to the payroll department. We are unable to reproduce exactly the calculations that led to the said amounts in this case, but note again that these are not challenged by the parties. See note 2, supra.

**[**231]** The MBTA appealed the conference order for a de novo determination. *G. L. c. 152, § 10A(3)*. A hearing was held before the same administrative judge on January 22, 2004, followed by the deposition of Dr. Sheehan on February 27, 2004. Prior to the hearing, McCarthy was permitted to request the assessment of a penalty against the MBTA, pursuant to *G. L. c. 152, § 8(1)*.

In his decision issued on June 24, 2004, the administrative judge affirmed his order of *§ 34* temporary total disability compensation from February 12 to May 7, 2003, and for payment of all reasonable and necessary medical expenses. In addition, the judge awarded McCarthy a penalty of $ 10,000 for the MBTA's late

payment of workers' compensation benefits and awarded McCarthy's counsel $ 4,467 in attorney's **[***8]** fees, plus reasonable expenses.

On June 28, 2004, the MBTA appealed this decision to the reviewing board, arguing that the benefits ordered by the judge pursuant to *G. L. c. 152, § 34*, would be sixty percent over and above the payments the employee already received during his period of incapacity. n7 The MBTA further stated that "[t]he Self-Insurer perceived the Conference Order as merely awarding a credit for payments it already forwarded on account of, or in lieu of, the worker's compensation benefits." Thus, the MBTA **[*545]** claims, it complied with the administrative judge's order, and consequently, the $ 10,000 penalty pursuant to *G. L. c. 152, § 8(1)*, was not warranted.

n7 The MBTA reasoned that by utilizing his sick time and vacation time, McCarthy had already received 100% of his salary during the period he was incapacitated. If he additionally was paid *§ 34* benefits, as per the order of the judge, McCarthy would receive an additional sixty percent of his salary, amounting to a total recovery of 160% of his salary for the period of his absence.

**[***9]**

The reviewing board affirmed the administrative judge's decision, ruling that "[w]e need not review the detailed discussion of 'double recovery' set out in the decision, because we consider the topic and premise to be wholly beside the point. This is a straightforward *§ 8(1)* case about the failure of the self-insurer to make 'all payments due an employee' under the explicit terms of a conference order." n8

n8 Concerning the MBTA's perception of the conference order as a "credit for payments it already forwarded," the reviewing board opined, correctly in our view, that "nothing of the sort was ordered therein."

On appeal, the MBTA again argues that allowing McCarthy to receive an excessive recovery would allow him to profit from his injury, contrary to public policy, and sets a bad precedent. Further, it asserts that McCarthy was made whole when his sick time was credited, and he received a check for $ 535.54 in response to the judge's conference order. Lastly, the MBTA claims that it is entitled to different **[***10]** treatment, because as a self-insurer, "sick pay benefits at the MBTA are not derived from a source other than the insurer." n9 Consequently, the MBTA challenges the reviewing board's determination that the issue of excessive recovery is irrelevant as against the weight of the evidence. Likewise, it challenges the imposition of the $ 10,000 penalty pursuant to *G. L. c. 152, § 8(1)*, as its actions complied with the judge's order within the fourteen-day period required under that section.

n9 In a case involving an employer that purchases workers' compensation insurance through a third-party insurance company, a workers' compensation award is paid by the insurance company, not the employer, as in the present case involving a self-insurer.

**[**232]** Discussion. The Workers' Compensation Act does not distinguish between self-insurers and those employers covered by third-party insurance companies. "The term 'insurer' . . . shall include, wherever applicable, a self-insurer . . . ." *G. L. c. 152, § 1(7)* **[***11]** , as amended by St. 1986, c. 662, § 5. Moreover, *G. L. c. 152, § 25E*, as amended through St. 1986, c. 662, § 21, states, in pertinent part, that "[w]orkers' compensation self-insurance groups shall be subject to all provisions of this chapter **[*546]** and all regulations promulgated hereunder governing the conduct of insurers with respect to the payment of workers' compensation benefits, and shall be subject to all fees, fines, penalties and assessments levied upon insurers for failure to comply with the claim procedures of this chapter." Thus, the assertion that the MBTA is entitled to different treatment because of its status as a self-insurer fails by reason of the explicit language of the statute.

Next we address whether the MBTA complied with the order issued by the administrative judge on July 16, 2003, in such a way that the statutory penalty pursuant to *G. L. c. 152, § 8(1)*, was not triggered. *General Laws c. 152, § 8(1)*, as amended through St. 1991, c. 398, § 23, provides in pertinent part: "Any failure of an insurer to make all payments due an employee under the terms of an order . . . shall result in **[***12]** a penalty of . . . ten thousand dollars if not made within ninety days."

The MBTA does not dispute that it did not pay McCarthy the amount ordered, $ 10,132.19. Instead, the MBTA claims that it complied with the order when, as its senior manager of payroll accounting, Kevin Sullivan, testified, "I took the liberty of saying that [McCarthy] was prepaid out of the judge's order and basically what I did was I requested [the workers' compensation department] to pay me back that money. And, in turn I credited Mr. McCarthy's sick bank for 34.15 days, not the actual money, but the actual days which he could use [at] a later date in his career."

This form of "self-reimbursement" did not comply with the terms of the administrative judge's unequivocal order that "the insurer . . . pay the claimant temporary total incapacity compensation." n10 As a result, the administrative judge and the **[*547]** reviewing board did not commit error in ruling that the employer failed to comply with the administrative judge's order of July 16, 2003.

n10 The Workers' Compensation Act "sets up a system of money payments for the loss of earning capacity sustained by an employee by reason of a work-connected injury." *Gunderson's Case, 423 Mass. 642, 644, 670 N.E.2d 386 (1996)*, quoting from Locke, Workmen's Compensation § 301, at 344 (2d ed. 1981). See *Gillen's Case, 215 Mass. 96, 99, 102 N.E. 346 (1913)*; *Sullivan's Case, 218 Mass. 141, 143, 105 N.E. 463 (1914)* (objective of the workers' compensation act is to "give compensation for a total or partial loss of the capacity to earn wages"). As such, it may be asserted that the MBTA's solution, which did not provide a cash payment, was improper. Regardless, the proper avenue was presenting its plan to the judge, not implementing it in contravention of his order.

**[***13]**

The MBTA's failure "to make all payments due an employee under the terms of an order," triggered the statutory penalty set forth in *G. L. c. 152, § 8(1)*. See *Eastern Cas. Ins. Co. v. Roberts, 52 Mass. App. Ct. 619, 621, 755 N.E.2d 776 (2001)* ("Effective December 24, 1991, . . . the Legislature amended *G. L. c. 152, § 8(1)*, thereby providing a statutory penalty for certain late payments"). The language of *§ 8(1)* is clear and does not need to be "enlarged or limited by construction." *Gateley's Case, 415 Mass. 397, 399, 613 N.E.2d 918 (1993)*. As per that statute, the $ 10,000 penalty was triggered **[**233]** when the MBTA failed, for more than ninety days, to pay the McCarthy the amount specified in the administrative judge's order. n11

N11 Whether McCarthy was entitled by statute or through his collective bargaining agreement to retain the funds previously received during his incapacity, or whether the MBTA may have recouped all or some of this money, is not before us. It does not appear from the record that the MBTA attempted to recover these funds in any way other than through the course of its unilateral self-reimbursement.

**[***14]**

Decision of the reviewing board affirmed.

# NORFOLK COUNTY RETIREMENT SYSTEM vs. DIRECTOR OF THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT & others. n1

n1 Director of the Division of Employment and Training, board of review of the Division of Employment and Training, and Pamela M. Masson-Smith. By St. 2003, c. 26, § 581, the duties of the Division of Employment and Training in the Department of Labor and Workforce Development were assigned to the Division of Unemployment Assistance within the Department of Labor. By St. 2004, c. 149, § 184, those duties were assigned to the Division of Unemployment Assistance within the Department of Workforce Development.

**No. 05-P-146**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 759; 850 N.E.2d 1079; 2006 Mass. App. LEXIS 783***

**November 2, 2005, Argued**
**July 19, 2006, Decided**

**SUBSEQUENT HISTORY:** As corrected August 18, 2006.

**PRIOR HISTORY:** **[***1]** Norfolk. Civil action commenced in the Stoughton Division of the District Court Department on June 27, 2003. The case was heard by Francis T. Crimmins, J.

**HEADNOTES:** Employment Security, Eligibility for benefits, Good cause, Voluntary unemployment, Availability for work. Administrative Law, Substantial evidence.

**COUNSEL:** Andrew Lawlor for Pamela M. Masson-Smith.

Thomas W. Colomb for the plaintiff.

**JUDGES:** Present: Lenk, Dreben, Green, JJ.

**OPINION BY:** LENK

**OPINION:**

**[*759]** **[**1081]** LENK, J. After being employed by Norfolk County for sixteen years, Pamela Masson-Smith (claimant) left her job as a bookkeeper with the Norfolk County Retirement System (employer) **[*760]** at the end of 2002. She did so solely because of the conflict between her work hours and her child care responsibilities. Her application for unemployment benefits was initially denied by the Division of Employment and Training (division) because the division viewed her departure as having been voluntary and without good cause attributable to her employer. She appealed, and after an evidentiary hearing at which the claimant and her supervisor testified to essentially undisputed facts, the review examiner determined that the claimant was entitled to benefits because her departure from work was rendered involuntary by "urgent, compelling and necessitous reasons within the meaning of *[G. L. c. 151A, § ] 25(e)(1)*." **[***2]** The division's board of review denied the employer's application for review, thus adopting the review examiner's decision. See *G. L. c. 151A, § 41(c)*. The employer's appeal to the District Court met with more success, with the judge setting aside the board of review's decision as unsupported by substantial evidence. The claimant now appeals from the judge's decision.

The uncontroverted facts are these. The claimant worked as a full-time employee of the county for sixteen years, the last four as a bookkeeper for the defendant employer. She was valued as an employee who did "good work." While employed by the county, the claimant also worked nights for more than ten years waitressing at different restaurants.

In connection with the birth of her first child, the claimant requested and was granted a paid six-month maternity leave, which began November 18, 2001. She returned to her job part-time in April, 2002, six weeks earlier than required, in order to accommodate her employer's needs; she worked two days per week until mid-May, when her maternity leave was exhausted. For a brief time after that, she resumed her former full-time schedule (forty **[***3]** hours per week, Monday through

Friday, 8:00 **[**1082]** A.M. to 4:00 P.M.) but could not sustain it. Because of child care responsibilities for her six month old daughter, she asked for a three day per week schedule. The employer reluctantly acquiesced on a temporary basis, choosing to pay the claimant as a full-time employee while deducting two days a week from her accrued vacation time. In the fall, when the claimant's accrued vacation time was nearly used up, the employer advised **[*761]** her that she would soon be required to return to a full-time schedule.

The claimant told her employer that she could not work her former full-time schedule because she was unable to find suitable day care for her baby for more than three days a week. Her husband was a self-employed electrician working days who was unavailable until late in the afternoons to care for their child. Her mother and mother-in-law also worked, as did close friends, and all were unavailable. The claimant's sister was willing to watch the baby but, because of her own child care obligations and pregnancy, could not do so more than three days a week. The claimant also looked into commercial day care, n2 but in addition to being **[***4]** unable to find affordable care, she did not want to put her then ten month old child in care of that type: "She was too little." In addition, the claimant had a one-hour commute each way between her home in Mendon and her job in Canton.

n2 The claimant provided no details as to what commercial day care alternatives she had explored or as to the quality, availability, and cost of local day care for infants. The employer, however, did not cross-examine the claimant as to such matters and did not argue the point to the review examiner.

The claimant offered to work three days a week at her employer's office and two other days from home, or in the evenings, or on weekends. The employer declined. Feeling that she "had to leave" but "didn't want to leave" her job so that she could take care of her child, the claimant gave her employer six weeks' notice and left on November 29, 2002. n3

n3 Thereafter the claimant sought full-time work as a waitress or as a clerical person with a flexible schedule that would not require her to work daytime hours more than three weekdays per week.

**[***5]**

In concluding that the claimant was entitled to benefits under *G. L. c. 151A, § 25(e)(1)*, the review examiner reasoned as follows:

> "The claimant was not discharged. She initiated this separation. Whether she is entitled to benefits will therefore be determined in accord with the provisions of *§ 25(e)(1). Section 25(e)(2)* is not applicable in this case.
>
> "Under *§ 25(e)(1)*, the claimant has the burden of **[*762]** proof. She must show by substantial and credible evidence either that her voluntary leaving was for good cause attributable to the employer or that her leaving was rendered involuntary due to urgent, compelling and necessitous reasons.
>
> "It is clear that the employer acted reasonably in this case. The employer has the right to operate its business as it sees fit. It hired the claimant to fill a full time position. It was under no obligation to modify the hours of that position to accommodate the claimant's changed circumstances. Although the employer chose to modify her hours for a period of time, it was not required to continue to do so. The parties agreed that no new contract of hire was negotiated when the claimant's hours were temporarily **[***6]** changed; no new promises were made. The claimant's leaving was not for good cause attributable to the employer within the meaning of *§ 25(e)(1)*.
>
> **[**1083]** "The claimant did meet her burden of proof in showing that her leaving was rendered involuntary due to urgent, compelling and necessitous reasons. The claimant was unable to locate any daycare that was satisfactory within her personal standards that would have permitted her to work the full time hours the employer demanded that she work. There were no alternative shifts or flex hours within the employer's organization that would have permitted her to put in a full time workweek. Her leaving work was therefore rendered involuntary due to urgent, compelling and necessitous reasons within the meaning of *§ 25(e)(1)*.
>
> "This review examiner did not feel it was necessary to address the issue of whether the claimant had a right to make

> the choices that she made. Whether the claimant has the right to restrict the hours when she makes herself available to work is an independent and separate issue from the one posed by the determination at hand. See the second 'Note to Local Office' below.[n4]
>
> **[*763]** "The claimant is therefore not subject to disqualification **[***7]** and she is entitled to benefits."

> n4 In the "Note to Local Office," the review examiner indicated that the claimant had testified to self-imposed limits on availability that prevented her from accepting employment requiring her to work a daytime shift more than three weekdays per week. The review examiner referred to the local office for investigation and determination the matter of the claimant's eligibility under *G. L. c. 151A, § 24(b)*.

On appeal, the claimant maintains that the District Court judge erred in concluding that the board of review's decision was unsupported by substantial evidence. She contends that the review examiner had before him uncontroverted evidence that she left her job for compelling personal reasons -- to fulfil child care responsibilities -- after having first taken reasonable steps to preserve her employment, which the review examiner was entitled to accept as such. This met her burden of proving that her work separation was involuntary and that **[***8]** she was entitled to benefits.

The employer takes the opposite view, maintaining that the claimant had not shown her work separation to be anything but a purely voluntary choice on her part, a product of her subjective belief that commercial day care was not suitable in the circumstances and a mere personal preference that her baby be cared for by family members or close friends. The employer contends that the claimant failed to show that she "had no choice but to leave work" and did not offer "objectively reasonable" reasons of an urgent, compelling or necessitous nature for leaving her job. In view of this, as well as the review examiner's failure to make findings as to the "objective reasonability" of the claimant's conduct, the employer argues that the judge was correct to set aside the review examiner's decision as being unsupported by substantial evidence. The employer also contends that, even if we conclude that the review examiner's decision as to *G. L. c. 151A, § 25(e)(1)*, was supported by substantial evidence, it nonetheless cannot stand because the review examiner failed to address the question of the claimant's availability for work under **[***9]** *G. L. c. 151A, § 24(b)*, given the restrictions she has placed on her work hours.

Discussion. Our review of the board's decision must "give due weight to the [agency's] experience, technical competence, and specialized knowledge[,] . . . as well as to the discretionary authority conferred upon it." *O'Brien v. Director of the Div.* **[*764]** *of Employment Security, 393 Mass. 482, 486, 472 N.E.2d 253 (1984)*, quoting from *G. L. c. 30A, § 14(7)*. We do not act as a fact finder in employment **[**1084]** security cases, because it remains "the agency's responsibility to weigh the evidence, find the facts, and decide the issues." *Manias v. Director of the Div. of Employment Security, 388 Mass. 201, 205, 445 N.E.2d 1068 (1983)*. See *Guarino v. Director of the Div. of Employment Security, 393 Mass. 89, 92, 469 N.E.2d 802 (1984)*. Our limited function is to determine whether the board of review applied correct legal principles in reaching its decision, whether the decision contains sufficient findings to demonstrate that the correct legal principles were applied, and whether those findings were supported by substantial evidence within the meaning of **[***10]** *G. L. c. 30A, § 14(7)(e)*. See *Guarino v. Director of the Div. of Employment Security, supra at 92-93*; *O'Brien v. Director of the Div. of Employment Security, 393 Mass. at 485*.

We begin by reviewing the fundamental legal principles the board of review must apply. The unemployment compensation statute in general, and the element of voluntariness included in *G. L. c. 151A, § 25(e)(1)*, in particular, serve the purpose of "avoiding temporary disqualification for persons who for compelling personal reasons are forced to give up an otherwise available position. . . . The grant of benefits to unemployed persons is not premised on the concept of employer fault." *Raytheon Co. v. Director of the Div. of Employment Security, 364 Mass. 593, 596, 307 N.E.2d 330 (1974)*. "The broader purpose of the law is to provide temporary relief for those who are realistically compelled to leave work through no 'fault' of their own, whatever the source of the compulsion, personal or employer-initiated." Ibid. The "dominant policy of the statute . . . is simply to allow benefits to an employee who is **[***11]** unwillingly out of work and without current earnings and unable to find work appropriate to his employment capacity." *Director of the Div. of Employment Security v. Fitzgerald, 382 Mass. 159, 164, 414 N.E.2d 608 (1980)*. The statute itself provides that it is to "be construed liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family." *G. L. c. 151A, § 74*, inserted by St. 1949, c. 290. *Reep v. Commissioner* **[**1085]** *of the Dept. of Employment & Training, 412 Mass. 845, 847, 593 N.E.2d 1297 (1992)*.

**[*765]** Accordingly, a "wide variety of personal circumstances," ibid., have been recognized as constituting "urgent, compelling and necessitous" reasons under *G. L. c. 151A, § 25(e)(1)*, which may render involuntary a claimant's departure from work. These include family ties that cause a married spouse or nonmarital partner to leave her employment in order to relocate with her spouse or partner, see, e.g., *Director of the Div. of Employment Security v. Fingerman, 378 Mass. 461, 464, 392 N.E.2d 846 (1979)*; *Reep v. Commissioner of the Dept. of Employment & Training, supra at 849-852*; **[***12]** pregnancy or pregnancy-related disability, see, e.g., *Dohoney v. Director of the Div. of Employment Security, 377 Mass. 333, 335-336, 386 N.E.2d 10 (1979)*; *Director of the Div. of Employment Security v. Fitzgerald, supra at 161& n.6* ; and domestic responsibilities including child care, see, e.g., *Manias v. Director of the Div. of Employment Security, 388 Mass. at 204.*

In determining, pursuant to *G. L. c. 151A, § 25(e)*, whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary, the inquiry proceeds on a case-by-case basis. "The nature of the circumstances in each individual case, the strength and the effect of the compulsive pressure of external and objective forces must be evaluated, and if they are sufficiently potent, they become relevant and controlling factors." *Reep v. Commissioner of the Dept. of Employment & Training, supra at 848*, quoting from *Raytheon Co. v. Director of the Div. of Employment Security, 344 Mass. 369, 373-374, 182 N.E.2d 293 (1962)*, quoting from *Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 557-558, 45 A.2d 898 (1946).* **[***13]** There should not be "too narrow a view [taken] of the factors entering into the determination whether reasons are 'urgent, compelling and necessitous' within the meaning of the statute." *Director of the Div. of Employment Security v. Fingerman, 378 Mass. at 464.* Benefits are not to be denied to those "who can prove they acted reasonably, based on pressing circumstances, in leaving employment." *Reep v. Commissioner of the Dept. of Employment & Training, supra at 851.*

Because *G. L. c. 151A, § 25(e)*, third par., as amended through St. 1990, c. 177, § 280, provides that a claimant is not to be disqualified from receiving benefits pursuant to *§ 25(e)(1)* **[*766]** if she "establishes to the satisfaction of the commissioner that [her] reasons for leaving were for such an urgent, compelling and necessitous nature as to make [her] separation involuntary," considerable deference is accorded the agency's determination in this regard. "The statutory exception to disqualification sets a standard calling for an exercise of judgment which is not purely factual. Such a determination, involving the application of the standard to **[***14]** the facts found, brings into play the experience, technical competence, and specialized knowledge of the agency." *Director of the Div. of Employment Security v. Fingerman, supra at 463.*

Prominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such "reasonable means to preserve her employment" as would indicate the claimant's "desire and willingness to continue her employment." *Raytheon Co. v. Director of the Div. of Employment Security, 364 Mass. at 597-598.* See *Dohoney v. Director of the Div. of Employment Security, supra at 336.* Contrary to the employer's suggestion, it is not necessary that a claimant seeking to prove that she left her job involuntarily establish that she had "no choice to do otherwise." "This statement disregards our cases which recognize that unemployment compensation benefits should not be denied to one who leaves her employment for what she reasonably believes are compelling reasons . . . ." *Fergione v. Director of the Div. of Employment Security, 396 Mass. 281, 284, 485 N.E.2d 949 (1985).* **[***15]** The relevant standard is the claimant's "reasonable belief," ibid., and "ordinarily the agency must make findings as to the reasonableness of a claimant's belief that she left her employment for a compelling reason." *Leone v. Director of the Div. of Employment Security, 397 Mass. 728, 732 n.4, 493 N.E.2d 493 (1986).*

Turning to the matter at hand, the District Court judge concluded, without explanation, that the board of review's decision was unsupported by substantial evidence. The employer echoes this view, suggesting that the claimant failed to meet her purported burden of establishing that, before leaving her job, she had sufficiently explored commercial day care options. The **[*767]** employer dwells on the claimant's testimony that she preferred to have her baby cared for by family and friends because she thought the child "too little" for commercial day care. Downplaying the claimant's testimony, albeit of a general nature, see note 2, supra, that she had looked into commercial day care and found it very expensive, the employer instead maintains **[**1086]** that the claimant "categorically refused to consider commercial day care for her child . . . and insisted on remaining home with the **[***16]** child at all times when family members were unavailable," and, further, that her "self imposed refusal to consider commercial day care" before leaving her job was a decision based on "preference, not economic necessity." Characterizing this variously as a "subjective" decision based on the claimant's "child rearing preferences, not economics," the employer urges that her conduct cannot be thought "objectively reasonable" because, by not pursuing -- and, if available, securing -- a commercial day care alternative,

the claimant has simply not shown that she was "compelled" to stay home with her child and that she had "no choice but to leave work." n5

> n5 The employer calls our attention in this regard to decisions in certain other jurisdictions that have held claimants ineligible for benefits who failed to seek and, if available, secure commercial child care before resigning their jobs. We observe that State statutes and decisional law differ considerably as to the extent to which family responsibilities are recognized as relevant factors in ascertaining eligibility for unemployment benefits. This being said, the decisions cited "are distinguishable and of no assistance in resolving the issue. We shall not belabor this opinion by discussing the decisions." *McElderry v. Planning Bd. of Nantucket, 431 Mass. 722, 725 n.6, 729 N.E.2d 1090 (2000)*. Neither our statute nor our case law have conditioned eligibility in this fashion.

**[***17]**

There is a sense in which many of the "personal circumstances" recognized as constituting "urgent, compelling and necessitous" reasons under *G. L. c. 151A, § 25(e)*, have subjective aspects and implicate personal preferences that may trump purely economic considerations. When, for example, a married spouse or nonmarital partner leaves his or her job to relocate in order to remain with the spouse or partner who has moved, the choice is a personal one, subjectively valuing the relationship over the employment situation, even if a lucrative one. When the work one does is perceived as endangering one's unborn child, the mother's decision to leave her job elevates the well-being of the fetus over the paycheck. How, responsibly, to meet **[*768]** the important obligation of caring for one's child is no different in implicating personal reasons and personal choices.

The key, for benefit eligibility, lies not in characterizing the decision as personal or subjective rather than as economic or objective, but in ascertaining whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." *Reep v. Commissioner of the Dept. of Employment & Training, supra at 851.* **[***18]** Not all personal reasons involving perceived family responsibilities will be seen as creating "sufficiently compelling circumstance[s] to render . . . unemployment involuntary." See, e.g., *Uvello v. Director of the Div. of Employment Security, 396 Mass. 812, 815, 489 N.E.2d 199 (1986)* ("[a] reasonable person could conclude . . . that [the claimant's] responsibility for preparing dinner for her husband, forty-three year old daughter, son-in-law, and granddaughter was not an obligation compelling [the claimant] to reject a shift ending at 6 P.M."). "The nature of the circumstances of each individual case, and the degree of compulsion that such circumstances exert on a claimant, must be objectively evaluated" on a case-by-case basis. *Crane v. Commissioner of the Dept. of Employment & Training, 414 Mass. 658, 661, 609 N.E.2d 476 (1993).*

We agree with the employer, however, that the board of review's decision is deficient. Nevertheless, we disagree that the problem has to do with a lack of substantial evidence. The deficiency lies instead in the review examiner's findings and rationale. The review examiner found that, given the claimant's inability to locate **[**1087]** day care **[***19]** "satisfactory within her personal standards," the claimant left her job due to the conflict between work hours and child care responsibilities. The review examiner concluded that this constituted an urgent, compelling and necessitous reason for her having done so. The review examiner also stated, however, that he "did not feel it was necessary to address the issue of whether the claimant had a right to make the choices that she made." The result is a decision that fails to address certain core matters that are committed to the agency's "informed judgment." *Director of the Div. of Employment Security v. Fingerman, supra at 464.* For example, did the claimant prove that she "acted reasonably, based on pressing circumstances" in leaving her job? *Reep v. Commissioner of the* **[*769]** *Dept. of Employment & Training, supra at 851.* See *Fergione v. Director of the Div. of Employment Security, supra at 284*; *Leone v. Director of the Div. of Employment Security, supra at 732 n.4.* It is the agency's responsibility expressly to decide this, not ours. *Manias v. Director of the Div. of Employment Security, supra at 205.* **[***20]**

While the evidence at the hearing before him was undisputed, the review examiner nonetheless had the benefit of observing the claimant as she gave testimony. Her demeanor may of course factor into the "exercise of judgment which is not purely factual" that the review examiner is called upon to make, set as it is against the backdrop of "the experience, technical competence, and specialized knowledge of the agency." *Director of the Div. of Employment Security v. Fingerman, supra at 463.* Although it is not made clear in the decision, it may be that the review examiner took into account when reaching his decision the claimant's longstanding employment history as a valued employee, her accommodation of the employer by returning early from her maternity leave, and her willingness to exhaust accrued vacation time to juggle work and child care responsibilities. The reasonableness of the claimant's efforts should be evaluated in light of the relevant circumstances, and the foregoing could well be relevant considerations in determining

whether the claimant had taken reasonable steps to preserve her job.

It may also be, though not so stated in the decision, that the review **[***21]** examiner took into account the age of the child in evaluating the reasonableness of this claimant's efforts to locate suitable child care. The circumstances of each case must be individually assessed; the needs and demands of children and the employment circumstances of their parents vary so greatly that universally applicable rules defy easy formulation. In any event, the extent to which the mother of a baby must, in order to preserve her job, investigate and accept commercial day care in addition to ascertaining the availability of family and friends is a question the board of review, not the court, should determine in the first instance. The distance between home and work and the affordability of available commercial day care could also be factored into the requisite assessment whether the claimant **[*770]** reasonably believed that she left her job for compelling reasons.

The review examiner did not make all requisite findings and did not sufficiently explain his reasons or the evidence underlying his decision. n6 "Without findings on all material issues, this court cannot exercise its appellate function." *Uvello v. Director* **[**1088]** *of the Div. of Employment Security, supra at 816.* **[***22]** In the absence of "sufficient subsidiary findings to demonstrate that correct legal principles were applied," ibid., quoting from *Lycurgus v. Director of the Div. of Employment Security, 391 Mass. 623, 626-627, 462 N.E.2d 326 (1984)*, the decision cannot stand.

n6 This is true as to the determination of both the involuntariness of the claimant's separation from employment pursuant to *G. L. c. 151A, § 25(e)(1)*, and the claimant's availability for work pursuant to *§ 24(b)*. In order to obtain unemployment compensation, the claimant must satisfy both requirements. The review examiner was seemingly reluctant to receive evidence on the latter issue at the hearing for reasons that are not clear to us, though some evidence was nonetheless taken. He thereafter declined to make a determination on the matter, referring it to a "local office."

In view of this, we think the proper course is to remand the matter to the board of review for further proceedings consistent with this opinion. **[***23]** *G. L. c. 30A, § 14(7). G. L. c. 151A, § 42.* See *Conlon v. Director of the Div. of Employment Security, 382 Mass. 19, 24-25, 413 N.E.2d 727 (1980)*; *Manias v. Director of the Div. of Employment Security, supra at 205-206.* The board of review may rest on the record in considering both the reasonableness of the claimant's conduct for purposes of *G. L. c. 151A, § 25(e)(1)*, and her availability for work under *§ 24(b)*, and in articulating what it concludes as to both and why. "Alternatively, the board of review may [take additional evidence or] send this matter back to the review examiner for findings and a determination on the evidence in the record or for an evidentiary hearing on the issues raised." *Id. at 206.*

We therefore reverse the order of the District Court. A new order shall enter remanding this matter to the board of review for further proceedings consistent with this opinion.

So ordered.

**JOANNE SILVESTRIS vs. TANTASQUA REGIONAL SCHOOL DISTRICT (and a companion case n1).**

n1 Valerie A. Goncalves vs. Tantasqua Regional School District.

**SJC-09540**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***446 Mass. 756; 847 N.E.2d 328; 2006 Mass. LEXIS 318; 152 Lab. Cas. (CCH) P60,213***

**March 7, 2006, Argued**
**May 18, 2006, Decided**

**PRIOR HISTORY:** **[***1]** Hampden. Civil actions commenced in the Superior Court Department on June 28, 2000. The cases were heard by Judd J. Carhart, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**HEADNOTES:** Anti-Discrimination Law, Employment, Sex. Employment, Discrimination. Limitations, Statute of. School and School Committee, Compensation of personnel. Practice, Civil, Findings by judge.

**COUNSEL:** Maria E. DeLuzio (Karen W. Peters with her) for Tantasqua Regional School District.

Cornelius J. Moriarty, II, for for Joanne Silvestris & another.

The following submitted briefs for amici curiae: Danielle Y. Vanderzanden & Douglass C. Lawrence for Associated Industries of Massachusetts. Thomas F. Reilly, Attorney General, Catherine C. Ziehl, & Zoe Butler-Stark, Assistant Attorneys General, for the Attorney General. Sara Smolik, Robert Mantell, & Elizabeth A. Rodgers for National Employment Lawyers Association, Massachusetts Chapter.

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

**OPINION BY:** SPINA

**OPINION:**

**[**330]** **[*757]** SPINA, J. Joanne Silvestris and Valerie Goncalves (collectively, plaintiffs) are teachers in the technical division of Tantasqua regional high school (Tantasqua). n2 On July 14, 1999, each filed a discrimination charge against the Tantasqua regional school district (school district) with the Massachusetts Commission Against Discrimination **[***2]** (MCAD), claiming that the school district had violated the Massachusetts antidiscrimination statute, *G. L. c. 151B*, and the Massachusetts Equal Pay Act (MEPA), *G. L. c. 149, § 105A*, by "failing to pay [them] salary and benefits equal to what male employees received from work of comparable character." Eleven months later, Silvestris and Goncalves each filed a complaint against the school district in the Superior Court, alleging only that the school district's conduct in paying them less than their male colleagues constituted wage discrimination in violation of MEPA. The thrust of the plaintiffs' allegations was that, when they were hired by the superintendent of schools for the school district (superintendent), their starting salaries were set lower than the starting salaries of male teachers in the technical division because they were given less credit for their prior work experience. In its answer to each complaint, the school district asserted, as an affirmative defense, that the plaintiffs' actions were barred by the applicable statute of limitations. In response to a motion of the school district, agreed to by the plaintiffs, the two actions were consolidated. **[***3]**

n2 Tantasqua has both an academic and a technical division. The technical division is, in essence, a vocational school.

**[**331]** The plaintiffs then amended their complaints to add claims alleging that the school district's conduct in establishing their starting salaries had violated *G. L. c. 151B* and the Massachusetts **[*758]** Equal Rights Act (equal rights act), *G. L. c. 93, § 102*. The school district again raised the statute of limitations as an affirmative defense in its answers. The parties presented their evidence to the judge in a jury-waived trial. At the close of all the evidence, the plaintiffs' claims under the

equal rights act were dismissed pursuant to *Mass. R. Civ. P. 41 (b) (2)*, 365 Mass. 803 (1974). After the judge made findings of fact and conclusions of law pursuant to *Mass. R. Civ. P. 52 (a)*, as amended, 423 Mass. 1402 (1996), he entered judgment for the school district with respect to the plaintiffs' **[***4]** claims under *G. L. c. 151B*, and stated that, after a further hearing on damages, judgment would enter for the plaintiffs on their MEPA claims. He concluded that the plaintiffs' charges had been timely filed with the MCAD, and that the school district had engaged in wage discrimination in violation of *G. L. c. 149, § 105A*, by failing to give the plaintiffs credit for their prior work experience in a manner that was comparable to the way in which male teachers had been given credit for prior work experience. The judge subsequently awarded damages in the amount of $ 60,370 to Silvestris, damages in the amount of $ 115,811.44 to Goncalves, and attorney's fees and costs in the amount of $ 42,893.08. n3

n3 The judge initially awarded damages in the amount of $ 30,185 to Silvestris, and damages in the amount of $ 57,905.72 to Goncalves. However, the judge then allowed the plaintiffs' motion to amend the judgment to allow them to recover liquidated damages in accordance with *G. L. c. 149, § 105A* ("Any employer who violates any provision of this section shall be liable to the employee or employees affected in the amount of their unpaid wages, and in an additional equal amount of liquidated damages"). As such, the judge issued an amended judgment awarding the plaintiffs damages in the amounts of $ 60,370 and $ 115,811.44, respectively.

**[***5]**

The school district appealed from the judgment in favor of the plaintiffs on their MEPA claims, including the allowance of liquidated damages and the assessment of legal fees, and the cases were transferred from the Appeals Court on our own motion. n4 The school district now contends that (1) the plaintiffs' MEPA claims were barred by the statute of limitations; (2) the judge's findings that the plaintiffs were paid less than their **[*759]** male colleagues for prior experience were clearly erroneous; (3) the judge erred in calculating the plaintiffs' damages by awarding back pay to their dates of hire, rather than limiting back pay to the six months preceding the filing of their MCAD charges and by using the maximum salary level when calculating their back pay; and (4) the judge erred in calculating the amount of attorney's fees by failing to take into consideration the fact that the school district prevailed on two of the plaintiffs' three claims, and by failing to deduct allegedly vague, duplicative, and unreasonable fees. For the reasons that follow, we now vacate the judgment in favor of the plaintiffs on their wage discrimination claims and direct the entry of judgment for the school **[***6]** district on those claims.

n4 We acknowledge the amicus briefs filed by Associated Industries of Massachusetts, the Massachusetts Chapter of the National Employment Lawyers Association, and the Attorney General.

1. Statutory framework. *General Laws c. 149, § 105A*, states, in pertinent part:

> "No employer shall discriminate in any way in the payment of wages as between the sexes, or pay any person in **[**332]** his employ salary or wage rates less than the rates paid to employees of the opposite sex for work of like or comparable character or work on like or comparable operations; provided, however, that variations in rates of pay shall not be prohibited when based upon a difference in seniority. Any employer who violates any provision of this section shall be liable to the employee or employees affected in the amount of their unpaid wages, and in an additional equal amount of liquidated damages."

The purpose of this statute is "to remedy pay inequities between male and female **[***7]** employees in comparable positions." *Jancey v. School Comm. of Everett, 421 Mass. 482, 497, 658 N.E.2d 162 (1995)*, S.C., *427 Mass. 603, 695 N.E.2d 194 (1998)*.

2. Factual background. Teacher salaries at Tantasqua are governed by the provisions of a collective bargaining agreement (agreement). n5 The agreement states, in relevant part: "Initial salary levels of teachers new to the [school district] shall be set by the [s]uperintendent in accordance with existing salary schedules." The superintendent assigns each new teacher a level **[*760]** and year designation from the salary schedule set forth in an appendix to the agreement, which is based on a matrix reflecting educational achievement and years of experience. Level I covers one through three years of experience, Level II covers four through nine years of experience, and Level III covers ten and more years of experience. A teacher would progress through the levels in

increments equal to the number of years taught. For example, the designation "Level I, Year 1" would signify that a teacher was in his or her first year of teaching, whereas the designation "Level II, Year 5" would signify that a teacher was in his or her fifth year **[***8]** of teaching. While an entry-level teacher could expect to reach the maximum salary category of "Level III" in ten years, a new teacher who began at a higher level (due to prior experience) could expect to reach the maximum salary category sooner, depending on the level and year designation assigned by the superintendent.

n5 The terms of a collective bargaining agreement cannot override the provisions of *G. L. c. 149, § 105A*. See *G. L. c. 150E, § 7*.

In June, 1993, Silvestris applied for a newly created position at Tantasqua as an allied health teacher in the technical division. The job was designed to prepare students for careers in nursing. Silvestris had experience in this field prior to applying for the Tantasqua position. In 1972, she received an associate's degree in nursing from Springfield Technical Community College, passed the State licensing examination, and became a registered nurse. For the next six years, Silvestris worked as a nurse at Holyoke **[***9]** Hospital and provided instruction to student nurses. n6 In 1980, she took a position with the Westover Job Corps, where she taught students in the nursing assistants program and coordinated job-related training for students already under the direction of employers. In 1986, Silvestris began a new job at Holyoke Community College as a job developer, working with business leaders to establish employment opportunities for business, computer science, and secretarial science students. Silvestris remained at Holyoke Community College for two years. During this same time period, she attended Westfield State College, from which she received a bachelor of science degree in occupational education in 1991. Silvestris **[**333]** also obtained a vocational teaching certificate in the field of allied health.

n6 Before becoming a registered nurse in 1972, Silvestris had worked for three years at Holyoke Hospital as a licensed practical nurse.

**[*761]** After interviewing for the position at Tantasqua in June, 1993, with the director of its technical **[***10]** division, Silvestris met with the superintendent, David Roach, to discuss her educational background, her prior work experience, and her salary. According to Silvestris, the superintendent said that she would receive credit for her teaching time at the Westover Job Corps because it involved the nursing assistants program and because the students there were generally the same age as high school students. However, she would not get credit for her time at Holyoke Community College because that was postsecondary experience. Further, according to Silvestris, the superintendent told her that the school district did not give credit for prior work experience "in the trade."

On July 19, 1993, the superintendent notified Silvestris that she would be hired for the 1993-1994 school year, that she would be placed in the "vocational certificate plus bachelor's degree" education category, and that her starting salary would be established at "Level II, Year 6." n7 This meant that she was given credit for five years of experience. Silvestris accepted a contract with the school district. At the time she was hired, there were six male teachers and no female teachers in the technical division, and she **[***11]** had the highest starting salary of any teacher who had been hired for the technical division to that point in time. Silvestris's ongoing job responsibilities were essentially the same as those of her male colleagues, although she was charged initially with the task of developing the allied health program for the freshmen and sophomore classes and securing its certification by the Department of Public Health and the Department of Education. n8 In 1997, Silvestris reached **[*762]** "Level III" status, the highest classification, and she has remained in that salary category.

n7 The position for which Silvestris was hired was 80% of a full-time job during the 1993-1994 school year because it was a newly created position. She accepted this arrangement. In subsequent school years, Silvestris worked 100% of a full-time position.

n8 Other teachers, including male teachers, who were hired to begin new programs in the technical division were also charged with the task of getting their respective programs certified by the State. Teachers who are hired to develop new programs have fewer classroom or student-and-teacher connections. They spend the majority of their time during the school day writing the new curriculum. Once the program has been certified, those teachers then do more teaching than program development.

**[***12]**

In June, 1995, Goncalves applied for a position at Tantasqua as an allied health teacher in the technical division. Like Silvestris, she had experience in the field of nursing prior to applying for this position. In 1975,

she received a bachelor of science degree in nursing from Fitchburg State College, passed the State licensing examination, and became a registered nurse. For the next four years, Goncalves worked as a nurse at Ludlow Hospital. In 1979, she took a position as a registered nurse at Mercy Hospital in Springfield where she provided direct patient care and supervised nursing students. In 1984, Goncalves began a new job working as a nurse in a private medical office. She left private practice in 1994 and joined the staff of the Hampden County house of correction, where her duties included providing patient care and performing health screenings for newly admitted inmates. In addition, Goncalves taught, for one year, at the Lower Pioneer Valley Educational Collaborative, where she prepared students for certification as nursing assistants and home health aides. Goncalves also obtained **[**334]** a vocational teaching certificate in the field of nursing.

After interviewing for the position **[***13]** at Tantasqua with both the outgoing and incoming directors of its technical division, Goncalves met with the superintendent, Rosemary Joseph, to discuss her educational background, her prior work experience, and her salary. According to Goncalves, the superintendent initially told her that she would not be given credit for her prior work experience and, therefore, would be offered a salary commensurate with that of an entry-level teacher. Goncalves did not accept this offer. Subsequently, the outgoing technical director notified Goncalves that she would be hired for the 1995-1996 school year, n9 that she would be placed in the "bachelor's degree" education category, n10 and that her starting salary would be established at "Level II, Year 4." This meant that she was given **[*763]** credit for three years of experience. Goncalves accepted a contract with the school district. At the time Goncalves was hired, Silvestris was the only other female teacher in the technical division. Goncalves's ongoing job responsibilities were essentially the same as those of her male colleagues, although she initially was charged with the task of developing the new allied health program for the junior and senior **[***14]** classes and securing its certification by the Department of Public Health and the Department of Education. In 2001, Goncalves reached "Level III" status, and she has remained in that salary category.

n9 The position for which Goncalves was hired was 80% of a full-time job during the 1995-1996 school year because it was a newly created position. She accepted this arrangement. In subsequent school years, Goncalves worked 100% of a full-time position.

n10 It appears that Goncalves erroneously was not given credit for having a provisional vocational certificate when she was hired in the summer of 1995, and that she did not bring this error to the school district's attention until some time during the late fall of the 1996-1997 school year. Goncalves had signed teacher contracts for the 1995-1996 and 1996-1997 school years that included this error. The error was corrected in her contract for the 1997-1998 school year, and Goncalves was bumped up to the "vocational certificate plus bachelor's degree" education category. According to the superintendent, neither the Tantasqua Teachers' Association nor Goncalves requested that the school district bring the matter of retroactive compensation before the school committee of the Tantasqua regional school district for an affirmative vote. Goncalves received her full vocational certificate in June, 1998.

**[***15]**

In August, 1998, the school district hired Gary Manuel as a technology teacher at Tantasqua for the 1998-1999 school year. He had four years of prior teaching experience at a public middle school and eighteen years of work experience as a general contractor. Manuel was placed in the "master's degree plus 30" education category, and his starting salary was established at "Level II, Year 8." Around this time, the plaintiffs spoke with their male colleagues in the technical division, including Manuel, about whether their years of trade experience had been credited toward teaching experience, thereby enabling them to start at higher salaries. Based on these conversations, the plaintiffs came to believe that, when they were hired, they were started at lower salary levels than male colleagues with purportedly comparable backgrounds. Consequently, on September 22, 1998, the plaintiffs wrote a letter to the president of the Tantasqua Teachers' Association (association) expressing their concern that they had been subjected to sexual discrimination when their initial pay grades were established. n11 **[**335]** In particular, they asserted that when they were hired, there was no **[*764]** mention of their prior **[***16]** work experience counting toward teaching experience.

n11 Although the plaintiffs did not view their September 22, 1998, letter as a grievance, it was treated as such by the school district.

After receiving the September 22, 1998, letter, the association scheduled a "Level Two" grievance hearing with the superintendent, the purpose of which was to

hear the plaintiffs' complaint and their proposed remedy. n12 At this point, the plaintiffs did not know the starting salaries of the other teachers in the technical division, their levels of educational achievement, or their prior work experience. The grievance hearing was held in November, 1998, n13 and was attended by the plaintiffs, a representative from the association, a representative from the Massachusetts Teachers Association, the superintendent, and the school district's legal counsel. According to the superintendent, the plaintiffs declined to proceed with the hearing when they learned of the presence of the school district's legal counsel. The association **[***17]** subsequently requested from the superintendent, on several occasions, the personnel records of all of the teachers in the school district. In May, 1999, the plaintiffs received a document listing the names of nine teachers in the technical division (including themselves), their degree statuses, their positions, their dates of hire, their level and year designations, and their starting salaries. n14 Once they had this specific information, the plaintiffs commenced the present actions.

n12 According to the terms of the 1997-2000 collective bargaining agreement, a "grievance" was defined as "a complaint, a violation, misinterpretation, or inequitable application of any of the provisions of [the] contract." A "Level Two" grievance proceeding meant that the matter had been referred to the superintendent for review and disposition.

n13 The exact date of this grievance hearing is not set forth in the record.

n14 Neither the exact date the plaintiffs received this document nor the reason for the delay in its distribution is set forth in the record. The document was dated April 23, 1999. The plaintiffs testified that they received it sometime in May, 1999. For our purposes here, it makes no difference whether the plaintiffs received it in April or May, 1999.

**[***18]**

3. Statute of limitations. The school district first contends that the judge erred in failing to conclude that the plaintiffs' MEPA claims were barred by the applicable statute of limitations. It asserts that the plaintiffs were required to file their complaints with the MCAD within six months of the alleged discriminatory act. See *G. L. c. 151B, § 5*. However, the plaintiffs did not file their charges with the MCAD until July 14, 1999, which, according **[*765]** to the school district, was too late. The school district further contends that the judge erred in determining that the trigger for the statute of limitations was April, 1999, n15 when the plaintiffs' suspicions of discrimination were confirmed by documentary evidence as to the starting salaries of teachers in the technical division. Relying on *Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 750 N.E.2d 928 (2001)*, the school district asserts that the trigger for the statute of limitations should have been the date that the plaintiffs were aware, or reasonably should have been aware, of the alleged discriminatory action. In the school district's opinion, the plaintiffs knew of their claims in September, **[***19]** 1998, when they spoke to their male colleagues about their starting salaries and, then, when they wrote a letter to the association expressing their concerns. Thus, the school district argues that it was in September, 1998, that the statute of limitations began to run on the plaintiffs' claims, and their charges **[**336]** should have been filed with the MCAD by March, 1999.

n15 See note 14, supra.

The plaintiffs agree with the school district, as do we, that the governing statute of limitations was six months. n16 When they filed their charges with the MCAD, the plaintiffs alleged that the school district had discriminated against them in violation of both *G. L. c. 151B* and *G. L. c. 149, § 105A*, by failing to pay them in a manner that was comparable to their male colleagues. Accordingly, the plaintiffs' claims fell within the purview of the statute of limitations set forth in c. 151B. *General Laws c. 151B, § 5*, requires that a complaint alleging wrongful conduct **[***20]** be filed with the MCAD within six months after the alleged act of discrimination. n17 See *Cuddyer v. Stop & Shop Supermarket Co., supra at 531*; *School Comm. of Brockton v.* **[*766]** *Massachusetts Comm'n Against Discrimination, 423 Mass. 7, 10, 666 N.E.2d 468 (1996)*; *Jancey v. School Comm. of Everett, 421 Mass. 482, 497-498, 658 N.E.2d 162 (1995)*. The filing of a timely charge of discrimination with the MCAD is a prerequisite to the filing of such an action in the Superior Court. See *Cuddyer v. Stop & Shop Supermarket Co., supra at 531 n.11*; *Andrews v. Arkwright Mut. Ins. Co., 423 Mass. 1021, 673 N.E.2d 40 (1996)*; *Charland v. Muzi Motors, Inc., 417 Mass. 580, 583-584, 631 N.E.2d 555 (1994)*.

n16 MEPA has its own one-year statute of limitations for actions alleging the discriminatory payment of wages based on sex. *General Laws c. 149, § 105A*, states that "[a]ny action based upon or arising under [*§ § 105A - 105C*], inclusive, shall be instituted within one year after the date

of the alleged violation." Because the applicability of this statute of limitations to the plaintiffs' claims was not raised before the judge, we deem it waived. See *Sugarman v. Board of Registration in Med., 422 Mass. 338, 347, 662 N.E.2d 1020 (1996)*; *Kagan v. Levenson, 334 Mass. 100, 106, 134 N.E.2d 415 (1956)*.

**[***21]**

n17 In 2002, the limitations period under *G. L. c. 151B, § 5*, was extended from six months to 300 days. See St. 2002, c. 223, § 1.

With these general principles in mind, we now consider when the alleged discriminatory acts occurred, and when the plaintiffs knew that they had been harmed, so as to determine when the six-month statute of limitations began to run on their claims. When a cause of action accrues for purposes of the statute of limitations has not been defined by the Legislature but has been the subject of judicial interpretation in this Commonwealth. See *Riley v. Presnell, 409 Mass. 239, 243, 565 N.E.2d 780 (1991)*; *Franklin v. Albert, 381 Mass. 611, 617, 411 N.E.2d 458 (1980)*. As a general rule, tort actions accrue at the time the plaintiff is injured. See *Joseph A. Fortin Constr., Inc. v. Massachusetts Hous. Fin. Agency, 392 Mass. 440, 442, 466 N.E.2d 514 (1984)*; *Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 741, 374 N.E.2d 582 (1978)*. The unfairness of such a rule, however, has been recognized in actions where the wrong is "inherently unknowable. **[***22]** " See *Mohr v. Commonwealth, 421 Mass. 147, 155, 653 N.E.2d 1104 (1995)*; *Olsen v. Bell Tel. Labs., Inc., 388 Mass. 171, 175, 445 N.E.2d 609 (1983)*. Accordingly, pursuant to the so-called "discovery rule," the statute of limitations for a particular cause of action does not begin to run until the plaintiff knows, or should have known, that she has been harmed by the defendant's conduct. See *Wheatley v. American Tel. & Tel. Co., 418 Mass. 394, 398, 636 N.E.2d 265 (1994)* (limitations period does not begin to run in discrimination action until plaintiff knows or reasonably should know of replacement by younger employee). See also *Albrecht v. Clifford, 436 Mass. 706, 714-715, 767 N.E.2d 42 (2002)*; *Franklin v. Albert, supra* **[**337]** *at 618-619*. "One need not apprehend the full extent or nature of an injury in order for a cause of action to accrue." *Riley v. Presnell, supra at 243*.

Once a defendant raises the statute of limitations as an affirmative defense and establishes that the action was brought more than six months from the date of the injury, the burden of **[*767]** proving facts that take the case outside the statute of limitations falls to the plaintiff. **[***23]** See *id. at 243-244*. In most instances, the question when a plaintiff knew or should have known of the existence of a cause of action is one of fact that will be decided by the trier of fact. See *id. at 247-248*, and cases cited. See also *Lindsay v. Romano, 427 Mass. 771, 774, 696 N.E.2d 520 (1998)*. The appropriate standard to be applied when assessing knowledge or notice is that of a "reasonable person in the plaintiff's position." *Riley v. Presnell, supra at 245*. See *Bowen v. Eli Lilly & Co., 408 Mass. 204, 208-210, 557 N.E.2d 739 (1990)*.

Here, the school district properly raised the statute of limitations as an affirmative defense in its answers to the plaintiffs' complaints. It demonstrated that any alleged discrimination suffered by Silvestris first would have occurred during the 1993-1994 school year when she received paychecks pursuant to her initial contract with the school district that would have reflected a lower starting salary than the starting salaries received by male colleagues who purportedly had been given more credit for prior work experience when they were hired. Cf. *LeGoff v. Trustees of Boston Univ., 23 F. Supp. 2d 120, 126 (D. Mass. 1998)* **[***24]** (Equal Pay Act, *29 U.S.C. § 206 [d]*, "violated each time an employee receives a lower paycheck because of her sex"). Similarly, any alleged discrimination suffered by Goncalves first would have occurred during the 1995-1996 school year when she received paychecks pursuant to her initial contract with the school district that would have reflected a lower starting salary than the starting salaries received by male colleagues. When the plaintiffs filed their complaints with the MCAD on July 14, 1999, it plainly was more that six months from the dates of the alleged unlawful acts. The burden of proof then shifted to the plaintiffs to establish facts that would take their action outside this six-month statute of limitations. See *Riley v. Presnell, supra at 243-244*.

The plaintiffs testified that prior to the fall of 1998, they had no knowledge of the starting salaries of the other teachers in the technical division, their levels of educational achievement, or their prior work experience. The plaintiffs would have had no reason to request such statistics, and nothing in the record suggests that specific salary data for individual teachers in **[***25]** the **[*768]** school district (as opposed to the generic salary matrix set forth in the agreement) was public information. It was not until the school district hired Gary Manuel for the 1998-1999 school year and established his starting salary at "Level II, Year 8" that the plaintiffs began to suspect discriminatory payment of wages. That suspicion triggered conversations with their male colleagues about whether they had received credit for their years of prior work experience, thereby enabling them to start at various higher salaries than entry-level teachers. Based solely on these conversations, the plaintiffs came to believe that, when they were hired, they unlawfully

were given less credit for their prior work experience than male teachers.

The judge found that the plaintiffs knew that they had been harmed by the school district's conduct in April, 1999, when they **[**338]** received documentary evidence supporting their suspicions about salary disparities. However, based on the letter that the plaintiffs wrote to the association on September 22, 1998, n18 we conclude that they had ascertained sufficient information at that point to believe that they, as women, had been subjected to discriminatory **[***26]** treatment by the school district when the superintendent established their starting salaries. Accordingly, September 22, 1998, was the date when the plaintiffs had reason to know that they had been harmed by the school district's conduct, and when the six-month statute of limitations began to run on their claims.

n18 In their letter to the association, the plaintiffs stated as follows: "It has been brought to our attention that several of our male coworkers, upon being hired, were given their years of industrial service as credit towards teaching experience. This automatically placed them at a much higher salary level than a new teacher, even though many of them did not hold a bachelor's degree or full certification. We understand that technical education has to offer an incentive in order to secure licensed trades people. However, when we were hired, there was no mention of industrial experience being used in place of our teaching experience. For this reason, we feel that we were sexually discriminated against during our hirings."

**[***27]**

The plaintiffs advocate for application of the so-called continuing violation doctrine to their claims alleging inequitable payment of wages in violation of *G. L. c. 149, § 105A*. Such doctrine heretofore has been applied in this Commonwealth as a limited exception to the six-month statute of limitations for discrimination claims, usually those premised on a hostile work **[*769]** environment. n19 See *Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 616-617, 839 N.E.2d 314 (2005)*; *Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 540, 750 N.E.2d 928 (2001)*. Cf. *Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 632, 642-643, 808 N.E.2d 257 (2004)*. "This exception for violations of a continuing nature 'recognizes that some claims of discrimination involve a series of related events that have to be viewed in their totality in order to assess adequately their discriminatory nature and impact.'" *Id. at 642*, quoting *Cuddyer v. Stop & Shop Supermarket Co., supra at 531*. See *National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)* (recognizing that **[***28]** essence of hostile work environment claim is repeated conduct, not separate and distinct acts). This totality of events approach is not pertinent to an unequal compensation claim under *G. L. c. 149, § 105A*, which is based on discrete acts. An alleged inequality can be identified on examination of individual paychecks, rather than on the evaluation of ongoing wrongful conduct. See, e.g., *Pollis v. New Sch. for Social Research, 132 F.3d 115, 119 (2d Cir. 1997)* ("a claim of discriminatory pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action").

n19 This exception to the six-month statute of limitations, see *G. L. c. 151B, § 5*, provided that "[t]he complaint may be filed . . . at any time within six months after the alleged unlawful conduct; provided, however, that the six month requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature . . . ." *804 Code Mass. Regs. § 1.10(2)* (1999). See note 17, supra.

**[***29]**

Further, as a general proposition, expanding the continuing violation doctrine beyond discrimination claims brought under *G. L. c. 151B* to unequal wage claims brought under *G. L. c. 149, § 105A*, would **[**339]** eviscerate the one-year statute of limitations set forth in *§ 105A*. See note 16, supra. See also *Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, supra at 645* (discrete discriminatory act triggers statute of limitations). For these reasons, we decline to expand the continuing violation doctrine to unequal wage claims under *G. L. c. 149, § 105A*. "Because pay claims do give rise to a **[*770]** cause of action each time they occur and are easily identifiable, it is not unreasonable to expect a plaintiff to file a charge of discrimination within the limitations period, so long as [the plaintiff] is aware of the discrimination" (emphasis added). *Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1028 (N.D. Iowa 2002)*. Cf. *National R.R. Passenger Corp. v. Morgan, supra at 105, 113* (recognizing viability of equitable principles, such as discovery **[***30]** rule, to toll time period for filing charge of discrimination under Title VII of Civil Rights Act of 1964, *42 U.S.C. § § 2000e et seq.*). The continuing violation doctrine does not operate to extend the limitations period in the present case.

The matter, however, does not end there. The MCAD's rules of procedure state, inter alia, that "the six month requirement shall not be a bar to filing in those instances . . . when pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within six months of the conduct complained of and subsequently files a complaint within six months of the outcome of such proceeding(s)." *804 Code Mass. Regs. § 1.10(2)* (1999). n20 Here, the statute of limitations was tolled when the plaintiffs sent their letter to the association and it was treated as a grievance by the school district. The school district has not shown that the filing of the plaintiffs' complaints with the MCAD was untimely under *804 Code Mass. Regs. § 1.10(2)*. n21 Accordingly, the school district's reliance on the statute of limitations **[***31]** as an affirmative defense is unavailing.

n20 In 2004, the six-month filing requirement was extended to 300 days. See *804 Code Mass. Regs. § 1.10(2)* (2004).

n21 To the extent that the school district and the superintendent may not have adhered to the grievance procedure set forth in Art. II of the agreement by completing grievance proceedings in a timely manner, that fact does not inure to the benefit of the school district.

4. Wage discrimination. The school district contends that the judge's findings that the male teachers were given more credit for previous work experience than the plaintiffs, thereby allowing male teachers to start at higher salaries, were clearly erroneous. Therefore, the school district continues, the plaintiffs were not entitled to prevail on their claims under *G. L. c. 149, § 105A*. We agree.

**[*771]** In reviewing the judge's decision, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be **[***32]** given to the opportunity of the trial court to judge of the credibility of the witnesses." *Mass. R. Civ. P. 52 (a)*. See *Kendall v. Selvaggio, 413 Mass. 619, 620, 602 N.E.2d 206 (1992)*. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 792, 494 N.E.2d 374 (1986)*, quoting *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*. "[T]o ensure that the ultimate findings and conclusions are consistent with the law, we **[**340]** scrutinize without deference the legal standard which the judge applied to the facts." *Kendall v. Selvaggio, supra at 621*.

The plain language of *G. L. c. 149, § 105A*, allows for variations in rates of pay based on "seniority" and demonstrates the Legislature's recognition that employers may offer different levels of compensation based on the prior experience of their prospective employees. See *G. L. c. 149, § 105A* **[***33]** . At Tantasqua, seniority is established when the superintendent assigns each new teacher a level and a year designation as set forth on the salary matrix in the agreement. The issue here is whether the plaintiffs were subjected to wage discrimination because, when they were hired for the technical division, they were given less credit for prior work experience than male teachers and, consequently, over the years, their salaries continued to be below those of their male colleagues until the salaries for both male and female teachers equaled out when they all reached the highest category, "Level III." This case does not present the issue whether, once they were hired, male and female teachers in the technical division were doing "work of like or comparable character." *G. L. c. 149, § 105A*.

Pursuant to the terms of the 1994-1997 agreement, which was in effect at the time Silvestris and Goncalves were hired, n22 "[i]nitial salary levels of teachers new to the [school district] [would] be set by the [s]uperintendent in accordance with existing **[*772]** salary schedules." In addition, "[p]revious experience and hours of graduate credit [would] be evaluated **[***34]** in relationship to the position being filled." The agreement did not specify how "[p]revious experience," whether it be teaching experience or time the applicant spent working in a particular profession, should be qualitatively evaluated, or how credit for any such experience should be allocated in determining a new teacher's initial salary level. The absence of such specific language suggests that it was within the discretion of the superintendent, who presumably had the most experience in this area, to make those judgment determinations.

n22 While Silvestris was hired during the summer of 1993, and the 1994-1997 agreement was dated March 15, 1994, it nonetheless included the school district's teachers' salary schedule for the 1993-1994 school year.

Much has been made of the deposition testimony of Rosemary Joseph, the school district's superintendent beginning in 1995, in which she stated that her "rule of thumb" in hiring was to give "two years of experience for one year of teaching," meaning that two years **[***35]** of prior work experience would be credited as one year of prior teaching experience in order to increase a new

teacher's starting salary. However, she also stated in her deposition, and then at trial, that she looked at work experience "all things being equal," which included consideration of the applicant's performance during the interview, the type of position being filled, the quality of the other candidates, and budgetary constraints. Notwithstanding the superintendent's articulation of her general "rule of thumb," the record demonstrates that it was not used in any clear or consistent way to establish initial teacher salaries, either for men or women. The superintendent acknowledged as much in her testimony.

The judge rightly found, and we agree, that there was no clearly defined and articulated standard for how much credit a new teacher would be given for prior work experience. However, the judge's related finding that male teachers were given more credit for prior work experience than **[**341]** the plaintiffs was clearly erroneous. Based on a close review of the record, we conclude that the evidence did not support a finding that the superintendent's conduct had a disproportionately **[***36]** discriminatory impact on women. The plaintiffs' starting salaries were not determined in a manner that violated *G. L. c. 149, § 105A*.

When Stephen McGuiness and Alfred Errede were hired in 1975 to teach industrial arts in the technical division, neither **[*773]** had any prior teaching or work experience. Accordingly, each was assigned a salary category of "Level I, Year 1."

When Maurice Bracken and Donald Manseau were hired in 1984 to teach electrical work, neither had any prior teaching experience. n23 The superintendent testified that Bracken had six and one-half years of prior work experience, n24 for which he was given three years of credit and assigned a salary category of "Level II, Year 4." Manseau had thirteen years of prior work experience, for which he was also given three years of credit and assigned a salary category of "Level II, Year 4." When Raymond Rousseau was hired in 1989 to teach machine shop, he had no prior teaching experience and nine years of prior work experience. Like Bracken and Manseau, he was given three years of credit and assigned a salary category of "Level II, Year 4." When Lawrence LaBelle was hired in 1990 to teach drafting, he **[***37]** had no prior teaching experience and seventeen years of prior work experience. Similarly, he was given three years of credit and assigned a salary category of "Level II, Year 4." The data support a conclusion that credit for prior work experience was allocated in an unspecified manner, and that not all prior experience was treated equally. When Bracken, Manseau, Rousseau, and LaBelle applied for positions in the technical division, none had any prior teaching experience, and their years of prior work experience varied widely from six and one-half years to seventeen years. Yet, each was assigned the same salary category of "Level II, Year 4."

n23 Notwithstanding the superintendent's testimony that, to her knowledge, Donald Manseau had no prior teaching experience, his resume indicated that, at the time he applied for a position at Tantasqua, he was teaching electrical work at Bay Path Vocational Technical High School. It does not appear that he was given credit for this teaching experience.

n24 Based on Maurice Bracken's resume, it appears that the four and one-half years he was the owner and operator of Maurice A. Bracken Electric was not counted as "prior work experience."

**[***38]**

When Silvestris was hired in 1993 to teach allied health, she was given five years of credit and assigned a salary category of "Level II, Year 6," higher than any of the male teachers hired before her. She testified that she had been told by the superintendent that she would be given credit for her prior experience at the Westover Job Corps (which would count as **[*774]** "teaching" experience), but not for her prior experience at Holyoke Community College. Silvestris further testified that, in response to her inquiry about credit for her prior nursing experience, the superintendent explained to her that the school district did not give credit for work experience "in the trade." However, the evidence does not demonstrate that the school district actually applied this purported policy. David Roach, the superintendent who hired Silvestris, testified that the job for which Silvestris applied had been budgeted as a "Level I, Year 1" position because it was new. He also stated that, before he interviewed Silvestris, he was aware that she had no public school **[**342]** teaching experience. n25 Notwithstanding Silvestris's understanding of how she would be given credit for prior teaching and work experience, **[***39]** Roach testified that she was ultimately extended a job offer at "Level II, Year 6" based on a "totality of experience" that led the school district to conclude that Silvestris was "the person for the job." The testimony of the superintendent did not pinpoint to what extent Silvestris was given credit for prior teaching experience versus prior work experience. What is clear is that she was given five years of credit for some combination of approximately fourteen years of prior teaching and work experience. When compared with the male teachers who had been hired before her, the evidence does not support

a conclusion that Silvestris was subjected to wage discrimination based on gender.

n25 David Roach did not testify about how the school district evaluated "teaching" experience for purposes of setting initial salary levels. However, Rosemary Joseph stated that prior public school teaching experience was weighed more favorably than other types of teaching experience because it was easier to assess the prior public school teaching experience and compare it with the new teacher's responsibilities at Tantasqua.

**[***40]**

The same is true with respect to Goncalves. When she was hired in 1995 to teach allied health, she was given three years of credit and assigned a salary category of "Level II, Year 4." Like Silvestris, Goncalves testified that, in response to her inquiry about credit for her prior nursing experience, the superintendent told her that the school district "did not do that." However, the evidence again does not demonstrate that the school district actually applied this purported policy. Rosemary Joseph, the superintendent who hired Goncalves, **[*775]** testified that Goncalves's starting salary was based on a "combination of factors" -- teaching experience and comparable prior work experience. The teaching experience was one year that Goncalves had spent at the Lower Pioneer Valley Educational Collaborative in a part-time position. The superintendent testified that the prior work experience for which Goncalves was given credit was the time that Goncalves had spent at Ludlow Hospital and Mercy Hospital (eight years), and not the time that she had spent working for a private medical practice or at the Hampden County correctional center because, in the superintendent's judgment, those two latter **[***41]** jobs were not applicable to the type of work that Goncalves would be doing at Tantasqua. Thus, notwithstanding Goncalves's understanding that the school district did not give credit for work experience "in the trade," she actually did receive such credit. The fact that she was not given credit for all of her prior nursing experience was based on the superintendent's considered judgment that not all of Goncalves's experience was relevant and applicable to teaching high school students. Similar determinations appear to have been made with respect to the male teachers hired before her given that their years of prior work experience varied widely and yet each was assigned the same starting salary category. The evidence does not support a conclusion that Goncalves was subjected to wage discrimination based on gender.

A brief review of the school district's hiring practices after the plaintiffs accepted their positions at Tantasqua bolsters our conclusions that credit for prior work experience was allocated in an unspecified manner (not using a "rule of thumb" of "two years of experience for one year of teaching"), and that such allocation did not have a disproportionately discriminatory **[***42]** impact on women. When Valida Pendleton was hired in 1997 to teach allied **[**343]** health, she had no prior teaching experience or comparable work experience. n26 Accordingly, she was assigned a salary category of "Level I, Year 1." Tanya Bullock was hired that **[*776]** same year to teach computer science and had no prior teaching experience. However, she did have three years of prior computer experience, for which she was given three years of credit and assigned a salary category of "Level II, Year 4." Bullock, a woman, was the only teacher who was given the same number of years of credit for starting salary purposes as she had actual years of prior work experience.

n26 Based on her resume, it appears that Valida Pendleton worked for the Department of Mental Retardation for seven and one-half years. The superintendent testified that Pendleton received no credit for this experience because her position had been that of an "aide," which was not comparable to being a teacher.

When Timothy Seguin was hired in 1997 to teach carpentry, **[***43]** he had no prior teaching experience and fourteen years of prior work experience. He was given four years of credit and assigned a salary category of "Level II, Year 5," which was one step above Gonvalves and one step below Silvestris. Michael Napieralski was hired in 1997 to teach carpentry and had no prior teaching experience. n27 However, he did have over twenty years of prior work experience as a carpenter, for which he was given seven years of credit and assigned a salary category of "Level II, Year 8." Napieralski was the first teacher to be hired for a position in the technical division at a starting salary above both plaintiffs, a reflection of the fact that he had at least six more years of comparable prior work experience than Silvestris, and twelve more years than Goncalves. When Gary Manuel was hired in 1998 to teach technology, he had four years of prior teaching experience at a public middle school, and eighteen years of prior work experience as a general contractor. Like Napieralski, he was given seven years of credit (four years for his teaching experience, and three years for his work experience), and was assigned a salary category of "Level II, Year 8." The difference **[***44]** between Manuel's starting salary and those of the plaintiffs was primarily attributable to the fact that he had substantially more prior public school teaching experi-

ence than the plaintiffs, thereby elevating the amount of credit he received. n28

In sum, although the discretion conferred on **[***45]** the superintendent **[*777]** under the 1994-1997 agreement to set the initial salary levels of new teachers was exercised without any well-defined and articulated criteria, we conclude that the resulting lack of uniformity in starting salaries did not establish that the plaintiffs were subjected to wage discrimination based on gender in violation of *G. L. c. 149, § 105A*.

5. Conclusion. The judgment in favor of the plaintiffs on their wage discrimination claims is vacated, and a new judgment shall enter in favor of the school district on **[**344]** those claims. n29

So ordered.

n27 Notwithstanding the superintendent's testimony that, to her knowledge, Michael Napieralski had no prior teaching experience, his resume indicates that he had worked as a substitute teacher in the carpentry program at Bay Path Vocational Technical High School.

n28 When the plaintiffs filed their original charges with the MCAD on July 14, 1999, their allegations of discrimination were based on an examination of the salaries of those male teachers who had been hired up until that point in time. Accordingly, we need not analyze salary information pertaining to three male teachers (George Zini, Martin Drexhage, and Franco Dell'Olio) who were hired for the technical division after the filing of the plaintiffs' charges.

N29 In light of our disposition of these cases, we need not address the issue of damages or the plaintiffs' request for reasonable appellate attorney's fees and costs. See generally *Yorke Mgt. v. Castro, 406 Mass. 17, 546 N.E.2d 342 (1989)*.

**EILEEN STANDERWICK & others n1 vs. ZONING BOARD OF APPEALS OF ANDOVER & another. n2**

n1 Kirstin Clarke, Susan Powers, Dean Shu, Michael Marcoux, and Madelaine St. Amand.

n2 Avalon at St. Clare, Inc.

**SJC-09635**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

*447 Mass. 20; 849 N.E.2d 197; 2006 Mass. LEXIS 332*

**February 8, 2006, Argued**
**June 16, 2006, Decided**

**SUBSEQUENT HISTORY:** As Corrected July 5, 2006.

**PRIOR HISTORY:** **[***1]** Essex. Civil action commenced in the Superior Court Department on June 11, 2002. The case was heard by Howard J. Whitehead, J., on a motion for summary judgment. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review. *Standerwick v. Zoning Bd. of Appeals, 64 Mass. App. Ct. 337, 833 N.E.2d 181, 2005 Mass. App. LEXIS 809 (2005)*

**DISPOSITION:** Judgment affirmed.

**HEADNOTES:** Zoning, Comprehensive permit, Person aggrieved. Housing. Practice, Civil, Zoning appeal, Standing. Statute, Construction.

**COUNSEL:** Kevin P. O'Flaherty for Avalon at St. Clare, Inc.

Andrew A. Caffrey, Jr., for the plaintiffs.

Thomas J. Urbelis, for Zoning Board of Appeals of Andover, was present but did not argue.

The following submitted briefs for amici curiae:

Michael Pill, Pro se.

R. Jeffrey Lyman, Michael K. Murray, & Adam Hollingsworth for Greater Boston Real Estate Board & others.

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

**OPINION BY:** MARSHALL

**OPINION:**

**[*21]** **[**200]** MARSHALL, C.J. We consider in this case whether a claim of diminution of property values by abutting landowners constitutes a cognizable basis for standing to challenge a comprehensive permit for the construction of affordable housing granted pursuant to *G. L. c. 40B, § § 20-23* (act). Because the diminution of real estate values is not an injury to an interest that **[***2]** *G. L. c. 40B* was intended to protect, we conclude that it does not.

In 2002, the zoning board of appeals of the town of Andover (board) issued a comprehensive permit to Avalon at St. Clare, Inc. (developer), to construct a four-story apartment building, with one-quarter of the units to be reserved as affordable rental housing for low and moderate income tenants. The property at issue is located in an area of Andover zoned for single-family homes on one-acre lots. The plaintiffs, abutting and neighboring landowners, appealed to the Superior Court claiming they were "aggrieved" by the board's decision. See *G. L. c. 40B, § 21*. n3 A judge in the Superior Court allowed the developer's motion for summary judgment, ruling that the plaintiffs lacked standing to challenge the issuance of the comprehensive permit because their claim that the affordable housing project would diminish their property values was "not a concern recognized by *G. L. c. 40B*," and therefore not an injury that could confer standing on the plaintiffs.

n3 *General Laws c. 40B, § 21*, provides in pertinent part: "Any person aggrieved by the is-

suance of a comprehensive permit or approval may appeal to the court as provided in [*G. L. c. 40A, § 17*]." *General Laws c. 40A, § 17*, provides in pertinent part: "Any person aggrieved by a decision of the board of appeals . . . may appeal to . . . the superior court department in which the land concerned is situated . . . by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. . . . The complaint shall allege that the decision exceeds the authority of the board . . . and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled."

**[***3]**

**[*22]** The Appeals Court reversed, holding that diminution in real estate values is "an injury that is a tangible and particularized injury to a private property or legal interest protected by zoning law," which it held to be "a valid basis for a claim of standing" to challenge the issuance of a comprehensive permit under *G. L. c. 40B*. *Standerwick v. Zoning Bd. of Appeals of Andover, 64 Mass. App. Ct. 337, 341, 342, 833 N.E.2d 181 (2005)* (Standerwick). It further concluded that the plaintiffs' presumptive standing as abutters n4 was not adequately challenged by evidence submitted by the developer in support of its motion for summary judgment. *Id. at 342-344*. We granted the developer's application for further appellate review. We affirm the decision of the Superior Court judge. n5

n4 As to three plaintiffs who did not join in this appeal, the judge ruled they did not have the benefit of a presumption of standing because they are not direct abutters to the site, nor are they owners of property within 300 feet of the site, which in either event would give them a presumption of standing to challenge the issuance of a comprehensive permit. See *G. L. c. 40A, § 11*; *Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 110-111, 653 N.E.2d 589 (1995)*. The judge also ruled that these three plaintiffs had not alleged any facts to indicate that the proposed development would affect them in any way distinct from the manner in which all town residents would be affected.

**[***4]**

n5 We acknowledge the amicus brief of the Greater Boston Real Estate Board, Citizens' Housing and Planning Association, the National Association of Industrial and Office Properties (Massachusetts Chapter), and the Massachusetts Association of Realtors, and the amicus brief of Michael Pill.

**[**201]** 1. Background. As described more fully by the Appeals Court, *Standerwick, supra at 338-339*, the developer seeks to construct a 115-unit four-story apartment building on a 9.127-acre parcel at 460 River Road in Andover (site). Twenty-nine units of the building will be designated for low and moderate income housing. The site, which is enclosed by a ten-foot high masonry wall running parallel to three of the property's boundaries, is currently improved by a four-story brick building built in 1959, and is used as a residence for a religious community. The developer intends to retain the masonry wall but raze the existing building and construct a new building on the site.

In October, 2001, after the board denied the developer's first application for a comprehensive permit to construct **[***5]** 152 units in eight buildings on the property, the developer appealed to the housing appeals committee (HAC) of the Department of Housing **[*23]** and Community Development, pursuant to *G. L. c. 40B, § § 22-23*. The developer, the board, and a local citizens' group known as "Protect Andover Zoning" (composed of the plaintiffs and others) then engaged in HAC-sponsored mediation, during which the developer agreed to reduce the scope of its original proposal to 115 units in a single, four-story building, subject to certain other conditions. The HAC remanded the case to the board for further consideration. After additional public hearings, the board approved the comprehensive permit at issue in May, 2002.

The plaintiffs commenced this action in June, 2002, claiming that as abutters and neighbors of the proposed development, they were "aggrieved" by the issuance of the comprehensive permit. See *G. L. c. 40B, § 21*. n6 In response to the developer's discovery, the plaintiffs identified the following as the adverse impacts of the proposed housing development on them: light and noise pollution, traffic and related safety concerns, **[***6]** an increase in crime or vandalism, adverse drainage effects on septic systems, a decrease in the plaintiffs' privacy, and a diminution of their property values. Although requested to do so, the plaintiffs offered no expert opinion to support any of the claimed adverse impacts. n7

n6 The plaintiffs alleged that the decision of the board was not consistent with relevant laws or regulations and that the board had exceeded its authority because (1) the site is a "remote rural area of single family homes on one acre lots" not serviced by public transportation or other ser-

vices; (2) the site is "inappropriate" for a "large multi-family residential structure, particularly at the density approved"; (3) the "public safety" of the residents of the development and of the town has "not been adequately protected and provided for"; and (4) the "public health issue of sanitary sewage disposal remains unresolved." They also alleged that the "regional need for low and moderate income housing is . . . outweighed by valid planning objections."

n7 For example, one plaintiff described the basis for her claim that rates of vandalism would increase as a "gut feel on just reading the papers" and "personal experience."

**[***7]**

In March, 2003, the developer filed a motion for summary judgment supported by affidavits on the issue of the plaintiffs' standing to challenge the comprehensive permit. In one, a civil engineer opined that the development would have no adverse **[*24]** impact on local water and sewer service, n8 and that a new drainage system **[**202]** would adequately handle storm water drainage and run-off in conformance with State environmental standards. In a second affidavit, a traffic engineer stated that the development would not create unacceptable levels of service at various relevant intersections in the area and that development-generated traffic could be "adequately and safely" absorbed by local roads. With respect to other anticipated adverse impacts, the developer argued that the plaintiffs, who had conceded in their own responses to discovery that they had no evidence to support them, would not be able to prove their claims at trial. n9

n8 The civil engineer concluded that, contrary to the plaintiffs' assertions, the development would improve water service in the area: as a result of a new water line the developer would install and connect to the town water system, town water service would now be available to certain homes and new hydrants would improve fire protection.

**[***8]**

n9 As noted earlier, the other concerns were light and noise pollution, an increase in crime or vandalism, a decrease in privacy resulting from the change in the rural character of the neighborhood, and a diminution in property values.

In opposition to the developer's motion for summary judgment, the plaintiffs submitted affidavits from two real estate professionals, each of whom claimed that the proposed development would diminish the value of the plaintiffs' properties. n10 The developer moved to strike the affidavits on the ground that property value diminution cannot confer standing in a *G. L. c. 40B* case "because preservation of property values is not within the scope of interests protected" by *G. L. c. 40B*. n11

n10 One of the affidavits was submitted by Kirstin Clarke, a plaintiff in this action. A licensed real estate sales person, Clarke stated that the proposed development "will devalue my property by as much as 20%," pointing to "location, density, traffic, and the impact of nonconforming uses and structures which may impact property value." The plaintiffs' second affidavit was from a certified real estate appraiser who stated that the property of the "immediate" abutters would suffer a 20% diminution in value because the proposed structure would "be substantially greater in height" than permitted under current zoning, the development would "significantly increase area traffic," and a "trash compactor" proposed for the rear of the site would "affect" the view of the site's "immediate" abutters.

**[***9]**

n11 The developer also argued that the two affidavits should be struck because they did not disclose facts on which the opinions were based, lacked a basis in any reliable methodology, and were not admissible as expert opinion.

A judge in the Superior Court allowed the developer's motion **[*25]** for summary judgment, concluding that the plaintiffs' claims of light and noise pollution did not raise cognizable health and safety concerns but were "purely aesthetic"; that the plaintiffs' traffic claims would not impact safety; and that their claim that drainage might raise health and safety issues was "speculative." He concluded that the developer had rebutted the plaintiffs' presumption of standing on the traffic and drainage issues by expert opinion and that the plaintiffs had proffered nothing to support their "apprehension and speculation" that the proposed development would lead to an increase in crime or vandalism. As noted earlier, the judge ruled that the claim of diminution of real estate values could not serve as a basis for standing. The judge allowed the developer's motion to strike the plaintiffs' **[***10]** real estate value affidavits, although his reason

for doing so is not clear. See note 11, supra. The plaintiffs appealed.

The Appeals Court held that whether a person is "aggrieved" under *G. L. c. 40B, § 21*, is governed by the "substantive standards" applicable to standing analysis under *G. L. c. 40A, § 17*, "such as property values, traffic, or parking," *Standerwick, supra at 340*. This, it said, included the plaintiffs' claim that their property values would diminish if the proposed affordable housing development went forward. n12 The Appeals Court further **[**203]** determined that, because of their presumptive standing as abutters, the plaintiffs had no burden to produce any evidence supporting their claims "unless and until the defendants had offered evidence 'warranting a finding contrary to the presumed fact,'" *id. at 342*, quoting *Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 111, 653 N.E.2d 589 (1995)* (Watros). Concluding that reliance on the plaintiffs' failure to identify in discovery any evidence to support their claims of aggrievement did not constitute such **[***11]** "evidence," n13 the court ruled that the developer had not come forward with **[*26]** sufficient evidence to rebut this presumption of standing. *Id. at 344-345 & n.16*.

N12 As to the plaintiffs' other claims of aggrievement, the Appeals Court declined to address "the merits or viability of all of the bases on which the plaintiffs claim[ed] standing" because, it concluded, the plaintiffs had "at least one valid basis, the claim that their property values would diminish," sufficient to confer standing. *Standerwick v. Zoning Bd. of Appeals of Andover, 64 Mass. App. Ct. 337, 345 n.16, 833 N.E.2d 181 (2005)* (Standerwick).

n13 The Appeals Court explained that, in its view, it is not enough for a defendant "merely to dispute the plaintiffs' claim of standing and to show that the plaintiffs have no evidence to support their position." *Standerwick, supra at 342*. In so doing, the Appeals Court addressed *Cohen v. Zoning Bd. of Appeals of Plymouth, 35 Mass. App. Ct. 619, 624 N.E.2d 119 (1993)* (Cohen), by stating: "We can no longer say, as we did in *[Cohen, supra] at 621*, that the filing of a motion for summary judgment constitutes a 'challenge' sufficient to make the statutory presumption recede, and requires the plaintiffs to come forward with 'specific facts' to support their assertion of status as aggrieved persons, as would be required under *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991)*." *Standerwick, supra at 343-344*.

**[***12]**

2. Legally cognizable injury under *G. L. c. 40B*. We first address the scope of the cognizable interests protected by *G. L. c. 40B*, and then turn to the issue of the plaintiffs' presumptive standing. n14 The developer asserts that the Appeals Court erred in concluding that analysis of the injury that constitutes cognizable "aggrievement" under *G. L. c. 40B, § 21*, is the same as the analysis for injury constituting "aggrievement" cognizable under *G. L. c. 40A, § 17*. It next argues that, in any event, diminution in real estate values is not a legally cognizable injury for purposes of standing to challenge the issuance of a comprehensive permit. We agree with the developer that assertions of harm that confer standing as a "person aggrieved" under *G. L. c. 40A* are not necessarily cognizable as a basis for "aggrievement" under *G. L. c. 40B*.

n14 On appeal, the plaintiffs press two arguments, which we need not address: (1) the judge erred in striking the two affidavits from the real estate professionals submitted by the plaintiffs in opposition to the developer's motion for summary judgment, see notes 10 and 11, supra; and (2) the failure of the board to make findings of fact supporting the issuance of the comprehensive permit establishes that material questions of fact exist that precluded summary judgment. We need not address the first issue because, as we shall explain, diminution of real estate values cannot be the basis for the plaintiffs' standing in this *G. L. c. 40B* case. See discussion, infra. We do not address the merits of the plaintiffs' second argument because we affirm the judge's ruling that the plaintiffs do not have standing to challenge the issuance of the comprehensive permit.

**[***13]**

*General Laws c. 40B, § 21*, provides that "[a]ny person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in *[G. L. c. 40A, § 17]*." See note 3, supra. While the words "person aggrieved" are not to be narrowly construed, *Marotta v. Board of Appeals of Revere, 336 Mass. 199, 204, 143 N.E.2d 270 (1957)* (Marotta), the Legislature **[**204]** has **[*27]** "intentionally limited the class of parties with standing to challenge a comprehensive permit," and likely sought to avoid "manipulation of the comprehensive permitting process to thwart the construction of low and moderate income housing." *Planning Bd. of Hingham v. Hingham Campus, LLC, 438 Mass. 364, 370, 780 N.E.2d 902 (2003)* (Hingham Campus).

In reaching its conclusion that the "substantive standards" applicable to standing requirements under *G. L. c. 40B* are the same as those applicable under *G. L. c. 40A*, *Standerwick, supra at 340, 342*, the Appeals Court relied on this court's statement in *Bell v. Zoning Bd. of Appeals of Gloucester, 429 Mass. 551, 553, 709 N.E.2d 815 (1999)* (Bell), that the "same standing **[***14]** requirements apply to appeals under *G. L. c. 40A* and *G. L. c. 40B* appeals." *Standerwick, supra at 340*. In Bell, where it was the abutter plaintiff arguing that *G. L. c. 40A* was irrelevant to the analysis, we were not required to and did not examine the potential differences between legally cognizable injuries under the two statutes as a consequence of the differing interests the two land use schemes were intended to protect. *Bell, supra at 554*. Although analyzed using broad language concerning standing under *G. L. c. 40A*, the plaintiff in that comprehensive permit case did not satisfy the standing requirement of a "person aggrieved" under *G. L. c. 40A*, id., and it was therefore not necessary for the court to consider whether a plaintiff who could satisfy *G. L. c. 40A* standing requirements would automatically be a "person aggrieved" for purposes of *G. L. c. 40B*.

Both *G. L. c. 40A* and *G. L. c. 40B* use the term "person aggrieved"; it is this term that we interpret in like manner. See *Hingham Campus, supra at 368* ("For purposes of interpreting the term 'person aggrieved' under the comprehensive permit statute, **[***15]** we look to interpretation of the identical term in *G. L. c. 40A, § 17*"). Specifically, a "person aggrieved" as that term is used in both statutes must assert "a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest." *Harvard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass. App. Ct. 491, 493, 540 N.E.2d 182 (1989)*. See *Barvenik v. Aldermen of Newton, 33 Mass. App. Ct. 129, 130-132, 597 N.E.2d 48 (1992)* (Barvenik). Of particular importance, the right or interest asserted must be one that the statute under which a **[*28]** plaintiff claims aggrievement intends to protect. See *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 431, 86 N.E.2d 920 (1949)*. Contrary to the plaintiffs' claim, Bell does not stand for the proposition that allegations of injury that may establish a claim of "aggrievement" under *G. L. c. 40A* automatically establish "aggrievement" under *G. L. c. 40B*. See *Hingham Campus, supra at 367* (it is "inappropriate to rely" on *G. L. c. 40A* to establish standing where permit was issued pursuant to *G. L. c. 40B*, and "we **[***16]** should not look to the more general statutory scheme of *G. L. c. 40A, § 17*, to determine standing" under *G. L. c. 40B*).

The interests protected by *G. L. c. 40B* differ from, and in some respects are inconsistent with, those protected by *G. L. c. 40A*. Compare *Kane v. Board of Appeals of Medford, 273 Mass. 97, 104, 173 N.E. 1 (1930)* (purpose of zoning law is "to stabilize property uses in the specified districts in the interests of the public health and safety and the general welfare, and not to permit changes, exceptions or relaxations except after such full notice as shall enable all those interested to know what is projected **[**205]** and to have opportunity to protest"); *Murray v. Board of Appeals of Barnstable, 22 Mass. App. Ct. 473, 476, 494 N.E.2d 1364 (1986)* (abutters in single-family, one-acre zoning district had standing to challenge *G. L. c. 40A* special permit because of "legitimate interest in preserving the integrity of the district from the intrusion of multi-family housing"), with *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 822, 767 N.E.2d 584 (2002)* (comprehensive permit process under *G. L. c. 40B* designed **[***17]** to override local opposition to low income housing). The reference in *G. L. c. 40B, § 21*, to *G. L. c. 40A, § 17*, must be construed in a manner that effectuates the intent of the act. Although the Legislature chose in *G. L. c. 40B, § 21*, to incorporate the judicial review procedure established in *G. L. c. 40A, § 17*, the substantive standing requirements of *G. L. c. 40A* are neither the same as nor incorporated into *G. L. c. 40B*.

We next consider whether diminished real estate values constitute a basis for standing to challenge the issuance of a comprehensive permit. We have long recognized that the Legislature's intent in enacting *G. L. c. 40B, § § 20-23*, is "to **[*29]** provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing" in the Commonwealth. *Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 354, 294 N.E.2d 393 (1973)*. See generally *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, supra at 820-824*. **[***18]** The statute reflects the Legislature's considered judgment that a crisis in housing for low and moderate income people demands a legislative scheme that requires the local interests of a town to yield to the regional need for the construction of low and moderate income housing, particularly in suburban areas. See *G. L. c. 40B, § § 20, 23*. See also *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, supra at 814-815*; *Board of Appeals of Hanover v. Housing Appeals Comm., supra at 354-355*. As we described in these and other cases, to effectuate this purpose the act establishes a streamlined comprehensive permitting procedure, *Hingham Campus, supra at 370*, permitting a developer to file a single application to the local zoning board of appeals for construction of low or moderate income housing. *G. L. c. 40B, § 21*. In cities and towns that have not met the minimum statutory threshold of affordable housing, n15 a developer may override bulk, height, dimensional, use, and other limitations, often invoked as a pretext to exclude affordable **[***19]**

housing. See *Board of Appeals of Hanover v. Housing Appeals Comm., supra at 354.* See also Krefetz, The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act, *22 W. New Eng. L. Rev. 381, 386-387 (2001).* In addition to streamlining the permitting process itself, the clear intent of the Legislature was to promote affordable housing by minimizing lengthy and expensive delays occasioned by court battles **[**206]** commenced by those seeking to exclude affordable housing from their own neighborhoods.

n15 A need for affordable housing exists where fewer than ten per cent of the housing units in a city or town qualify as low or moderate income housing. *G. L. c. 40B, § 20.* The act defines "[l]ow or moderate income housing" as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization." Id. It is not disputed that Andover has not satisfied its ten per cent minimum obligation for affordable housing under *G. L. c. 40B.*

**[***20]**

**[*30]** In light of these oft-repeated objectives, we have no hesitation in concluding that granting standing to challenge the issuance of a comprehensive permit under *G. L. c. 40B, § 21*, to those who claim a diminution in the value of their property frustrates the intent of the Legislature. It is also inconsistent with our long-standing jurisprudence that standing to challenge a zoning decision is conferred only on those who can plausibly demonstrate that a proposed project will injure their own personal legal interests and that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect. See *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 431, 86 N.E.2d 920 (1949)* ("we must inquire what peculiar legal rights were intended to be given to the plaintiff by the statute permitting an appeal"). See also *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293, 367 N.E.2d 796 (1977)* (party has standing when alleging "injury within the area of concern of the statute or regulatory scheme under which the injurious action has **[***21]** occurred"); B.C. Levey, Massachusetts Zoning and Land Use Law § 5-26(b) (1996 & Supp. 1998) (plaintiff must show that proposed project "will injure his legal or property interests and that the injury is to an interest the zoning law was intended to protect"); Healy, Judicial Review of Variance and Special Permits, 1 Massachusetts Zoning Manual § 11.5.2 (b), at 11-39 (Mass. Continuing Legal Educ. 2000 & Supp. 2002) (to be "person aggrieved," plaintiff's injury "must relate to a cognizable interest protected by the zoning provisions at issue"). Accordingly, we look to the interest protected by *G. L. c. 40B*, namely, the expansion of affordable housing throughout the Commonwealth, to resolve the plaintiffs' claim of standing.

The preservation of real estate values of property abutting an affordable housing development is clearly not a concern that the *G. L. c. 40B* regulatory scheme is intended to protect. As the developer points out, such a result is antithetical to the purposes of *G. L. c. 40B*, which seeks to provide critically needed affordable housing throughout the Commonwealth. It would grant standing to challenge a comprehensive permit to persons who object to the construction **[***22]** of any affordable housing project simply by claims that the introduction of affordable housing for **[*31]** low and moderate income persons would cause their property values to drop. Rather, the interest in the provision of critically needed affordable housing must be balanced against the statutorily authorized interests in the protection of the safety and health of the town's residents, development of improved site and building design, and preservation of open space. See *G. L. c. 40B, § 20.*

In concluding that diminution in real estate values "is an injury that is a tangible and particularized injury to a private property or legal interest protected by zoning law," *Standerwick, supra at 341*, the Appeals Court relied on *Tsagronis v. Board of Appeals of Wareham, 33 Mass. App. Ct. 55, 59, 596 N.E.2d 369 (1992)*, S.C., *415 Mass. 329, 613 N.E.2d 893 (1993).* Tsagronis was decided under *G. L. c. 40A*, and we have already recognized that *G. L. c. 40A* and *c. 40B* are separate and distinct statutory schemes. In any event, the ruling in that case is not as sweeping as the plaintiffs posit. The plaintiff-abutters in that case appealed from the issuance **[***23]** of a variance under *G. L. c. 40A*, claiming that construction of a house on a neighboring nonconforming lot would partially obstruct their water view, **[**207]** thereby diminishing the value of their property. The trial judge found that the plaintiffs were aggrieved persons under *G. L. c. 40A, § 17*, and this court concluded that the judge was warranted in so finding. *Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329, 330 n.4, 613 N.E.2d 893 (1993).* Tsagronis is consistent with our determination in this case. The plaintiffs identified an injury personal to them: the diminution in value of their property. The attendant legal interest that the zoning scheme at issue protected was the interest in "preventing further construction in a district in which the existing development is already more dense than the applicable zoning regulations allow." *Tsagronis v. Board of Appeals*

*of Wareham, supra at 58-59*, citing *DiCicco v. Berwick, 27 Mass. App. Ct. 312, 315, 537 N.E.2d 1267 (1989)*. It was the plaintiffs' claim that the issuance of the variance adversely impacted them directly and that their injury related to a cognizable interest protected **[***24]** by the applicable zoning law -- the interest in preserving a certain level of density in the zoning district -- that conferred standing on them.

A claim of diminution of property values must be derivative of or related to cognizable interests protected by the applicable **[*32]** zoning scheme. See *Tranfaglia v. Building Comm'r of Winchester, 306 Mass. 495, 503-504, 28 N.E.2d 537 (1940)* (zoning legislation "is not designed for the preservation of the economic value of property, except in so far as that end is served by making the community a safe and healthy place in which to live"). To untether a claimed diminution in real estate values from an interest the zoning scheme seeks to protect would permit any abutter who claims that any change in property use would diminish the value of property to obtain standing to challenge a zoning decision. A developer may conclusively demonstrate, for example, that an increase of traffic will not adversely impact plaintiffs or their property such that plaintiffs are unable to establish a traffic-related "aggrievement." The developer did so in this case. But a real estate appraiser may then opine that the increase in traffic will nevertheless cause a property **[***25]** to diminish in value, as the plaintiffs' real estate appraiser did in this case. To confer standing in such circumstances would permit any plaintiff to make an "end run" around the rigorous standing requirements we have consistently recognized. See *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, supra.* n16

n16 The judge in the Superior Court did not address the plaintiffs' concern that the development will change the rural character of the neighborhood, resulting in a decrease in privacy. Relying on *Harvard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass. App. Ct. 491, 493, 540 N.E.2d 182 (1989)*, the Appeals Court correctly noted that "[a]n interest in preserving the rural character of the neighborhood is not a legally cognizable interest to be considered in determining standing." *Standerwick, supra at 345.*

3. Rebuttable presumption of standing. We turn now to consider the plaintiffs' other asserted grounds of standing. See note **[***26]** 9, supra, and accompanying text. The case is before us on further appellate review of a grant of summary judgment and we therefore view the material evidence in its light most favorable to the nonmoving party. *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. The moving party, here the developer, may satisfy its burden of demonstrating the absence of triable issues, *Pederson v. Time, Inc., 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989)*, by establishing that the plaintiffs will not be able to prove an essential element of their **[**208]** case. *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991)*.

As abutters, the plaintiffs are entitled to a rebuttable presumption **[*33]** that they are "persons aggrieved" under the act. n17 See *Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996)*; *Watros, supra at 110-111*; *Marotta, supra at 204*. This presumption originates in our jurisprudence concerning *G. L. c. 40A*, see *Marotta, supra*, but its reasoning -- that those entitled to notice of the proceedings are presumed to have the requisite interest **[***27]** -- applies with equal force in the context of challenges to comprehensive permits issued pursuant to *G. L. c. 40B*. Once the presumption is rebutted, the burden rests with the plaintiff to prove standing, which requires that the plaintiff "establish -- by direct facts and not by speculative personal opinion -- that his injury is special and different from the concerns of the rest of the community." *Barvenik, supra at 132*. The developer argues that the Appeals Court misconstrued the evidence required to rebut the presumption of standing. We agree. n18

n17 Hearings on an application for a comprehensive permit are held subject to the provisions of *G. L. c. 40A, § 11*. See *G. L. c. 40B, § 21*. "Parties in interest" entitled to notice of hearings under *G. L. c. 40A, § 11*, are presumed to be "persons aggrieved." See *Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 110-111, 653 N.E.2d 589 (1995)*. See also *Marotta v. Board of Appeals of Revere, 336 Mass. 199, 203-204, 143 N.E.2d 270 (1957)*. *General Laws c. 40A, § 11*, defines "[p]arties in interest" as including "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner."

**[***28]**

n18 The Appeals Court has noted a lack of clarity concerning the amount and nature of evidence required to rebut a presumption of standing. See, e.g., *Denneny v. Zoning Bd. of Appeals*

*of Seekonk, 59 Mass. App. Ct. 208, 212 n.6, 794 N.E.2d 1269 (2003)* ("The quantum of evidence necessary to bring about elimination of the presumption has not been defined with precision"); *Barvenik v. Aldermen of Newton, 33 Mass. App. Ct. 129, 131 n.7, 597 N.E.2d 48 (1992)* (standing decisions "have not explicitly addressed the issue of the amount or nature of the defendant's evidence required" to rebut presumption).

Once a defendant "challenges the plaintiff's standing and offers evidence to support the challenge . . . the jurisdictional issue is to be decided on the basis of the evidence with no benefit to the plaintiff from the presumption." *Barvenik, supra at 131.* See *Marotta, supra* ("If the issue [of standing] is contested, and any additional evidence is offered, the point of jurisdiction will be determined on all the evidence with no benefit to the **[*34]** plaintiffs from **[***29]** the presumption as such"). n19 We have explained that to rebut the presumption, the defendant must offer evidence "warranting a finding contrary to the presumed fact." *Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 258, 797 N.E.2d 893 (2003).* See *Watros, supra at 111* (presumption "recedes when a defendant challenges a plaintiff's status as an aggrieved person and **[**209]** offers evidence supporting his or her challenge"; presumption "is destroyed upon the defendant's offer of evidence warranting a finding contrary to the presumed fact"). Compare *Clifford v. Taylor, 204 Mass. 358, 361, 90 N.E. 862 (1910)* (on introduction of evidence that "tends to control" presumed fact, "the case is to be determined upon the whole evidence") with *Scaltreto v. Shea, 352 Mass. 62, 64, 223 N.E.2d 525 (1967)* (rebuttable presumption "continues only until evidence has been introduced which would warrant a finding contrary to the presumed fact").

N19 Numerous cases have relied on this standard. See, e.g., *Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996); Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 212, 794 N.E.2d 1269 (2003); Valcourt v. Zoning Bd. of Appeals of Swansea, 48 Mass. App. Ct. 124, 127-128, 718 N.E.2d 389 (1999); Cohen v. Zoning Board of Appeals of Plymouth, 35 Mass. App. Ct. 619, 621, 624 N.E.2d 119 (1993); Redstone v. Board of Appeals of Chelmsford, 11 Mass. App. Ct. 383, 384-385, 416 N.E.2d 543 (1981); Waltham Motor Inn, Inc. v. LaCava, 3 Mass. App. Ct. 210, 215-217, 326 N.E.2d 348 (1975).*

**[***30]**

A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by "throw[ing] upon his adversary the burden of going forward with evidence." *Epstein v. Boston Hous. Auth., 317 Mass. 297, 302, 58 N.E.2d 135 (1944).* See *Thomes v. Meyer Store, Inc., 268 Mass. 587, 589, 168 N.E. 178 (1929)* (presumption is not evidence but rule of evidence that "disappears when the facts are shown"); *Duggan v. Bay State St. Ry., 230 Mass. 370, 378, 119 N.E. 757 (1918),* quoting *Mobile, Jackson & Kan. City R.R. v. Turnipseed, 219 U.S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78 (1910)* (presumption "stands only until the facts are shown" and "cast[s] upon" defendant "the duty of producing some evidence to the contrary"); *Wyman v. Whicher, 179 Mass. 276, 277-278, 60 N.E. 612 (1901)* (burden of going forward with evidence to rebut presumption does not change burden of proof). n20 See also 9 J. Wigmore, Evidence § 2487 (c), (d) (Chadbourn rev. ed. 1981); id. at § 2491 at 304-305. Thus, an abutter **[*35]** is presumed to have standing until the defendant comes forward with evidence to contradict that presumption. Our **[***31]** conclusion that this evidence must "warrant a finding contrary to the presumed fact" does not shift the burden of proof on the issue of standing to the defendant. See *Wyman v. Whicher, supra.* See also *Perley v. Perley, 144 Mass. 104, 107-108, 10 N.E. 726 (1887)* (if presumed fact is "met and encountered" by defendant's contrary evidence, burden of proof remains with plaintiff and is "not for the defendant to show that [the presumed fact] does not exist").

n20 In *Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 797 N.E.2d 893 (2003),* we held that the defendant did not successfully rebut the plaintiff's presumption of standing. We stated in passing that we declined "the board's invitation to shift the burden of proof to [the plaintiff]." *Id. at 258.* We clarify that the plaintiff always bears the burden of proof on the issue of standing. An abutter's presumption of standing simply shifts to the defendant the burden of going forward with the evidence.

In a summary **[***32]** judgment context, a defendant is not required to present affirmative evidence that refutes a plaintiff's basis for standing. See *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714, 575 N.E.2d 734 (1991),* citing *Celotex Corp. v. Catrett, 477 U.S. 317, 328, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (material supporting motion for summary judgment "need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest" but "must demonstrate that proof of that

element at trial is unlikely to be forthcoming"). It is enough that the moving party "demonstrate[], by reference to material described in *Mass. R. Civ. P. 56 (c)*, unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving" a legally cognizable injury. *Kourouvacilis v. General Motors Corp., supra at 716*. See *Mass. R. Civ. P. 56 (c)*, 365 Mass. 824 (1974) (summary judgment granted on pleadings, depositions, answers to interrogatories, responses to requests **[**210]** for admission, or affidavits). In this case, the developer presented **[***33]** evidence sufficient to warrant a finding that the plaintiffs' claims of aggrievement did not confer standing on them under the act, as we now explain.

First, through unchallenged affidavits of its experts, the developer established that the plaintiffs' claims of traffic and drainage problems were unfounded. The developer was not required to support its motion for summary judgment with affidavits on each of the plaintiffs' claimed sources of standing; its reliance on the plaintiffs' lack of evidence as to the other **[*36]** claims, obtained through discovery, had equal force. See *Bell v. Zoning Bd. of Appeals of Gloucester, 429 Mass. 551, 554, 709 N.E.2d 815 (1999)* (defendants rebutted plaintiff's presumption of standing where plaintiff's deposition testimony "failed to show that the proposed project will impair any interests of the [plaintiff] that are protected by the zoning law"); *Cohen v. Zoning Bd. of Appeals of Plymouth, 35 Mass. App. Ct. 619, 622, 624 N.E.2d 119 (1993)* (deponents' inability to "articulate whether or how the plaintiffs would be injured" were not conclusive but caused presumption of standing "to recede"). Cf. *Watros, supra at 108* (defendant's **[***34]** denials and affirmative defenses insufficient to make presumption of standing recede); *Valcourt v. Zoning Bd. of Appeals of Swansea, 48 Mass. App. Ct. 124, 128, 718 N.E.2d 389 (1999)* (defendants' answer to plaintiffs' complaint and memoranda of law opposing plaintiffs' motions for summary judgment did not qualify as evidence supporting challenge to plaintiff's presumptive standing). Through discovery of the plaintiffs, the developer demonstrated that the plaintiffs had no factual basis for their claims of increased crime or vandalism. The judge, in his discretion, determined that this concern was "beyond the scope of common knowledge, experience and understanding" and that expert evidence was therefore necessary to establish aggrievement. See *Barvenik, supra at 137 n.13*. Because the plaintiffs offered no expert evidence to support their concerns that crime or vandalism would increase, their responses to discovery were, as the judge found, nothing more than unsupported "apprehension and speculation."

In the context of a challenge to a comprehensive permit issued in *G. L. c. 40B*, a contrary ruling would place unnecessary and potentially onerous financial burdens **[***35]** on every developer. The construction of multiple-unit housing complexes, which frequently comprise the developments at issue under *G. L. c. 40B* proceedings, in rural, semi-rural, or suburban areas zoned for single-family use will necessarily increase the population of a community. Every increase in population gives rise to a host of potential consequences -- for example, an increase in the likelihood of contagious diseases, an increase of noise from passing automobiles, or an increase in vandalism. When the persons challenging a permit concede that they have nothing **[*37]** more than unfounded speculation to support their claims of injury, our law does not require that a developer come forward with expert evidence to challenge every such speculative injury.

It is not sufficient for a defendant simply to file a motion for summary judgment, or to deny the plaintiffs' allegations. But the developer may rebut a presumption of standing by seeking to discover from such plaintiffs the actual basis of their claims of aggrievement. If a person claiming to be aggrieved can point to no such evidence, a party seeking summary judgment is entitled to rely on that fact.

Once the developer in this case **[***36]** rebutted the plaintiffs' presumption of standing, the **[**211]** plaintiffs were required to, but did not, meet their burden to establish standing. The plaintiffs relied solely on two affidavits supporting their claim of a potential decrease in real estate values, a concern not protected by *G. L. c. 40B*. Cf. *Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 213-214, 794 N.E.2d 1269 (2003)* (plaintiff did not have standing after defendant rebutted plaintiff's presumptive standing, and plaintiff offered no evidence in response, other than her own "speculative and conclusory" testimony). The developer successfully established that the plaintiffs had no reasonable likelihood of proving they were "aggrieved" persons.

Judgment affirmed.

**ZOEL SYLVESTER vs. COMMISSIONER OF REVENUE & others. n1**

n1 Town of Danvers and other cities and towns of the Commonwealth similarly situated.

**SJC-09486**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***445 Mass. 304; 837 N.E.2d 662; 2005 Mass. LEXIS 564***

**October 5, 2005, Argued**
**November 16, 2005, Decided**

**SUBSEQUENT HISTORY:** US Supreme Court certiorari denied by *Sylvester v. Lebovidge, 2006 U.S. LEXIS 3971 (U.S., May 22, 2006)*

**PRIOR HISTORY:** **[***1]** Suffolk. Civil action commenced in the Superior Court Department on February 20, 2003. The case was heard by Geraldine S. Hines, J., on motions for summary judgment. The Supreme Judicial Court granted an application for direct appellate review. Joel Z. Eigerman for the plaintiff. Thomas A. Barnico, Assistant Attorney General (Daniel J. Hammond, Assistant Attorney General, with him) for Commissioner of Revenue. Bryan R. LeBlanc for town of Danvers.

**HEADNOTES:** Taxation, Real estate tax: exemption. Veteran. Constitutional Law, Taxation, Real estate tax, Veteran, Privileges and immunities, Equal protection of laws, Right to travel.

**COUNSEL:** Joel Z. Eigerman for the plaintiff.

Thomas A. Barnico, Assistant Attorney General (Daniel J. Hammond, Assistant Attorney General, with him) for Commissioner of Revenue.

Bryan R. LeBlanc for town of Danvers.

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

**OPINION BY:** GREANEY

**OPINION:**

**[*304]** **[**663]** GREANEY, J. We allowed an application for direct appellate **[*305]** review to decide Federal and State constitutional challenges to a partial real estate tax exemption under *G. L. c. 59, § 5*, Twenty-second, afforded to certain disabled veterans (veterans' exemption). The exemption applies to real estate "occupied in whole or in part" as a disabled veteran's "domicile" in "the amount of two thousand dollars of **[***2]** [its] assessed taxable valuation or the sum of $ 250, whichever would result in an abatement of the greater amount of actual taxes due." Id. At issue is the imposition of a residency requirement, granting eligibility for the exemption to disabled veterans who have resided in Massachusetts "for five consecutive years next prior to date of filing for exemptions." n2 Id. The plaintiff claims that the five-year residency requirement is an unconstitutional infringement on his right to travel and serves no compelling or legitimate State interest, thereby violating the equal protection and privileges or immunities clauses of the *Fourteenth Amendment to the United States Constitution*. He also argues that the five-year residency requirement violates *Pt. 1, art. 6, of the Declaration of Rights of the Massachusetts Constitution*. We reject the plaintiff's constitutional challenges.

n2 The statute, *G. L. c. 59, § 5*, provides that certain "property shall be exempt from taxation," and reads as follows:

> "Twenty-second, Real estate of the following classes of persons who are legal residents of the commonwealth and who are veterans, as defined in [*G. L. c. 4, § 7, Forty-third*], and whose last discharge or release from the armed forces was under other than dishonorable conditions and who were domiciled in Massachusetts for at least six months prior to entering such service, or who have

> resided in the commonwealth for five consecutive years next prior to date of filing for exemptions under this clause, hereinafter referred to in this clause as soldiers and sailors, provided such real estate is occupied in whole or in part as his domicile by such person, . . . to the amount of two thousand dollars of assessed taxable valuation or the sum of $ 250, whichever would result in an abatement of the greater amount of actual taxes due. No real estate shall be so exempt which the assessors shall adjudge has been conveyed to a soldier or sailor or to the spouse, surviving spouse, father or mother of a soldier or sailor to evade taxation."

**[***3]**

The factual and procedural background of the case is as follows. The plaintiff is a disabled veteran within the meaning **[*306]** of *G. L. c. 59, § 5, Twenty-second (a)*, n3 and *G. L. c. 4, § 7, Forty-third*. n4 **[**664]** He served in the United States Marine Corps during World War II, and was wounded at the Battle of Saipan in 1944, and at the Battle of Iwo Jima in 1945. He was awarded the decoration of the Purple Heart, and subsequently a gold star to the Purple Heart, for wounds he suffered at the Battle of Saipan. The plaintiff was honorably discharged in 1945, with a fifty per cent disability from the United States Veterans Administration.

> n3 *General Laws c. 59, § 5, Twenty-second (a)*, applies to "soldiers and sailors who, as a result of disabilities contracted while in the line of duty, have a disability rating of ten per cent or more as determined by the Veterans Administration or by any branch of the armed forces."

> n4 *General Laws c. 4, § 7, Forty-third*, defines the term "veteran" to include "any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the . . . marine corps . . . of the United States . . . for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, that any person who so served in wartime and was awarded a service-connected disability or a Purple Heart . . . shall be deemed to be a veteran notwithstanding his failure to complete 90 days of active service . . . ." The clause defines "Wartime service" to include service performed by a "World War II veteran" between September 16, 1940 and December 31, 1946. Id.

**[***4]**

The plaintiff first moved to the town of Danvers and bought a home there in 1953. In 1958, he was granted a partial exemption under *G. L. c. 59, § 5, Twenty-second*, from a real estate tax assessed on his property. In 1994, he moved to New Hampshire. He returned to Danvers in 2000, and has since resided there in a home that he owns.

In January, 2001, the plaintiff applied for a partial exemption under *G. L. c. 59, § 5, Twenty-second*, in connection with a 2001 real estate tax assessed on his property. n5 His application was denied by the board of assessors of Danvers because he had not satisfied the five-year residency requirement.

> n5 Exemptions under *G. L. c. 59, § 5*, are determined in the first instance by the local assessor, subject to the regulations and guidelines issued by the Commissioner of Revenue (commissioner), who is charged with the administration and enforcement of the tax laws of the Commonwealth. See *G. L. c. 14, § § 1, 3, 6*; *G. L. c. 58, § § 1, 1A, 3*. The commissioner has, at all relevant times, instructed local assessors to observe and to enforce the residency requirements contained in the various clauses of *G. L. c. 59, § 5*.

**[***5]**

At a special town meeting held on November 25, 2002, the **[*307]** town voted unanimously to accept, as pertaining to the fiscal year 2003, the provisions of the last paragraph of *G. L. c. 59, § 5, Twenty-second E*, which authorizes a municipality to impose a one-year residency requirement to an exemption sought under *G. L. c. 59, § 5, Twenty-second*. n6 Subsequently, in February, 2003, the plaintiff applied for the exemption under *G. L. c. 59, § 5, Twenty-second E*, having satisfied the one-year residency requirement. The board of assessors granted his application, allowing an abatement in the amount of $ 338.87.

> n6 The last paragraph of *G. L. c. 59, § 5, Twenty-second E* provides:

> "Notwithstanding the provisions of this section, in any city or town which accepts the provisions of this paragraph, said exemptions available under clauses twenty-second, twenty-second A, twenty-second B, twenty-second C, twenty-second D and twenty-second E may be granted to otherwise eligible persons who have resided in the commonwealth for one year prior to the date of filing for exemptions under the applicable clause" (emphasis added).

**[***6]**

The plaintiff then commenced this action in the Superior Court seeking injunctive and declaratory relief, as well as damages, with respect to the denial of his 2001 request for a partial exemption under *G. L. c. 59, § 5, Twenty-second*, and more generally with respect to the denials for exemptions under that statute "for the past three years." The plaintiff moved for partial summary judgment, and the defendants **[**665]** filed what we deem to be cross-motions for summary judgment, on the plaintiff's request for a declaration concerning the constitutionality of the five-year residency requirement of *G. L. c. 59, § 5, Twenty-second* (and in other similar clauses). n7

> n7 *Clause Twenty-second of G. L. c. 59, § 5*, is one of several real estate tax exemptions given to veterans. See *G. L. c. 59, § 5, Twenty-second*, *Twenty-second A*, *Twenty-second B*, *Twenty-second C*, *Twenty-second D*, and *Twenty-second E*. Each of these veterans' exemptions essentially contains the same five-year residency requirement that is found in clause *Twenty-second* (the requirement in clause *Twenty-second D* applies to surviving spouses instead of to veterans). The amount of the partial abatement afforded in each clause varies depending on the severity of the veteran's injury, per cent of disability or, in certain circumstances, loss of life.
>
> In his complaint, the plaintiff also seeks certification of a class of veterans similarly situated and those persons who would receive real estate tax exemptions under clauses *Twenty-second*, *Twenty-second A*, *Twenty-second B*, *Twenty-second C*, *Twenty-second D*, and *Twenty-second E of G. L. c. 59, § 5*, but for each clause's five-year residency requirement. His request for declaratory relief pertains to all of these clauses. Because he moved for partial summary judgment before obtaining class certification, we focus on the clause that pertains to him, namely, the five-year residency requirement contained in *G. L. c. 59, § 5, Twenty-second*. Our conclusion applies equally to the five-year residency requirements in the other veterans' exemption clauses. We take note of, and later discuss, those provisions.

**[***7]**

In her memorandum and order, the judge rejected the argument **[*308]** of the Commissioner of Revenue (commissioner) that the allowance of the plaintiff's application for an exemption under the one-year residency provision contained in the last paragraph of *G. L. c. 59, § 5, Twenty-second E*, see note 6, supra, rendered the case moot, pointing out that that provision "became effective for exemption applications beginning in fiscal year 2003" and did not resolve the plaintiff's claim that his constitutional rights were violated by the application of the five-year residency requirement of *G. L. c. 59, § 5, Twenty-second*, in fiscal years 2001 and 2002. n8 On the constitutional claims, the judge rejected the plaintiff's contention that the residency requirement in the veterans' exemption impinged on his right to travel to a degree that required strict scrutiny analysis. The judge concluded, under a rational basis analysis, that the residency requirement was constitutional under the Federal and State constitutions. Judgment entered dismissing the plaintiff's complaint, and as mentioned, we granted an application for direct appellate review.

> n8 The commissioner does not challenge this conclusion.

**[***8]**

1. The questions presented are ones of law, requiring no deference to the judge's decision. The burden is on the plaintiff to rebut the strong presumption that the statute is constitutional. See *Aloha Freightways, Inc. v. Commissioner of Revenue, 428 Mass. 418, 423, 701 N.E.2d 961 (1998)*; *Frost v. Commissioner of Corps. & Taxation, 363 Mass. 235, 247-248, 293 N.E.2d 862 (1973)*. With these considerations in mind, we take up the issues.

(a) The plaintiff argues that the residency requirement in the veterans' exemption burdens his right to travel in violation of both the equal protection and privileges or immunities clauses of the *Fourteenth Amendment to the United States Constitution*. n9 Relying on *Shapiro v. Thompson,* **[**666]** *394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969)* (and **[*309]** related decisions), and *Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518,*

*143 L. Ed. 2d 689 (1999)*, the plaintiff maintains that the residency requirement in the veterans' exemption requires, and fails, a strict scrutiny analysis. n10 The plaintiff also posits, if the latter argument is rejected, that the residency requirement lacks any rational basis.

n9 The text of the first section of the *Fourteenth Amendment to the United States Constitution* reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**[***9]**

n10 The plaintiff did not cite *Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)*, in his memorandum of law in support of his partial motion for summary judgment. Nor did he mention the "privileges or immunities clause" in either his memorandum or motion. The judge decided the case presumably on the line of analysis developed in *Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969)*, and related cases. The commissioner's appellate brief points out these omissions from the plaintiff's argument in the Superior Court, but makes no argument that the omissions constitute a waiver of any part of the plaintiff's Federal constitutional claim.

In *Saenz v. Roe, supra*, the United States Supreme Court struck down a provision in the California Aid to Families with Dependent Children (AFDC) program limiting otherwise qualifying new residents, for the first year of their residence in California, to the monetary welfare benefits they would have received in the State of their prior residence, if those benefits were lower than California's. *Id. at 494, 505.* **[***10]** The Court concluded that the provision violated the third component of the constitutionally protected right to travel by imposing a discriminatory classification on travelers who elected to become permanent residents of California. n11 *Id. at 502-505.* The violation resulted when the State, without permissible justification, **[*310]** denied new residents the right to be treated like other comparably situated residents (including eligible California citizens who had resided there for at least one year and new citizens who had previously resided in another country or State that provided a welfare benefit as generous as or more generous than California's). *Id. at 504-507.*

n11 The two other components to the "right to travel" are "the right of a citizen of one State to enter and to leave another State," and "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe, supra at 500.* The United States Supreme Court has yet to identify the source of the first component in the Federal Constitution. *Id. at 501.* The second component, however, is "expressly protected" in the privileges and immunities clause of Article IV of the United States Constitution, which states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Id., quoting Article IV, § 2, of the United States Constitution.

**[***11]**

In reaching its conclusion, the Court made four points which are relevant to this case. First, the Court reaffirmed the holding of *Shapiro v. Thompson, supra* (and, by extension, later related decisions), that the constitutional right to travel is protected by the *equal protection clause of the Fourteenth Amendment*, so that a State classification involving a length of residence to qualify for welfare benefits has the effect of imposing a "penalty" on the right to travel which is unlawful unless the classification is necessary to advance a compelling governmental interest. *Saenz v. Roe, supra at 498-499.* Second, the Court declared that the third component of the right to travel -- the right of a traveler who migrates to another **[**667]** State, and becomes a permanent resident of the new State, to be treated like other comparably situated citizens of that State -- encompasses the new arrival's status as both a State citizen and a Federal citizen, and thus, the component is specifically protected by the privileges or immunities clause of the *Fourteenth Amendment. Id. at 502-504.* Third, the Court noted that a classification based entirely **[***12]** on a new arrival's duration of residency and location of prior residence treats comparably situated citizens of the same State unequally, thereby creating a discriminatory classification

that is, in itself, a penalty, as that term is used in the Shapiro decision. *Id. at 504-505, 507.* Fourth, the Court pointed out that a discriminatory classification in a statute may be justifiable, but requires close examination of both the justification for the classification and the means employed by the State to accomplish the statute's underlying purpose. *Id. at 505-507.* If the discriminatory classification has no relevance to the need of the disfavored class for the benefit, the State action cannot be justified. Id.

In legal effect, the *Saenz v. Roe* decision constitutes both a reaffirmation of *Shapiro v. Thompson, supra* (and related decisions), **[*311]** and a clarification of the framework to be applied in assessing the validity of the denial (or grant) of benefits affecting critical needs, political rights, or important interests, based on durational residency requirements. We do not read the Saenz v. Roe decision as requiring strict **[***13]** scrutiny for all durational residency requirements, imposed by a State as a condition to receiving a benefit, without examining the nature of the benefit at issue or the significance of the impact of the requirement on the right to travel. To read the Saenz v. Roe decision otherwise in a case like this one would disrupt the strong principle of federalism which, as we shall subsequently note, broadly protects the States from undue Federal interference in the tax field. See *Madden v. Kentucky, 309 U.S. 83, 88, 93, 60 S. Ct. 406, 84 L. Ed. 590 (1940)* (overruling *Colgate v. Harvey, 296 U.S. 404, 416, 433, 436, 56 S. Ct. 252, 80 L. Ed. 299 [1935]*, which had concluded that Vermont income tax provision was invalid under privileges or immunities clause of *Fourteenth Amendment*, and stating that in taxation matters "even more than in other fields, legislatures possess the greatest freedom in classification"); *Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509, 57 S. Ct. 868, 81 L. Ed. 1245 (1937)* ("This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation"). **[***14]**

The residency requirement in the veterans' exemption does "not rise to a level of interference with the right to travel that would justify the application of strict scrutiny," *Lee v. Commissioner of Revenue, 395 Mass. 527, 532, 481 N.E.2d 183 (1985)*, because the exemption neither imposes an impermissible "penalty" on the right to travel (as that term is used in *Shapiro v. Thompson, supra*, and related decisions), nor creates an impermissible classification (as that term is used in the Saenz v. Roe decision). The residency requirement in the veterans' exemption does not prevent new arrivals from purchasing property in Massachusetts or from establishing a domicile here. It recognizes that the plaintiff, as a taxpayer, has no right to a particular rate of taxation, and it is underpinned, as previously mentioned, by the well-settled law affording "States . . . large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Williams v. Vermont,* **[*312]** *472 U.S. 14, 22, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985).* Indeed, **[**668]** the Legislature was under no obligation to enact any veterans' exemption, and the exemption provides **[***15]** no benefit of any kind to Massachusetts residents who are not disabled veterans. As will later be explained, the need for the exemption, contrary to the situation presented in the Saenz v. Roe decision, is directly related to the period of time that a disabled veteran resides in the State.

The legal principles discussed above become critically relevant here because the State action in question does not involve any "necessity of life" (as was the case in *Saenz v. Roe, supra*; *Memorial Hosp. v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 [1974]*; and *Shapiro v. Thompson, supra*), or any fundamental political right (as was the case in *Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 [1972]).* There is no claim that the State action has any significant impact on any other right, privilege or immunity. There is no assertion that the plaintiff has been deprived of any benefit he had in New Hampshire. The plaintiff obviously is not a member of a suspect class. The "nature of the benefit denied" to the otherwise eligible veterans who have not satisfied the residency requirement is essentially **[***16]** the denial of a grant that takes the form of a modest tax abatement. The purpose of the classification is fair, and the means used to effect it are (as will be explained below) justifiable. The veterans' exemption, therefore, is not substantively comparable to the benefits at issue in the decisions cited above, nor is it comparable to statutes that have been found to be invalid in other cases, n12 and its residence requirement does not have a sufficiently perceptible effect on the right to travel so as to require the application of **[*313]** strict scrutiny. n13 The judge correctly concluded that the rational basis standard is the appropriate one by which to measure the validity of the exemption.

n12 The judge correctly distinguished the five-year residency requirement from statutes invalidated in other cases that categorically denied a tax exemption or similar benefit by creating permanent classes of favored or disfavored residents. See *Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 900, 908-909, 911, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986)* (invalidating civil service employment preference to veterans who were New York residents when they entered military service, noting that veterans who failed to satisfy New York residence requirements were

permanently deprived civil service preference and possibly deprived civil service employment); *Hooper v. Bernalillo County Assessor, 472 U.S. 612, 614, 616-617, 619-623, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985)* (invalidating, on equal protection grounds, "fixed-date residence requirement," namely, a New Mexico statute that provided property tax exemption for Vietnam veterans who had established residency in New Mexico before May 8, 1976).

**[***17]**

n13 We reject the plaintiff's contention that he suffered an actual burden on his right to travel because "had he not moved to New Hampshire, he would never have suffered the loss of his abatement." This reasoning was rejected in *Lee v. Commissioner of Revenue, 395 Mass. 527, 533, 481 N.E.2d 183 (1985)* (explaining that distinction between those who move and those who stay and receive abatement "reflects preexisting differences; it does not establish new classes that are different only in the way the statute treats them," and noting that while one class receives abatement, other class has received capital gain which reflects increased value of prior home).

(b) The five-year residency requirement has a rational relationship to a legitimate governmental purpose, namely, to provide financial assistance to veterans who are disabled so that they are able, when faced with increased tax burdens due to escalating real estate prices and corresponding property taxes, to continue financially to maintain their domicile. The commissioner submitted national and State data demonstrating that, historically and **[***18]** **[**669]** currently, the cost of single-family residential homes in the Northeast and in Massachusetts has been, and is, significantly higher than the national median, and that corresponding property taxes in Massachusetts have risen over the years. The Legislature could have rationally believed that, as housing prices and corresponding property taxes rise, disabled veterans who have resided for five years in Massachusetts have borne, and otherwise would continue to bear, a relatively higher property tax obligation than disabled veterans who are new or newer to the State. n14 By providing partial abatements in different amounts based on the extent of the veteran's disability or injury, see note 7, supra, the Legislature could have permissibly reasoned that more severely injured or disabled veterans might face greater obstacles in earning income and, thus, need an abatement in a higher amount. Further, eligible disabled veterans **[*314]** who have resided in Massachusetts for a period of less than five years are not excluded from later receiving, after five years of residence, the partial exemption under *G. L. c. 59, § 5, Twenty-second*. We conclude that the residency requirement **[***19]** does not violate the protections afforded to the right to travel in the *Fourteenth Amendment*. See *Frost v. Commissioner of Corps. & Taxation, 363 Mass. 235, 248, 293 N.E.2d 862 (1973)*.

n14 Contrary to the plaintiff's argument, the five-year residency requirement is connected with home ownership. A reasonable construction of *G. L. c. 59, § 5, Twenty-second*, demonstrates that the real estate subject to the partial exemption is real estate "of . . . veterans," that is, real estate owned by them, and "occupied" by a disabled veteran "as his [or her] domicile." As such, the statute limits a disabled veteran who owns various parcels of real estate to receiving a partial exemption from property taxes only in connection with the real estate on which he is domiciled.

2. Finally, we reject the plaintiff's claim that the five-year residency requirement of *G. L. c. 59, § 5, Twenty-second*, violates *Pt. 1, art. 6, of the Declaration of Rights of the Massachusetts Constitution*. **[***20]** As explained, a legitimate public purpose supports the statute. The plaintiff has not demonstrated that, in violation of *art. 6*, the veterans' exemption imposes "privileges attributed to birth," see *Brown v. Russell, 166 Mass. 14, 22, 43 N.E. 1005 (1896)*, concerns public employment or office, see *Opinion of the Justices, 303 Mass. 631, 654, 22 N.E.2d 49 (1939)*; *Brown v. Russell, supra at 23-27*, or constitutes an "improper use of State power for private interest," see *Commonwealth v. Ellis, 429 Mass. 362, 371, 708 N.E.2d 644 (1999)*.

3. The judgment of dismissal is vacated. A judgment is to be entered declaring that the five-year residency requirement of *G. L. c. 59, § 5, Twenty-second*, is constitutional under the applicable clauses of the *Fourteenth Amendment to the United States Constitution*, and under *Pt. 1, art. 6, of the Declaration of Rights of the Massachusetts Constitution*.

So ordered.

447 Mass. 100, *; 849 N.E.2d 810, **;
2006 Mass. LEXIS 431, ***

# TEAMSTERS JOINT COUNCIL NO. 10 & others n1 vs. DIRECTOR OF THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT & others. n2

n1 Massachusetts Building and Construction Trades Council, Teamsters Local Union No. 25, Teamsters Local Union No. 42, Teamsters Local Union No. 49, Teamsters Local Union No. 59, Teamsters Local Union No. 170, Teamsters Local Union No. 251, Teamsters Local Union No. 379, Teamsters Local Union No. 404, and Teamsters Local Union No. 653.

n2 Deputy director of the division of occupational safety; Palmer Paving Corporation; Aggregate Industries, Inc.; Construction Industries of Massachusetts; and Massachusetts Aggregate & Asphalt Pavement Association.

**SJC-09505**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***447 Mass. 100; 849 N.E.2d 810; 2006 Mass. LEXIS 431***

**April 3, 2006, Argued**
**June 23, 2006, Decided**

**PRIOR HISTORY:** **[***1]** Suffolk. Civil action commenced in the Superior Court Department on September 19, 2001. The case was heard by Patrick J. Riley, J., on motions for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**DISPOSITION:** Judgment of Superior Court judge vacated. New judgment shall enter declaring that decision of deputy director that prevailing wage law does not cover over-the-road time of drivers of bituminous concrete was not arbitrary or capricious and is affirmed.

**HEADNOTES:** Practice, Civil, Relief in the nature of certiorari. Administrative Law, Judicial review. Public Works, Wage determination. Statute, Construction.

**COUNSEL:** Mark D. Nielsen, Special Assistant Attorney General (Kathryn B. Palmer, Special Assistant Attorney General, with him) for Department of Labor & another.

John D. O'Reilly, III, for Palmer Paving Corporation & others.

Paul F. Kelly for the plaintiffs.

Richard D. Wayne & Willard Krasnow, for Utility Contractors Association of New England, Inc., & others, amici curiae, submitted a brief.

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

**OPINION BY:** IRELAND

**OPINION:**

**[*101]** **[**812]** IRELAND, J. In 2001, the defendant businesses and organizations challenged a 1993 Department of Labor and Industries (department) n3 policy, applicable to public construction **[***2]** contracts, that the prevailing wage law, *G. L. c. 149, § § 26-27F*, covered the time spent by truck drivers hauling bituminous concrete n4 to and from the construction site (road time). The deputy director of the division of occupational safety (division) conducted a public hearing and, in a written decision dated August 21, **[**813]** 2001, concluded that the prevailing wage law did not cover drivers' road time, rescinding the 1993 policy. The plaintiffs, all labor organizations whose representatives include truck drivers who haul bituminous concrete and ready-mix concrete to public construction projects, sought review of the decision, and a Superior Court judge entered a declaration in the plaintiffs' favor. The defendants appealed, and we transferred this case here on our own motion. Because we conclude that the plaintiffs did not meet their burden to show that the decision of the deputy **[*102]** director was arbitrary or capricious, and because we grant due deference to the deputy director's interpretation of the prevailing wage statute, we vacate the judgment of the Superior Court.

n3 Since 1993 the department has been reorganized or renamed several times. See St. 1993, c. 110, § 71 ("department of labor and industries"); St. 1996, c. 151, § 111 ("department of labor and workforce development"); St. 2003, c. 26, § 554 ("department of labor").

**[***3]**

n4 Bituminous concrete, also known as asphalt, "is a mixture of sand and stone held together by a very heavy crude oil which acts as a glue." *Construction Indus. of Mass. v. Commissioner of Labor & Indus., 406 Mass. 162, 163, 546 N.E.2d 367 (1989)* (Construction Industries).

Statutory scheme. The director (or commissioner) n5 of the department administered the prevailing wage law, *G. L. c. 149, § § 1, 26-27F*, through the division. *G. L. c. 23, § § 1-3*. Under the prevailing wage law, the director establishes the hourly rate of wages for "mechanics and apprentices, teamsters, chauffeurs and laborers" who are employed in the construction of public works. *G. L. c. 149, § 26*. n6 The director prepares a list of the jobs usually performed on public works projects and, when requested, assigns to each job the minimum wage that must be paid to persons performing that job. *G. L. c. 149, § 27*. n7 *Section 27A of c. 149*, provides **[***4]** **[**814]** an administrative mechanism for review **[*103]** of the commissioner's wage determinations and classifications of employment. There is no provision for appeal of a decision made pursuant to *§ 27A*. n8 Violators of the prevailing wage law may be punished by a fine, imprisonment, or both. *G. L. c. 149, § 27C*. The Attorney General is charged with the law's enforcement. *G. L. c. 149, § 27*.

n5 The department head has been designated the commissioner (see St. 1993, c. 110, § 72), the director (see St. 1996, c. 151, § § 111, 112; St. 2003, c. 26, § 554), or both, see *G. L. c. 23, § 4*. *General Laws c. 149, § 1*, has defined "[c]ommissioner" as "the commissioner of labor and industries" (St. 1993, c. 110, § 167); "the director of labor and workforce development" (St. 1996, c. 151, § 365); and "the director of the department of labor" (St. 2003, c. 26, § 575). We refer to the commissioner as designated in 1993 and the director thereafter.

n6 *General Laws c. 149, § 26*, provides, in pertinent part:

> "In the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the commonwealth, or by a county, town, authority or district, or by persons contracting or subcontracting for such works . . . [t]he rate per hour of the wages paid . . . in the construction of public works shall not be less than the rate or rates of wages to be determined by the commissioner as hereinafter provided; provided, that the wages paid to laborers employed on said works shall not be less than those paid to laborers in the municipal service of the town or towns where said works are being constructed . . . ." (Emphasis added.)

**[***5]**

n7 *General Laws c. 149, § 27*, provides in pertinent part:

> "The commissioner shall prepare, for the use of such public officials or public bodies whose duty it shall be to cause public works to be constructed, a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed, including the transportation of gravel or fill to the site of said public works or the removal of surplus gravel or fill from such site. The commissioner shall classify said jobs, and he may revise said classification from time to time, as he may deem advisable. Prior to awarding a contract for the construction of public works, said public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices, teamsters, chauffeurs and laborers are to be employed, and shall request the commissioner to determine the rate of wages to be paid on each job. Said rates shall apply to all

persons engaged in transporting gravel or fill to the site of said public works or removing gravel or fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators. The commissioner, subject to the provisions of *[§ 26]*, shall proceed forthwith to determine the same, and shall furnish said official or public body with a schedule of such rate or rates of wages as soon as said determination shall have been made. In advertising or calling for bids for said works, the awarding official or public body shall incorporate said schedule in the advertisement or call for bids . . . and shall furnish a copy of said schedule, without cost, to any person requesting the same. Said schedule shall be made a part of the contract for said works and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract." (Emphasis added.)

The provisions regarding persons transporting or removing "gravel or fill" were inserted by the Legislature in 1973. See St. 1973, c. 625, § 1.

**[***6]**

n8 *General Laws c. 149, § 27A*, provides:

"Within five days from the date of the first advertisement or call for bids, two or more employers of labor, or two or more members of a labor organization, or the awarding officer or official, or five or more residents of the town or towns where the public works are to be constructed, may appeal to the commissioner or his designee from a wage determination, or a classification of employment as made by the commissioner, by serving on the commissioner a written notice to that effect. Thereupon the commissioner or his designee shall immediately hold a public hearing on the action appealed from. The commissioner or his designee shall render his decision not later than three days after the closing of the hearing. The decision of the commissioner or his designee shall be final and notice thereof shall be given forthwith to the awarding official or public body."

Background and procedure. In 1993, the commissioner (St. 1993, c. 110, § 72) issued a policy statement that teamsters who hauled bituminous concrete, ready-mix **[***7]** concrete, and **[*104]** "jersey barriers" were covered by the prevailing wage law both for their road time as well as for their time at the construction site. n9 In addition to the prevailing wage law, the commissioner cited our decision in *Construction Indus. of Mass. v. Commissioner of Labor & Indus., 406 Mass. 162, 546 N.E.2d 367 (1989)* (Construction Industries), as authority for the policy.

n9 This appeal concerns only whether the statute covers road time for truck drivers of bituminous concrete.

Consistent with the 1993 policy, in July, 2001, in connection with a Massachusetts Highway Department construction project, the division issued wage rate sheets that included road time for drivers hauling bituminous concrete. The defendant businesses and organizations then filed an appeal pursuant to *G. L. c. 149, § 27A*, contesting the application of the prevailing wage law to the drivers' road time. After a public hearing conducted in accordance with *G. L. c. 149, § 27A* **[***8]** , the deputy director issued his written decision, which rescinded the 1993 policy, ruling that:

"Drivers who deliver bituminous concrete or ready mix concrete to public construction projects . . . are covered by the prevailing wage law while they are on-site at the public construction project. Those drivers are not covered by the prevailing wage law while off-site, including over-the-road driving and picking-up materials. All drivers who operate trucks on public construction sites as part of the construc-

tion work are covered by the prevailing wage law while they are on-site." n10

n10 Before the hearing, the division solicited testimony concerning the applicability of the prevailing wage law to the road time spent by ready-mix concrete drivers. In his decision, the deputy director noted that testimony was received in opposition to the inclusion of ready-mix drivers, but that "the opponents to the scope of the hearing failed to present any reasoning as to why the work of ready-mix drivers is dissimilar to the work of bituminous drivers and should be treated singularly." The decision included ready-mix drivers, but this appeal pertains only to drivers of bituminous concrete.

**[***9]**

**[**815]** In his decision, the deputy director stated that, since the Construction Industries opinion, "bituminous drivers have been undisputedly covered by the prevailing wage law while at the work site," but noted that the court's decision did not address whether drivers of bituminous concrete are entitled to receive **[*105]** prevailing wage rates for road time. Because the prevailing wage law repeatedly references the employment of workers "on said works," with the exception of drivers who haul gravel or fill, the deputy director concluded that "[a]ny regulation of the wages of off-site workers, except drivers who haul gravel or fill, is an expansion of the statute's applicability beyond its clearly stated scope." The deputy director also concluded that the 1993 policy was not a correct interpretation of the intent of the prevailing wage statute. He further noted that his conclusion was consistent with the Federal prevailing wage law that covers workers' on-site time only.

The plaintiffs sought review of the deputy director's decision in the Superior Court. The plaintiffs sought declaratory relief under *G. L. c. 231A* and relief in the nature of a writ of certiorari pursuant to *G. L. c. 249, § 4* **[***10]** . n11 The parties filed cross motions for judgment on the pleadings. A Superior Court judge allowed the plaintiffs' motion for judgment on the pleadings and denied the State defendants' cross motion. The judge ordered the entry of a judgment declaring that the director "is empowered and indeed duty bound to set wages pursuant to *G. L. c. 149, § § 26-27F*, for the over-the-road hours of teamsters who haul bituminous or ready-mix concrete provided said hours and said teamsters have substantial connection or nexus with the site of public construction." n12

n11 The plaintiffs also had included a count under *G. L. c. 30A*, but it was dismissed on the State defendants' motion to dismiss by another Superior Court judge, who concluded that judicial review in the nature of certiorari under *G. L. c. 249, § 4*, is an appropriate remedy. There was no appeal.

n12 In reaching his conclusion, the judge stated that the deputy director's interpretation of the terms "on" and "upon" in the statute were "too wooden." The judge emphasized that the "significant nexus" required under the Construction Industries decision connotes more than mere physical presence. A "significant connection" is also required, which the judge found to be undisputed due to the "integral" role played by these truck drivers. In addition, the judge stated that "the plain requirement of *[§ § ] 26* and *27* is that the director set wages for the entire job these teamsters perform not just the on-site hours." The judge concluded that to uphold the deputy director's decision would frustrate the statute's purpose of protecting teamsters from substandard earnings because the nature of the teamsters' jobs "prevents them from being physically present on the work site throughout the entire work day," and would result in a "two tiered pay scale," an "absurd and unfair" result. Last, the judge reasoned that, "by including the term 'teamsters' within the statute, the Legislature meant professional truck drivers and also understood that the nature of the occupation involved a substantial amount of driving to and from a public work site."

**[***11]**

The defendants filed notices of appeal. A single justice of the **[*106]** Appeals Court entered a stay of the Superior Court judgment pending appeal.

Standard of review. Because the prevailing wage law contains no provision for judicial review of a decision of the director or his designee, *G. L. c. 149, § 27A* ("The decision of the [director] or his designee shall be final"), the plaintiffs' resort to certiorari was not inappropriate. See *School Comm. of Franklin v. Commissioner* **[**816]** *of Educ., 395 Mass. 800, 807, 482 N.E.2d 796 & n.6 (1985)* ("[r]esort to certiorari may not be had if another adequate remedy is available"). See also *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth, 430 Mass. 783, 790, 724 N.E.2d 288 (2000)*, quoting *Carney v. Springfield, 403 Mass. 604, 605, 532 N.E.2d 631 (1988)* (*G. L. c. 249, § 4*, provides limited judicial review to correct substantial error of law affecting material rights). "The standard of review for an ac-

tion in the nature of certiorari depends on 'the nature of the action sought to be reviewed.'" *Black Rose, Inc. v. Boston, 433 Mass. 501, 503, 744 N.E.2d 640 (2001)*, quoting **[***12]** *Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 49, 371 N.E.2d 728 (1977)*. Although *Felix A. Marino Co. v. Commissioner of Labor & Indus., 426 Mass. 458, 464, 689 N.E.2d 495 (1998)*, did not address directly the proper avenue to obtain review of a decision of the commissioner (or his designee) under *G. L. c. 149, § 27A*, it stated that because the plaintiff in that case challenged the commissioner's decision "[b]y allegations in the nature of a petition for a writ of certiorari," the plaintiff had to establish that the decision was arbitrary or capricious. See *Receiver of the Boston Hous. Auth. v. Commissioner of Labor & Indus., 396 Mass. 50, 58, 484 N.E.2d 86 (1985)* (wage rate determination subject to arbitrary or capricious standard). A decision is not arbitrary or capricious unless there is no ground which "reasonable [people] might deem proper" to support it. *Cotter v. Chelsea, 329 Mass. 314, 318, 108 N.E.2d 47 (1952)*. "We give great deference to the [agency's] expertise and experience in areas where the Legislature has delegated to it decision making authority . . . ." *Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 412, 758 N.E.2d 604 (2001)*, **[***13]** quoting *Wolf* **[*107]** *v. Department of Pub. Utils., 407 Mass. 363, 367, 553 N.E.2d 922 (1990)*. Moreover, we accord no special weight to the decision of the Superior Court judge in reviewing the record before the deputy director. *Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 5, 767 N.E.2d 1054 (2002)*.

Discussion. The plaintiffs argue that the Superior Court judge was correct in concluding that the decision of the deputy director was arbitrary and capricious n13 because the statute covers road time for haulers of bituminous concrete. In support of their assertion, the plaintiffs rely on this court's opinion in Construction Industries. We disagree.

> n13 The State defendants argue that the Superior Court judge erroneously conducted a de novo review of the case, instead of conducting review pursuant to *G. L. c. 249, § 4* (certiorari), to determine whether the deputy director's decision was arbitrary or capricious. While the judge refused to extend any deference to the deputy director's decision because he viewed the issue as a matter of statutory construction solely for the court, he did conclude that the decision was arbitrary or capricious due to the "absurd" results it creates (a two-tiered pay scale for the teamsters and a limitation on their pay where the nature of the job prevents them from being present on the worksite throughout the entire day). Thus, while deference to the deputy director's decision should have been extended, the ultimate relevant inquiry, whether the decision was arbitrary or capricious, was followed.

**[***14]**

In *Construction Industries, supra at 163*, the plaintiffs, two trade associations and four truck owners, sought a declaration that the commissioner lacked authority under the prevailing wage law to set wages for truck drivers who deliver bituminous concrete to public works construction sites. After defining bituminous concrete, the court explained how it is used in the construction of roads and highways:

> "The manufacture of bituminous concrete takes place at either a stationary plant, from which it is then transported **[**817]** to the construction site or, in some cases, at portable on-site plants. In either case, the bituminous concrete is hauled by truck from the site of manufacture to the location where it is laid down. The role of the truck driver is the same whether the bituminous concrete is manufactured on the site or at a stationary plant. After loading the truck, the driver proceeds to the application site. The driver then backs the truck up to a device called a spreader and dumps the concrete into the spreader's hopper. The spreader is **[*108]** used to lay the concrete down evenly. A 'roller' follows the spreader and compacts the layer of bituminous concrete.
>
> "It usually **[***15]** takes several 'lifts' to empty a truck. . . . The truck driver continues to dump concrete into the spreader until his truck is empty. He then leaves the site, fills the truck again, returns to the site, and repeats the entire process. During the dumping and spreading procedure, the truck driver takes directions from the spreader operator and the foreman. It takes from five to fifteen minutes to complete the process and empty the truck."

*Id. at 164*. The court stated: "It is beyond dispute that the truck drivers at issue are 'teamsters' [for purposes of *G. L. c. 149, § § 26-27*]." *Id. at 167*. However, based on limiting language in the statute, the court went on to explain:

> "Quite clearly, the commissioner has not been given authority to set wages for all teamsters who have any connection with a public works project. . . . [T]he limits of the commissioner's authority to set wages . . . are governed by the physical locus of the work site itself and the work which is performed there. The commissioner is empowered to set wages for teamsters when there is a significant nexus between the work **[***16]** those teamsters perform and the site of the construction project. In simple terms, the commissioner must ask, 'What do they do at the site?' When the performance of a statutorily specified job has a significant connection with the construction project, then that job falls within the domain of the posted wage law statute."

*Id. at 168.* The court concluded that the commissioner had authority "to set wages for the teamsters employed by the plaintiffs who haul bituminous concrete to public works projects and then aid in its installation," noting that the truck drivers are more than "materialmen" because "they work with the road crew to spread the bituminous concrete," thus rendering their activities "an essential part of the work done at the site." *Id. at 168, 169.* Therefore, the decision affirmed that the commissioner has fairly broad policy-making authority because the **[*109]** Legislature delegated the details of how the prevailing wage law should be applied, subject to certain limits. *Id. at 168, 173.* Most importantly, nowhere in the *Construction Industries* case did the court address whether the wage rates that the commissioner had **[***17]** authority to set included road time.

In further reliance on *Construction Industries, supra*, the plaintiffs argue that the deputy director erred because the prevailing wage law is not ambiguous. Thus, they argue, the decision of the deputy director is entitled to no deference. The plaintiffs read too much into the court's statements that the statute is not ambiguous. *Id. at 168, 169 n.5.* As discussed, the issue whether road time was covered was not addressed. In addition, the court's conclusion concerning the clarity of the statute's language was made **[**818]** in the context of the commissioner's authority to set wages for teamsters whose work had a significant connection with the work site. n14 The opinion does not assist the plaintiffs' argument. See generally *Felix A. Marino Co. v. Commissioner of Labor & Indus., 426 Mass. 458, 461, 689 N.E.2d 495 (1998)* ("word 'construction' in *§ 26* is ambiguous standing alone"). Moreover, the plain language of the statute does not refer to road time. See notes 6 and 7, supra. Accordingly, the decision in this case is entitled to deference because the **[*110]** Legislature has delegated decision making authority to the commissioner. *Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 412, 758 N.E.2d 604 (2001)*; **[***18]** *G. L. c. 149, § § 26-27F.* See *Felix A. Marino Co. v. Commissioner of Labor & Indus., supra* (where question whether work fell under *G. L. c. 149, § § 26-27H*, "fairly debatable," deference to commissioner's discretion required).

n14 The two statements on which the plaintiffs rely are as follows:

> "The commissioner is empowered to set wages for teamsters when there is a significant nexus between the work those teamsters perform and the site of the construction project. In simple terms, the commissioner must ask, 'What do they do at the site?' When the performance of a statutorily specified job has a significant connection with the construction project, then that job falls within the domain of the posted wage statute."

*Construction Industries, supra at 168.*

> "*General Laws c. 149, § § 26* and *27*, are not ambiguous. The plain requirement of these provisions is that the commissioner set wage rates for teamsters (among others) whose work has a significant connection with the work site."

*Id. at 169 n.5.*

The latter conclusion was in the context whether, because of the maxim that an ambiguous penal statute should be construed narrowly, drivers who hauled bituminous concrete should be excluded from the statute's reach altogether. Id.

**[***19]**

In concluding that the statute did not cover road time, the deputy director relied on the words in the statute "'on said works,' 'upon [public works projects],' and

'on various types of public works.'" To support his exclusion of road time, he also noted that *G. L. c. 149, § 27*, contained a single specific exception for individuals who transport "gravel or fill to the site of said public works or remov[e] gravel or fill from such site." Discussing the rule of statutory construction stated in *Harborview Residents' Comm., Inc. v. Quincy Hous. Auth., 368 Mass. 425, 432, 332 N.E.2d 891 (1975)* ("a statutory expression of one thing is an implied exclusion of other things omitted from the statute"), the deputy director concluded that the Legislature intended that only haulers of gravel and fill would be covered for road time. These are reasonable grounds for interpreting the statute. We do not impose our own judgment where an agency's interpretation of a statute is reasonable. *Massachusetts Med. Soc'y v. Commissioner of Ins., 402 Mass. 44, 62, 520 N.E.2d 1288 (1988)*. We conclude that the decision was not arbitrary or capricious. n15

n15 **[**819]** The plaintiffs further argue that the Construction Industries case rendered the deputy director's reliance on the rule of statutory construction "a bald attempt to relitigate a matter of settled law." See *id. at 169* (court need not address rule of statutory construction that expression of one thing implies exclusion of other things because "we think the plaintiffs' fundamental assumption that [teamsters] are mere materialmen is mistaken"). We decline to address this argument because, even if the plaintiffs are correct, the deputy director's reliance on the statute's language alone provides reasonable grounds for his interpretation. For the same reason, we need not address the parties' arguments concerning the deputy director's consideration whether his interpretation of the prevailing wage law aligned with the Federal wage statute, *40 U.S.C. § 3141 (2000 & Supp. II 2002)*.

**[***20]**

The plaintiffs argue that, even if the decision of the deputy director is entitled to deference, the decision is still arbitrary or capricious because covering road time under the prevailing wage statute has been a policy for twenty-five years. See *Cleary* **[*111]** *v. Cardullo's, Inc., 347 Mass. 337, 343-344, 198 N.E.2d 281 (1964)* ("Significance in interpretation may be given to a consistent, long continued administrative application of an ambiguous statute," but interpretation or regulation may not conflict with statute). The plaintiffs point to nothing in the record that demonstrates that the policy of covering drivers of bituminous concrete for road time existed before the 1993 policy. n16 Indeed, the 1993 document itself indicates that it is a new policy. It has an effective date of July 1, 1993, and states that the policy would "not apply to on-going investigations or projects out to bid or award before the effective date." As discussed, the 1993 policy relied on the statute as well as the Construction Industries case, which we have concluded did not address the issue whether road time was covered. It was not arbitrary or capricious for the deputy director, after analyzing the statute's **[***21]** language, to conclude that in setting the 1993 policy, the then "commissioner expanded his authority under the statute beyond its plain meaning." "[T]he commissioner is charged with the implementation of the prevailing wage law," *Felix A. Marino Co. v. Commissioner of Labor & Indus., supra at 460*, the statute makes his decisions final, and the deputy director changed the policy through a public hearing pursuant to the appeal process in *§ 27*. See *Commissioner of Revenue v. BayBank Middlesex, 421 Mass. 736, 741-742, 659 N.E.2d 1186 (1996)* ("commissioner's expertise in tax matters might even bring the commissioner to the conclusion that a prior interpretation of a statute or regulation was wrong and should be changed"). n17

n16 In support of their contention, they rely on *Construction Industries, supra at 164-165*, where the court stated: "Since at least 1976, the commissioner has considered those truckers who haul bituminous concrete to the site of public works projects and aid in the application of that concrete, to be teamsters employed on those sites." However, there is nothing that indicates that teamsters who haul bituminous concrete were covered for their road time since 1976.

**[***22]**

n17 In light of our conclusion, we need not address the parties' differing public policy arguments.

Conclusion. For the reasons set forth above, the judgment of the Superior Court judge is vacated. A new judgment shall enter declaring that the decision of the deputy director that the prevailing wage law does not cover the over-the-road time of drivers **[*112]** of bituminous concrete was not arbitrary or capricious and is, therefore, affirmed.

So ordered.

**TERESA TODINO vs. TOWN OF WELLFLEET & another. n1**

n1 Chief of police of the town of Wellfleet.

**No. 05-P-613**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 143; 845 N.E.2d 1178; 2006 Mass. App. LEXIS 433; 24 I.E.R. Cas. (BNA) 727***

**February 6, 2006, Argued**
**April 19, 2006, Decided**

**SUBSEQUENT HISTORY:** As Corrected May 12, 2006. Review granted by *Todino v. Town of Wellfleet, 447 Mass. 1101, 2006 Mass. LEXIS 344 (2006)*

**PRIOR HISTORY:** **[***1]** Barnstable. Civil action commenced in the Superior Court Department on May 24, 1999. Following review by this court, *61 Mass. App. Ct. 1123, 814 N.E.2d 36 (2004)*, motions seeking prejudgment and postjudgment interest were heard by Richard F. Connon, J. *Todino v. Town of Wellfleet, 61 Mass. App. Ct. 1123, 814 N.E.2d 36, 2004 Mass. App. LEXIS 946 (2004)*

**DISPOSITION:** Reversed and remanded.

**HEADNOTES:** Governmental Immunity. Interest. Judgment, Interest. Practice, Civil, Interest. Municipal Corporations, Police. Police, Injury on duty, Municipality's liability. Statute, Construction.

**COUNSEL:** Peter L. Freeman for the plaintiff.

Albert R. Mason for the defendants.

**JUDGES:** Present: Perretta, Kafker, Green, JJ.

**OPINION BY:** KAFKER

**OPINION:**

**[*143]** **[**1179]** KAFKER, J. The issue presented is whether an incapacitated police officer, injured on duty through no fault of her own, is entitled to recover prejudgment and postjudgment interest from the municipal employer who unsuccessfully challenged her right to compensation pursuant to *G. L. c. 41, § 111F*. We conclude that *G. L. c. 41, § 111F*, is designed to provide full and timely compensation of such injured police officers, and therefore interest against the municipal employer is recoverable, as sovereign immunity has been waived.

Background. The plaintiff, Teresa Todino, was injured on July 10, 1997, when, while directing traffic as a special police officer **[*144]** for the town of Wellfleet (town), she was struck by a car. As a **[***2]** result of her injuries, she was placed on leave without loss of pay pursuant to *G. L. c. 41, § 111F*, until December 15, 1998, when the town revoked her *§ 111F* benefits and terminated her employment. She sued for relief on May 24, 1999, and a Superior Court judge, after a bench trial, ruled as follows:

> "Based upon the foregoing, it is hereby ORDERED that the [town's] termination of the plaintiff's employment and [*G. L. c. 41, § 111F*,] benefits was UNLAWFUL; that the plaintiff is ENTITLED TO REINSTATEMENT OF HER SPECIAL POLICE OFFICER EMPLOYMENT STATUS with the [town], and that the plaintiff is ENTITLED TO RECEIVE LEAVE WITHOUT LOSS OF PAY BENEFITS under *G. L. c. 41, § 111F*, retroactive to December 15, 1998."

Judgment entered on November 4, 2002. On November 9, 2002, the defendants served the plaintiff with a motion for amended or additional findings, to alter or amend judgment, or for a new trial. The motion was denied and the defendants appealed. This court affirmed the judgment and the order denying the defendants' postjudgment motion in a memorandum and order pursuant to rule 1:28, see **[***3]** *Todino v. Wellfleet, 61 Mass. App. Ct. 1123, 814 N.E.2d 36 (2004)*. After the defendants unsuccessfully sought further appellate review, judgment after rescript entered on December 30, 2004.

The plaintiff then filed a motion for alteration or amendment of the judgment and petition for relief under *G. L. c. 231A, § 5*, requesting that the Superior Court judge specify the amount of "leave without loss of pay benefits under" *G. L. c. 41, § 111F*, and "specify and include the amount of [prejudgment] and [postjudgment] interest." She sought $ 166,615.68 in lost compensation, $ 68,868.91 in prejudgment interest, and **[**1180]** $ 60,671.36 in postjudgment interest. n2 The plaintiff based her motion on *Mass.R.Civ.P. 59(e)*, 365 Mass. 827 (1974), or, alternatively, *G. L. c. 231A, § 5*. The defendants opposed the **[*145]** motion on the ground that interest against a municipality is precluded based on sovereign immunity. n3 The Superior Court judge agreed, ruling that in "the absence of statutory authority, the [plaintiff] is not entitled to [prejudgment] nor [postjudgment] interest. **[***4]** " The plaintiff moved for reconsideration, the judge denied the motion, and the plaintiff filed her notice of appeal. The only issue presented in this appeal is whether *G. L. c. 41, § 111F*, provides for prejudgment and postjudgment interest payments against the municipal employer.

n2 On April 25, 2005, the town's insurer paid the plaintiff $ 172,850.72, which apparently represented the amount of back pay owed from December 15, 1998, through March 25, 2005, without interest.

n3 The defendants asserted no challenge to the timeliness of the plaintiff's motion, and we accordingly do not consider the question. See generally *Liberty Square Dev. Trust v. Worcester, 441 Mass. 605, 610, 808 N.E.2d 245 (2004)* ("judge did not abuse his discretion in agreeing to entertain the request, particularly where the city voiced no procedural objection at the time").

Discussion. The Supreme Judicial Court has held that "waivers of sovereign immunity must be expressed by the terms of the statute **[***5]** or appear by necessary implication from them." *Onofrio v. Department of Mental Health, 411 Mass. 657, 659, 584 N.E.2d 619 (1992)*, citing *Ware v. Commonwealth, 409 Mass. 89, 91, 564 N.E.2d 998 (1991)*. This includes the ordering of the government entity to pay prejudgment or postjudgment interest on the amounts the government entity owes pursuant to the particular statute. *Onofrio, supra.* See *Broadhurst v. Director of the Div. of Employment Security, 373 Mass. 720, 725-727, 369 N.E.2d 1018 (1977)*; *Onofrio, supra at 658 n.3*; *Secretary of Admn. & Fin. v. Labor Relations Commn., 434 Mass. 340, 345-347, 749 N.E.2d 137 (2001)*; *Brookfield v. Labor Relations Commn., 443 Mass. 315, 325-326, 821 N.E.2d 51 (2005)*; *Trustees of Health & Hosps. of Boston, Inc. v. Massachusetts Commn. Against Discrimination, 65 Mass. App. Ct. 329, 337-339, 839 N.E.2d 861 (2005)*.

According to the first paragraph of *G. L. c. 41, § 111F*, as appearing in St. 1964, c. 149:

> "Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of **[***6]** [her] duty without fault of [her] own . . . [she] shall be granted leave without loss of pay for the period of such incapacity . . . ."

In addition to providing the police officer or fire fighter with **[*146]** her full salary, the statute also requires that "[a]ll amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter." Ibid.

The second paragraph of the statute provides that the incapacitated employee shall be entitled to any excess recovery from third parties: "[t]he sum recovered [from the third party who caused the injury] shall be for the benefit of the city, town or fire or water district paying such compensation, unless the sum is greater than the compensation paid to the person so injured, in which event the excess shall be retained by or paid to the person so injured." *G. L. c. 41, § 111F*, inserted by St. 1977, c. 646, § 2.

In addressing this excess recovery, the Legislature discusses interest in *§ 111F* for the first and only time. The interest referred to, however, is interest recovered in actions **[***7]** against third parties. The Legislature defines "excess payments" as the "amount by which the total sum received in payment for the injury, exclusive of interest and costs, exceeds the amount paid under this section as compensation to the person so injured. The party bringing the action shall be entitled to any costs recovered by [her]. Any interest received in such action shall be apportioned between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively, inclusive of interest and costs." Ibid. (Emphases supplied.)

Unfortunately, *G. L. c. 41, § 111F*, does not expressly address the question whether interest is recoverable from the government employer. Compare *G. L. c. 152, § 50*, as appearing in St. 1991, c. 398, § 77 ("Whenever payments of any kind are not made within sixty days of being claimed by an employee, . . . and an order or decision requires that such payments be made,

interest at the rate of ten percent per annum of all sums due . . . shall be required by such order"). Contrast *G. L. c. 258, § 2*, inserted by **[***8]** St. 1978, c. 512, § 15 ("Public employers shall be liable for . . . personal injury . . . caused by the negligent or wrongful act or omission of any public employee . . . except that public employers . . . shall not be liable **[*147]** for interest prior to judgment . . . "). We therefore must determine whether interest payments are required by necessary implication from the statutory scheme. See generally *Broadhurst, 373 Mass. at 725-727*; *Onofrio, 411 Mass. at 658 n.3*; *Brookfield, 443 Mass. at 325-326*. Other intersecting or related statutes are to be considered as well. See, e.g., *Ware v. Commonwealth, 409 Mass. at 92*.

The express terms of *G. L. c. 41, § 111F*, require full and timely compensation to police officers or fire fighters incapacitated because of injury sustained in the performance of their duties through no fault of their own. Unlike other employees injured in the performance of their duties, these individuals receive one hundred percent of their regular compensation during their incapacity. In contrast, other injured employees who are unable to work receive only sixty percent of their **[***9]** preinjury compensation. *G. L. c. 152, § 34*. The incapacitated police officers and fire fighters also receive their compensation on the same payment schedule as they would have had they not been injured. n4

n4 Although not directly applicable, we note that the Legislature strictly has required timely payments of wages to active workers and established significant penalties, including fines and imprisonment, for untimely payment. See, e.g., *G. L. c. 149, § § 27C, 148*. This enforcement scheme applies to public as well as private employers. If interest were not allowed in the instant case, incapacitated police officers and fire fighters would have no remedy for long-delayed payments of "regular compensation" despite the Commonwealth's strict timeliness requirement in wage payments. See *G. L. c. 41, § 111F*.

The statute does not, however, expressly address what happens if the payments are contested and not timely **[***10]** made, but the police officer ultimately prevails in an action for *§ 111F* benefits. The defendants appear to argue that, when incapacitated police officers and fire fighters do not receive the timely payments to which they are entitled, the Legislature intended that they should forfeit the time value of their lost compensation as well. As demonstrated here, this loss can be significant; the plaintiff was not paid from December 15, 1998, through April 25, 2005.

**[**1182]** Although we recognize that this statute could have been drafted more clearly and more comprehensively, we are nonetheless **[*148]** convinced that the necessary implication of the statutory scheme requires prejudgment and postjudgment interest payments against the government employer pursuant to *G. L. c. 41, § 111F*. Otherwise, the ultimate payments to the employee would be incomplete as well as untimely and the over-all statutory scheme would be defeated. The Legislature clearly intended to provide full recovery for police officers and fire fighters incapacitated by injuries sustained in the performance of their duties due to no fault of their own.

Finally, the conclusion we reach today is consistent with the **[***11]** results of at least three prior appellate court decisions, which have, without comment, awarded interest against government employers pursuant to *G. L. c. 41, § 111F*. See *Thibeault v. New Bedford, 342 Mass. 552, 559, 174 N.E.2d 444 (1961)*; *Politano v. Selectmen of Nahant, 12 Mass. App. Ct. 738, 740, 429 N.E.2d 31 (1981)*; *Blair v. Selectmen of Brookline, 24 Mass. App. Ct. 261, 267, 508 N.E.2d 628 (1987)*. n5

n5 It is not clear from these opinions whether the issue of sovereign immunity was either raised or waived. Contrast *Secretary of Admn. v. Labor Relations Commn., 434 Mass. at 341 n.3*.

Conclusion. The orders denying the motion for alteration or amendment of judgment and the motion for reconsideration are reversed and the case is remanded to the Superior Court for further action consistent with this opinion.

So ordered.

66 Mass. App. Ct. 664, *; 849 N.E.2d 1275, **;
2006 Mass. App. LEXIS 732, ***

**TOWN OF BILLERICA vs. ANDREW T. CARD, SR.; PETER M. COPPINGER n1 & others, n2 defendants-in-counterclaim.**

n1 Individually and as a member of the board of selectmen of Billerica.

n2 Michael S. Rosa, Robert M. Correnti, Ellen Day Rawlings, and James F. O'Donnell, Jr., individually and as members of the board of selectmen of Billerica; and the town of Billerica.

**No. 05-P-14**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 664; 849 N.E.2d 1275; 2006 Mass. App. LEXIS 732***

**December 13, 2005, Argued**
**July 7, 2006, Decided**

**PRIOR HISTORY:** **[***1]** Suffolk. Civil action commenced in the Land Court Department on July 5, 2001. The case was heard by Alexander H. Sands, J., on motions for summary judgment.

**DISPOSITION:** Judgment affirmed.

**HEADNOTES:** Real Property, Agricultural or horticultural use, Right of first refusal, Option. Municipal Corporations, Acquisition of real estate, Notice to municipality. Unjust Enrichment.

**COUNSEL:** Francis A. DiLuna (Elizabeth Kowal with him) for the defendant.

Elaine M. Lucas for town of Billerica & others.

**JUDGES:** Present: Lenk, Brown, & Green, JJ.

**OPINION BY:** LENK

**OPINION:**

**[*664]** **[**1277]** LENK, J. The plaintiff, the town of Billerica (town), sought **[*665]** declaratory judgment to the effect that a certain notice of intent to convert agricultural land, owned by the defendant Andrew T. Card, Sr., had been sent to the town by Card pursuant to *G. L. c. 61A* and had thereby vested in the town an option to purchase such land; Card counterclaimed. Summary judgment entered for the town and Card appeals. We affirm.

Background. Card owns 50.78 acres of land on Nashua Road in the town; forty-nine of those acres were classified as agricultural land pursuant to *G. L. c. 61A*, entitling Card to a reduced tax assessment on the acres so classified. Card informed the town by letter dated December 30, 1999 (1999 letter), that he wished to remove 15.85 acres from *c. 61A* classification. He asserts that he delivered the 1999 letter by hand to the **[***2]** town's board of selectmen and mailed copies to the board of assessors, the planning board, and the conservation commission. It is undisputed that Card failed to send the 1999 letter by certified mail as required by *G. L. c. 61A, § 14*.

Richard Scanlon, the town's principal assessor, responded in a letter dated January 6, 2000, requesting that Card provide an impartial appraisal of the property and stating his opinion that, without such an appraisal, the letter was insufficient to constitute proper notice under the law. In a January 6, 2000, meeting with Scanlon, Card discussed a possible resubmission of the 1999 letter in order to comply with *G. L. c. 61A*. He subsequently sent to all relevant parties, via certified mail, a letter dated June 23, 2000 (2000 letter), in which he requested to remove 14.51 acres from *c. 61A* classification n3; the letter included an appraisal dated May 27, 2000, putting the fair market value of the land at $ 405,000. In a July 25, 2000, written response to Card's request for a calculation of his "roll-back" taxes, n4 the board of assessors included a State tax form indicating that the "full value" of the property for fiscal year **[***3]** 2000 was assessed at $ 540,000.

n3 There is no indication in the record before us as to why Card sought in the 2000 letter to convert 14.51 acres as opposed to the 15.85 acres he had sought to convert in the 1999 letter.

n4 "Roll-back taxes are the difference between the property taxes actually paid under *c.*

> *61A* and what would have been paid if the land had been assessed outside of *c. 61A* for the current tax year and up to the four preceding tax years." *Sudbury v. Scott, 439 Mass. 288, 295 n.8, 787 N.E.2d 536 (2003).*

**[*666]** **[**1278]** At a public meeting held on August 7, 2000, the board of selectmen voted to exercise their option under *G. L. c. 61A, § 14*, to purchase the property at Card's appraised value of $ 405,000. Card objected to that figure as being too low given the board of assessors' assessment of the property at $ 540,000. Selectman Robert Correnti indicated that Card could probably withdraw his notice of intent, and Card stated that he chose to do just that; Card later confirmed this **[***4]** verbal withdrawal in a letter dated August 11, 2000. Disregarding the letter, the selectmen executed a "Notice of Exercise of Option to Purchase," which was recorded on September 8, 2000; this was subsequently approved by the town on October 3, 2000, and $ 405,000 was allocated for the purchase of the property. On April 24, 2001, Card filed with the town a second appraisal valuing the property at $ 700,000.

The town sought declaratory relief to determine the validity of the 2000 letter; there followed a flurry of counterclaims and amended counterclaims, a motion to dismiss, and the town's motion for summary judgment. The trial judge ordered summary judgment for the town, concluding that (1) the 1999 letter was not valid; (2) the 2000 letter was valid; (3) Card did not have the right to withdraw the 2000 letter; and (4) the town's option to purchase was valid and properly exercised.

Discussion. On appeal, Card argues that the judge erred in ruling that the 1999 letter was invalid, and that Card did not have the right to withdraw the 2000 letter. In addition, he claims that the town was unjustly enriched when permitted to purchase the property for less than its full and fair market **[***5]** value.

a. The statutory requirements of *G. L. c. 61A, § 14*. n5 Under *G. L. c. 61A*, agricultural land is assessed at a rate significantly **[*667]** lower than its value under the highest and best use standard on which real property is typically assessed. *Sudbury v. Scott, 439 Mass. 288, 294, 787 N.E.2d 536 (2003).* In return for a lower assessment and lower taxes, the owner must agree that the municipality will have the right of first refusal should the property **[**1279]** be sold or converted to nonagricultural use. *Id. at 295.* When the town receives a notice of an intended sale or conversion, the right of first refusal ripens into an option either to meet a bona fide purchase offer or, in the case of conversion, to purchase the property at full and fair market value; such option must be exercised within 120 days following the notice. *Id. at 297-298.* Central to the matter before us is whether the 1999 letter or the 2000 letter served as the notice of intent to the town for the purposes of ascertaining the town's option period.

n5 *General Laws c. 61A, § 14*, as amended through St. 1987, c. 95, § 3, provides, in pertinent part:

> "Land which is valued, assessed and taxed on the basis of its agricultural or horticultural use under an application filed and approved pursuant to this chapter shall not be sold for or converted to residential, industrial or commercial use while so valued, assessed and taxed unless the city or town in which such land is located has been notified of intent to sell for or convert to such other use; provided, however, that the discontinuance of the use of such land for agricultural or horticultural purposes shall not be deemed a conversion. . . . For a period of one hundred twenty days subsequent to such notification, said city or town shall have, in the case of an intended sale, a first refusal option to meet a bona fide offer to purchase said land, or, in the case of an intended conversion not involving sale, an option to purchase said land at full and fair market value to be determined by impartial appraisal. . . . Such notice of intent shall be sent by the landowner via certified mail to the mayor and city council of a city, or to the board of selectmen of a town, to its board of assessors and to its planning board and conservation commission, if any, and said option period shall run from the day following the latest date of deposit of any of such notices in the United States mails. No sale or conversion of such land shall be consummated unless and until either said option period shall have expired or the landowner shall have been notified in writing by the mayor or board of

> the mayor or board of selectmen of the city or town in question that said option will not be exercised. Such option may be exercised only by written notice signed by the mayor or board of selectmen, mailed to the landowner by certified mail at such address as may be specified in his notice of intention and recorded with the registry of deeds, within the option period."

**[***6]**

b. The 1999 letter. Card contends that the 1999 letter, received by all relevant parties in the first week of January, 2000, constituted valid notice; the town's failure to exercise its option within 120 days, he maintains, extinguished that right. n6 The town's response is two-fold: it claims that (1) because the letter **[*668]** was not sent by certified mail, it did not satisfy a statutory prerequisite for valid notice; and (2) Card is, in any event, estopped from asserting the town's failure to exercise timely its option since the town reasonably relied, to its detriment, on Card's verbal representation that he intended to resubmit notice in order to comply with *G. L. c. 61A, § 14*. See *Rotundi v. Arbella Mut. Ins. Co., 54 Mass. App. Ct. 906, 763 N.E.2d 563 (2002)*. The town's first reason suffices.

> n6 Card further argues that the town erroneously required the notice to include an appraisal, a mistake for which he should not be held responsible. In its motion for summary judgment, the town maintained that the 1999 letter was insufficient notice because it did not include an appraisal. There is no statutory requirement, however, that an appraisal exist at the time of the notice of intent. See discussion, infra.

**[***7]**

"[P]ublic interest requires 'strict enforcement of the statutory notice requirements.'" *Calnan v. Planning Bd. of Lynn, 63 Mass. App. Ct. 384, 390, 826 N.E.2d 258 (2005)*, quoting from *O'Blenes v. Zoning Bd. of Appeals of Lynn, 397 Mass. 555, 558, 492 N.E.2d 354 (1986)*. We are to construe a statute so that effect is given to all of its provisions. *Adoption of Marlene, 443 Mass. 494, 500, 822 N.E.2d 714 (2005)*. See *Massachusetts Bay Transp. Authy. v. Massachusetts Bay Transp. Authy. Retirement Bd., 397 Mass. 734, 740, 493 N.E.2d 848 (1986)* ("It is the function of this court to construe [*G. L. c. 61A, § 14*], as written, and an event or contingency for which no provision has been made does not justify judicial legislation").

*General Laws c. 61A* was enacted "to preserve and protect the agricultural use of land . . . by requiring notice." *Sudbury v. Scott, 439 Mass. at 301*. "Where, as here, the language of a statute is clear and unambiguous, it is conclusive as to the intent of the Legislature." *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 60-61, 762 N.E.2d 303 (2002)*. The statutory requirement that notice be sent by certified **[***8]** mail ensures that all parties will receive a notice of intent reflecting a readily ascertainable date of mailing, which sets the option period running. To construe the statute otherwise would permit a degree of imprecision as to the start of the 120-day option period, which the Legislature deemed undesirable. See *Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 355, 294 N.E.2d 393 (1973)*.

c. The 2000 letter. Card argues that he had a statutory right to withdraw the 2000 notice of intent. As support therefor he points to *G. L. c. 61A, § 6*, which states that an application seeking *c. 61A* classification may not be withdrawn; **[**1280]** had the Legislature intended such a prohibition regarding notice of intent to sell or convert, Card contends, it would have inserted similar language in *§ 14*. In view of the different functions served by the two sections, we are not persuaded that Card is correct.

**[*669]** *General Laws c. 61A, § 6*, addresses the mechanism by which a landowner obtains *c. 61A* classification; *§ 14* provides for a municipality's right of first refusal or option to purchase land. Upon notice under *§ 14* of a bona fide **[***9]** offer to purchase, "'a right of first refusal ripens into an option to purchase according to [the] terms' of the offer." *Franklin v. Wyllie, 443 Mass. 187, 195, 819 N.E.2d 943 (2005)*, quoting from *Greenfield Country Estates Tenants Assn. v. Deep, 423 Mass. 81, 89, 666 N.E.2d 988 (1996)*. See *Sudbury v. Scott, 439 Mass. at 297-298* ("Under *G. L. c. 61A, § 14*, a town's right of first refusal ripens into an option to purchase when the town receives notice of an intended sale of land under *c. 61A* for a nonagricultural use"). The option vests in the town as soon as it receives a notice of intent, and any purported subsequent withdrawal of the notice can have no effect. See *Stapleton v. Macchi, 401 Mass. 725, 729 n.6, 519 N.E.2d 273 (1988)* ("An option is simply an irrevocable offer creating a power of acceptance in the optionee"). In like manner, the town's receipt of notification of a landowner's intended conversion not involving a sale triggered the town's 120-day option to purchase the land at full and fair market value. "Common-law principles apply to a right of first refusal created by statute." *Sudbury v. Scott, 439 Mass. at 297 n.12*. **[***10]** The option having been triggered by the notice,

Card could not thereafter unilaterally take back rights that had already irrevocably vested in the town, at least in the absence of a statutory provision expressly permitting such withdrawal. n7

n7 Card's argument that he was led to believe by Correnti that he could withdraw his notice is of little moment. Members of a municipal board cannot act separately as individuals, and Correnti's opinion accordingly did not reflect a formal decision by, or binding upon, the board of selectmen. *Carbone, Inc. v. Kelly, 289 Mass. 602, 605, 194 N.E. 701 (1935).*

d. Unjust enrichment. Card claims that the town would be unjustly enriched were it to be permitted to purchase the property for the May, 2000, appraisal value of $ 405,000, despite the fact that it was assessed by the town on July 7, 2000, at $ 540,000, and later appraised at Card's behest in April, 2001, at $ 700,000.

*Section 14 of G. L. c. 61A* provides, in pertinent part, that "[f]or a period of one hundred **[***11]** twenty days subsequent to such **[*670]** notification, said city or town shall have, in the case of an intended sale, a first refusal option to meet a bona fide offer to purchase said land, or, in the case of an intended conversion not involving sale, an option to purchase said land at full and fair market value to be determined by impartial appraisal."

The two situations are quite different with respect to valuation. When there is an intended sale to a bona fide purchaser, the purchase price is disclosed at the time notice to the town is given; it is that price that the town must decide whether it will meet. Where there is to be a conversion, on the other hand, all that the statute requires is that the parcel intended for conversion be identified; the town has the option then to purchase it for "full and fair market value to be determined by impartial appraisal." The statute is silent as to when the appraisal is to be made -- whether at the time of giving notice, during the 120-day window within **[**1281]** which the town can exercise its options or, for that matter, at some later date.

We take the "to be determined" language in *G. L. c. 61A, § 14*, as suggesting that the appraisal **[***12]** may be done following the notice. Hence, the notice itself need not contain an appraisal. Mindful, however, that the statute must be construed "in a manner that will not frustrate or impair a town's right of first refusal," *Franklin v. Wyllie, 443 Mass. at 196*, it seems plain that once in receipt of the notice, the town cannot be expected to decide whether it is in a position to exercise its option to buy the subject land without first knowing what it will have to pay to do so. See *Roy v. George W. Greene, Inc., 404 Mass. 67, 69-71, 533 N.E.2d 1323 (1989)*. Hence, we think the sensible reading of *§ 14* is that the impartial appraisal envisioned by the statute will ordinarily be obtained well within the 120-day option period. See *Franklin v. Wyllie, supra.*

When Card sent the 2000 letter giving notice of the intended conversion, he included an appraisal valuing the land at $ 405,000. n8 After notifying Card that it was exercising its right of first refusal, the town twice informed Card (on August 16 **[*671]** and September 6, 2000) that, should he believe that the $ 405,000 appraisal did not constitute the "'impartial appraisal' envisioned by the statute, **[***13]** " he should contact the town's principal assessor "so that a new appraisal [could] be ordered." Card apparently did not do so, preferring instead to maintain that he had withdrawn his notice of intention to convert the land. Then, more than six months after town meeting voted to appropriate $ 405,000 to purchase the property, Card submitted an appraisal dated April 24, 2001, which he had apparently unilaterally commissioned. This appraisal valued the land at $ 700,000. In the circumstances, we discern no unjust enrichment in the town's purchase of the land at the $ 405,000 appraised value. To allow Card to substitute a second appraisal after expiration of the 120-day period for the town's exercise of its right of first refusal, and well after the town had made an informed decision, based on the previously submitted appraisal, to exercise the option, would impair the orderly administration of the procedures envisioned by the Legislature for towns to exercise their right of first refusal. See *Roy v. George W. Greene, Inc., 404 Mass. at 69-71.*

n8 Card does not suggest that the 2000 appraisal was anything other than impartial; he contends only that the town would be unjustly enriched should it acquire the land at $ 405,000. Card also claims that the town knew or should have known that the 2000 appraisal was low when it sent its July 7, 2000, tax evaluation form designed to calculate roll-back taxes reflecting an assessed value of $ 540,000.

**[***14]**

Judgment affirmed.

66 Mass. App. Ct. 672, *; 849 N.E.2d 1271, **;
2006 Mass. App. LEXIS 733, ***

**TOWN OF HANOVER vs. FRANK CERVELLI.**

**No. 05-P-215**

**APPEALS COURT OF MASSACHUSETTS**

***66 Mass. App. Ct. 672; 849 N.E.2d 1271; 2006 Mass. App. LEXIS 733***

**December 15, 2005, Argued**
**July 7, 2006, Decided**

**SUBSEQUENT HISTORY:** As Modified July 27, 2006.

**PRIOR HISTORY:** **[***1]** Plymouth. Civil action commenced in the Superior Court Department on June 20, 2000. The case was heard by Ernest B. Murphy, J.

**HEADNOTES:** Contract, Performance and breach, Specific performance, Condition, Option. Damages, Breach of contract. Real Property, Option. Municipal Corporation, Aquisition of real estate.

**COUNSEL:** John T. Spinale for the defendant.

James A. Toomey for the plaintiff.

**JUDGES:** Present: Gelinas, Kafker, Mills, JJ.

**OPINION BY:** GELINAS

**OPINION:**

**[*672]** **[**1272]** GELINAS, J. Frank Cervelli appeals from a Superior Court judgment in favor of the town of Hanover (town) in its action for breach of contract damages and specific performance of the parties' option contract for the purchase of Cervelli's land. We affirm the grant of specific performance, but reverse the award of damages.

Facts. We set out the facts generally, as stipulated by the parties, n1 reserving some details for discussion of the issues. The land at issue consists of some seventy-four acres of farmland **[*673]** located in Hanover. In or about late 1998, Douglas Thomson, chair of the town's open space committee, contacted Cervelli to inquire about the possibility of Cervelli selling the land to the town. Cervelli's attorney and Thomson, assisted by his father, continued to discuss the sale into early 2000. In mid-April of 2000, the town's counsel sent a draft agreement of an option to purchase land (option agreement) to **[***2]** Thomson. **[**1273]** Cervelli's attorney, the town's counsel, and Thomson's father communicated back and forth regarding the terms of the option agreement. On May 1, 2000, Cervelli's attorney faxed Cervelli the final version of the option agreement, which gave the town the option to purchase the land for $ 1,380,000 before July 1, 2000. On that same day, Cervelli signed the option agreement at his home without counsel present and then faxed it to Thomson's father. Cervelli subsequently destroyed the original option agreement he had signed.

n1 The trial judge's findings of fact are consistent with the parties' stipulations.

On May 5 and 12 of 2000, letters were faxed to Cervelli's attorney requesting that the original option agreement be submitted to the town. On May 23, 2000, Cervelli's attorney responded by letter, purporting to revoke Cervelli's signature on the option agreement. On June 2, 2000, the town's counsel sent Cervelli's attorney a letter expressing the town's position that Cervelli lacked the legal ability to **[***3]** revoke his signature, and that the town was exercising its option to purchase and intended to proceed with the transaction. On June 30, 2000, the town's counsel faxed a letter to Cervelli's attorney that documented their telephone conversations that the town stood ready all day to close on the transaction.

Specific performance. Cervelli argues that the town is not entitled to specific performance because it failed to properly exercise the option agreement by failing to meet one of its conditions, n2 namely, that Cervelli be discharged from any obligation to pay roll-back taxes under *G. L. c. 61A*. n3

n2 The relevant language of the option agreement is as follows: "Grantee's option to purchase is subject to . . . (3) Grantor being discharged from any obligation to pay roll-back taxes under *G. L. c. 61A*" (emphasis supplied).

n3 Cervelli's land was assessed as agricultural land and taxed at favorable rates pursuant to *G. L. c. 61A*. When land taxed as such is taken out of agricultural use, *G. L. c. 61A, § 13*, provides, subject to certain exceptions, that additional taxes, referred to as "roll-back taxes," be paid.

**[***4]**

The town argues that Cervelli waived this argument by failing **[*674]** to raise it in Superior Court and that, in any event, it lacks merit. Cervelli contends that his answer to the town's complaint, as well as the parties' joint pretrial memorandum, adequately raised the issue. Cervelli argues that he was entitled to an "ironclad assurance" from the town that he would not be liable for roll-back taxes, and that the town's failure to so provide, prior to July 1, 2000, excused his requirement to convey.

Prescinding from the town's argument of waiver, we conclude that this condition of the option agreement was adequately fulfilled by the town based on *G. L. c. 61A, § 13*, inserted by St. 1975, c. 794, § 7, which mandates in part that "no roll-back taxes shall be applicable if the land involved is purchased for a public purpose by the city or town in which it is situated." Regardless whether the town, prior to July 1, 2000, failed to "demonstrat[e] its ability or willingness in writing to discharge Cervelli" of any obligation to pay these taxes, given the language of the statute, any such formal assurance would be redundant and meaningless. In addition, the town **[***5]** gave no indication that it would attempt to impose roll-back taxes, and even had it done so, the statute would provide a clear, impenetrable defense to any such attempt. This condition of the option agreement merely reflected the statutory reality, and Cervelli cannot be excused from performance based on the town's failure to formally assure Cervelli that it would adhere to the statute.

**[**1274]** Damages. Cervelli also argues that the town was not entitled to "reliance damages." Prior to Cervelli signing the option agreement, the town sought and conditionally received a State grant in the amount of $ 50,000 for the purchase of lands for public recreational use. The grant, which expired in June of 2000, was lost when Cervelli failed to convey the land. The town agrees with Cervelli that it is not entitled to damages on a reliance theory. The town, however, argues that, although characterized by the trial judge as reliance damages, the amount is really ordinary breach of contract damages, which the town is entitled to receive, and therefore this court may affirm the award. See *Dorchester Mut. Fire Ins. Co. v. First Kostas Corp., 49 Mass. App. Ct. 651, 653, 731 N.E.2d 569 (2000)* ("It **[***6]** is well established that, on appeal, we may consider any ground apparent on the record **[*675]** that supports the result reached in the lower court" [citation omitted]).

"The fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position [that it] would have been in[] if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties[,] as reasonable [people][,] as a probable result of the breach . . . ." *John Hetherington & Sons, Ltd. v. William Firth Co., 210 Mass. 8, 21, 95 N.E. 961 (1911)*. See *Weeks v. Calnan, 39 Mass. App. Ct. 933, 934, 658 N.E.2d 173 (1995)*. The determination whether a given consequence was within the parties' contemplation as a likely result of a breach is made by reference to the time at which the contract was made, as distinguished from a point or points in time subsequent to the time of contracting. See *Bucholz v. Green Bros. Co., 272 Mass. 49, 54, 172 N.E. 101 (1930)*; *Boylston Hous. Corp. v. O'Toole, 321 Mass. 538, 562, 74 N.E.2d 288 (1947)*; *First Pa. Mort. Trust v. Dorchester Sav. Bank, 395 Mass. 614, 627, 481 N.E.2d 1132 (1985)*. **[***7]** See also *Short v. Riley, 150 Ariz. 583, 585, 724 P.2d 1252 (Ct. App. 1986)*; *Fairfield Dev., Inc. v. Georgetown Woods Senior Apartments Ltd. Partnership, 768 N.E.2d 463, 473 (Ind. Ct. App. 2002)*; *Restatement (Second) of Contracts § 351* (1981).

Nothing in the record indicates that the town had informed Cervelli, prior to the time of his signing the option agreement, that it would lose $ 50,000 if Cervelli breached the agreement, or that Cervelli had any knowledge of the grant. In support of its damage claim, the town refers only to record evidence, in the form of letters written by its counsel well after Cervelli had faxed the signed option agreement and, thereby, bound himself to the agreement. In the town's May 12, 2000, letter, the town's counsel informed Cervelli that delay in receiving the original option agreement and in closing the land transfer "could jeopardize funding of $ 100,000 or more" because the town "need[ed] to meet . . . deadlines to receive state funding and grants." In the town's June 30, 2000, letter, the town's counsel stated that "[w]ithout a deed in hand today the state grant is lost and our **[***8]** claim for damages will be pursued." Letters referring to the grant being lost as a consequence of Cervelli's **[*676]** breach, written after Cervelli had bound himself to the deal, cannot serve as proof that Cervelli and the town had contemplated, when Cervelli signed the option agreement, that $ 50,000 would be lost if Cervelli breached, or that Cervelli otherwise should have had reason to foresee the probability of such a loss. On this record, the town has failed to sustain its burden of showing that the loss was within the contemplation **[**1275]** of the parties when Cervelli executed the option agreement.

Conclusion. The town is entitled to specific performance under the terms of the option agreement upon its tendering of the agreed upon sales price of $ 1,380,000. It was error, however, for the judge to award the town damages. The judgment is reversed insofar as it awards damages to the town in the amount of $ 50,000, and in all other respects the judgment is affirmed.

So ordered.

**TOWN OF WARE vs. TOWN OF HARDWICK (and a companion case n1).**

n1 Randall Witkos vs. Town of Hardwick.

**No. 05-P-1218**

**APPEALS COURT OF MASSACHUSETTS**

*2006 Mass. App. LEXIS 952*

**April 10, 2006, Argued**
**September 13, 2006, Decided**

**PRIOR HISTORY:** **[*1]** Worcester. Civil actions commenced in the Superior Court Department on August 28 and October 5, 1998. After consolidation, the cases were heard by Peter W. Agnes, Jr., J.

**HEADNOTES:** Practice, Civil, Case stated, Statement of agreed facts. Police, Injury on duty. Indemnity. Public Employment, Indemnification of employee.

**COUNSEL:** Sarah N. Turner for town of Hardwick.

David A. Wojcik for town of Ware.

John K. McGuire, Jr., for Randall Witkos.

**JUDGES:** Present: Kantrowitz, Doerfer, & Cohen, JJ.

**OPINION BY:** DOERFER

**OPINION:**

DOERFER, J. The town of Ware (Ware), as assignee of Randall Witkos, brought an action to require the town of Hardwick (Hardwick) to pay to Ware statutory "injured on duty" benefits under *G. L. c. 32, § 85H*, allegedly due to Witkos on account of an aneurysm that disabled him while he was performing his duties as a part-time police officer for Hardwick. Witkos also sought in an action in his own name to require Hardwick to indemnify him under *G. L. c. 41, § 100*, for medical bills incurred as a result of the aneurysm. The cases were consolidated for a bench trial on a "case stated" basis in which all of the evidence (which was entirely documentary) was stipulated. Hardwick now appeals from amended judgments entered against it in both actions.

Standard of review of a case stated **[*2]** . Where an action was treated as a case stated n2 and the appellate court has all the documents, including the parties' stipulation of the facts, that formed the basis for the judgment, "we decide the questions of law involved unaffected by [the trial judge's] decision." *Tucci v. DiGregorio, 358 Mass. 493, 493-494, 265 N.E.2d 570 (1970)*. We thus review this case de novo. See *Richardson v. Lee Realty Corp., 364 Mass. 632, 634, 307 N.E.2d 570 (1974)* ("Because this appeal arises from a decision on a case stated, we deal with it anew, unaffected by any conclusions of law or inferences drawn by the [trial] judge"); *Malonis v. Harrington, 442 Mass. 692, 696, 816 N.E.2d 115 (2004)* (resolving the dispute on the case stated record); *Pilch v. Ware, 8 Mass. App. Ct. 779, 780, 397 N.E.2d 1123 (1979)*; *Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. 412, 429, 402 N.E.2d 76 (1980)*; *Hickey v. Green, 14 Mass. App. Ct. 671, 671 n.2, 442 N.E.2d 37 (1982)*. See also Nolan & Henry, Civil Practice § 33.7 (3d ed. 2004) ("It is now provided that upon a case stated by agreement of the parties for the decision of the court in any action, any court before which the case may come, either **[*3]** in the first instance or upon review, is at liberty to draw from the facts and documents stated in the case any inferences of fact which might have been drawn therefrom at a trial, unless the parties expressly agree that no inferences shall be drawn").

n2 The parties presented below an agreement setting forth "all the material ultimate facts on which the rights of the parties are to be determined by the law." *Pequod Realty Corp. v. Jeffries, 314 Mass. 713, 715, 51 N.E.2d 308 (1943)*, quoting from *Frati v. Jannini, 226 Mass. 430, 431, 115 N.E. 746 (1917)*. The label is not the determinative factor in treating an action as a "case stated," but rather the court looks to the substance of the agreement. *Id. at 432*.

Discussion. Witkos was both a full-time fire fighter for Ware and a part-time police officer for Hardwick. He had worked as a full-time fire fighter for Ware for many years. Witkos worked the entire day of August 29, 1996, at his Ware fire fighter job. Near the end of his shift, **[*4]** before leaving for his Hardwick police job, he felt

weak, tired, and run down. After finishing his fire fighter shift, he was called to assist in a police action in Hardwick that involved carrying contraband marijuana plants out of a field, over a stone wall, and on to a truck. He carried bundles of marijuana from the field to the truck three or four times. While performing this task, Witkos experienced disabling pain, collapsed, and was taken to a hospital where he was diagnosed with a dissecting aortic aneurysm. He incurred medical and hospital bills in the amount of $ 136,343.80 in connection with the treatment of the aneurysm.

Initially Ware began paying Witkos paid leave benefits under *G. L. c. 41, § 111F.* n3 See *Jones v. Wayland, 380 Mass. 110, 118, 402 N.E.2d 63 (1980).* Ware subsequently terminated these payments, taking the position that they were made in error because his injury was sustained while working on his Hardwick job, not on his Ware job. As a result, Witkos filed a grievance under a collective bargaining agreement with Ware. Ware and Witkos entered into a written agreement in settlement of that grievance, pursuant to which Witkos released **[*5]** his claims against Ware and assigned to Ware his rights against Hardwick under *G. L. c. 32, § 85H*, and *G. L. c. 41, § 111F.* n4 Witkos further received $ 19,278.73 in sick leave benefits from Ware and was allowed to keep the paid leave benefits (in the amount of $ 24,054.44) already received from Ware. The settlement agreement provided that Ware would keep amounts it recovered on the assigned claims, up to the total amount of the paid leave benefits and sick leave benefits it had paid to Witkos (i.e., $ 43,333.17). Any excess amounts recovered would belong to Witkos. Ware, to recoup its outlays, filed its action against Hardwick asserting Witkos's assigned claims. n5

n3 "Whenever a police officer or fire fighter of a . . . town . . . is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own . . . he shall be granted leave without loss of pay for the period of such incapacity . . . ." *G. L. c. 41, § 111F*, as appearing in St. 1964, c. 149.

n4 Hardwick admitted such in its answer to Ware's complaint, clarifying any ambiguity in the settlement agreement about the scope of the assignment.

**[*6]**

n5 Although Ware's complaint refers to benefits allegedly due to Witkos from Hardwick under *G. L. c. 41, § 111F*, for continuation of his Hardwick wages while he was out of work due to the injury suffered while on the Hardwick job, that claim was not pursued at trial or in this appeal, and we do not address it.

Witkos was totally disabled by the aneurysm and never worked again on either job. As part of the settlement of the grievance, Ware also agreed not to oppose his application for accidental disability retirement benefits from the Hampshire County retirement board under *G. L. c. 32, § 7.* n6 Witkos was successful in obtaining a disability retirement pension on October 22, 1997, at thirty-one years of age. That pension was granted from Hampshire County in connection with his full-time job as a Ware fire fighter under the so-called "heart law," *G. L. c. 32, § 94.* n7 The heart law creates a presumption that a disability of a full-time fire fighter arising out of a heart condition is causally related to his job, without **[*7]** the need to prove further any such causal connection. See *Blair v. Selectmen of Brookline, 24 Mass. App. Ct. 261, 265, 508 N.E.2d 628 (1987); Lisbon v. Contributory Retirement Appeal Board, 41 Mass. App. Ct. 246, 249, 670 N.E.2d 392 & n.5 (1996).*

n6 *General Laws c. 32, § 7(1)*, as amended by St. 1996, c. 306, § 14, provides accidental disability retirement for a qualified member in service "who is unable to perform the essential duties of his job and that such inability is likely to be permanent before attaining the maximum age for his group by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time on or after the date of his becoming a member . . ., without serious and willful misconduct on his part, upon his written application on a prescribed form filed with the [retirement] board and his respective employer . . . ."

n7 In relevant part, *G. L. c. 32, § 94*, as amended through St. 1991, c. 552, § 26, provides that "any condition of impairment of health caused by . . . heart disease resulting in total or partial disability . . . to a uniformed member of a paid fire department or permanent member of a police department . . . shall . . . . be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence."

**[*8]**

Meanwhile, Blue Cross Blue Shield of Massachusetts, which had paid for Witkos's hospitalization and

medical care expenses, retracted its coverage under the terms of its health insurance policy covering Witkos, on the ground that his injuries were work-related. n8 Consequently Witkos became liable for these expenses, a liability for which he filed his action seeking indemnification from Hardwick under *G. L. c. 41, § 100.*

n8 Witkos's claim against Blue Cross Blue Shield of Massachusetts is not before us.

Benefits for a part-time police officer. A part-time police officer who is disabled while working on his part-time job and who is thereby unable to work at his "regular" job is entitled to statutory "injured on duty" benefits under *G. L. c. 32, § 85H*, the relevant provisions of which state:

> "Whenever a call fire fighter or any member of a volunteer fire company in a town . . . or reserve or special or intermittent police officer of a town, or a reserve **[*9]** police officer or reserve or call fire fighter of a city is disabled because of injury or incapacity sustained in the performance of his duty without fault of his own, and is thereby unable to perform the usual duties of his regular occupation at the time such injury or incapacity was incurred, he shall receive from the city or town for the period of such injury or incapacity the amount of compensation payable to a permanent member of the police . . . force thereof . . . for the first year of service therein . . . provided, that no such compensation shall be payable for any period after such police officer . . . has been retired or pensioned in accordance with law . . . ."

*G. L. c. 32, § 85H*, as amended through St. 1970, c. 382, § 1. n9 See *Politano v. Selectmen of Nahant, 12 Mass. App. Ct. 738, 743, 429 N.E.2d 31 (1981)*. The "injured on duty" benefits paid to the part-time police officer under *G. L. c. 32, § 85H*, are designed to compensate the officer for the loss of income from a regular occupation. *Politano v. Selectmen of Nahant, supra.* The amount of these benefits, payable by the part-time employer, **[*10]** is equivalent to the amount of compensation that would be due to a first-year permanent member of the police department for the period of incapacity. This benefit ends upon retirement. See *id. at 744.*

n9 *General Laws c. 32, § 85H*, contains two types of "injured on duty" benefits: a permanent retirement benefit and temporary compensation related to the inability to perform a regular occupation. *Jones v. Wayland, 380 Mass. at 112.* At issue here are the temporary compensation benefits for the period prior to Witkos obtaining accidental disability retirement benefits from Hampshire County.

It is not necessary to a temporary compensation claim under *G. L. c. 32, § 85H*, to establish that the disability "sustained in the performance of . . . duty" was caused specifically by the duty being performed. Cf. *Wormstead v. Town Manager of Saugus, 366 Mass. 659, 662-663, 322 N.E.2d 171 (1975)* (under *G. L. c. 41, § 111F* **[*11]** [which possesses operative language similar to that of *G. L. c. 32, § 85H*], proof that the injury specifically resulted from the work is not necessary). It is sufficient that the disabling condition arose without fault of the part-time employee while working on the part-time job. See *G. L. c. 32, § 85H.* Thus, under the unique circumstances of this case, it is of no consequence to this claim, contrary to the argument of Hardwick, whether Witko's aneurysm may have been causally related in whole or in part to his job as a full-time Ware fire fighter.

Hardwick, citing *Jones v. Wayland, 380 Mass. at 120*, argues that Witkos should not be able to collect benefits for his Ware fire fighter job from both Ware (under *G. L. c. 41, § 111F*) and from Hardwick (under *G. L. c. 32, § 85H*). But unlike the situation in that case, this appeal does not involve the potential for overlapping benefits under *§ 85H* and *§ 111F* as related to an employee "who had lost only one job." *Jones v. Wayland, supra.* n10 Here Witkos would receive nothing more than he is entitled **[*12]** to under *G. L. c. 32, § 85H*, and will not be doubly compensated for his inability to work as a full-time Ware fire fighter. An amount equal to that which Ware has already paid to him (both in paid leave benefits and sick leave benefits) would be retained by Ware. Although any excess recovery (there is none here) would have gone to Witkos, there would be no more compensation to Witkos than the statute provides. This benefit is not limited by the amount he would have received on his primary job (so long as he had a primary job); it is measured by reference to what a full-time police officer in Hardwick earns. Compare *Murphy v. Dover, 35 Mass. App. Ct. 904, 904-905, 616 N.E.2d 835 (1993)* (a part-time call ambulance worker and police matron was not entitled to benefits, as her full-time work as a housewife was not considered a "regular occupation" because it did not constitute "a substantial source of income").

n10 Our decision should not be read to suggest that Witkos in fact had enforceable rights under both *§ 111F* (against Ware) and *§ 85H* (against Hardwick) to compensation for his disablement from his Ware fire fighter job. Because Witkos's grievance seeking *§ 111F* benefits from Ware was the subject of legal settlement and release, that claim was never properly litigated. It is not before us, we are not in a position to opine on its merits, and we are thus not confronted with the potential for "double recovery" that troubled the court in *Jones v. Wayland, 380 Mass. at 120.*

Moreover, we read the Jones decision simply as holding that, to avoid a "double recovery" not intended by the Legislature, the special police job (or other enumerated police or fire fighter job) being relied on to invoke *§ 85H* in the first instance cannot also count as the *§ 85H* claimant's "regular occupation" for purposes of compensation. Although dictum in the Jones opinion suggests categorically that "'regular occupation' cannot be police or fire duty," ibid., this language was not penned with the case in mind of a full-time public safety officer for one town suffering injury in the course of his part-time public safety work for another town.

**[*13]**

Finally, there is no requirement, as argued by Hardwick, that Witkos or someone on his behalf make a formal claim for benefits under *G. L. c. 32, § 85H*, before commencing an action to enforce it. See *Jones v. Wayland, 380 Mass. at 117.*

Reimbursement for medical bills. We turn next to the claims of Witkos against Hardwick for indemnification for his medical bills under *G. L. c. 41, § 100.* This statute does require some causal connection between the medical condition treated and the performance of his job for Hardwick. See *G. L. c. 41, § 100* (indemnification for reasonable medical expenses "incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own"). n11

n11 *General Laws c. 41, § 100*, as amended through St. 1970, c. 27, provides in pertinent part that, "Upon application by a fire fighter or police officer of a city, town or fire or water district, . . . the board or officer of such city, town or district authorized to appoint fire fighters or police officers,

as the case may be, shall determine whether it is appropriate under all the circumstances for such city, town or district to indemnify such fire fighter or police officer for his reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry) incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own." Furthermore, the statute "specifically provides for a petition to the Superior Court when an application for reimbursement is denied or ignored." *O'Donovan v. Somerville, 41 Mass. App. Ct. 917, 918, 669 N.E.2d 1106 (1996).*

**[*14]**

Contrary to the arguments of Hardwick, there is evidence in the record to support Witkos's claim of a causal connection between the acute dissection of his aortic aneurysm and his activity as a part-time police officer for Hardwick. Immediately before experiencing intense pain and collapsing, Witkos had been carrying bales of marijuana on his shoulder from a field, over a stone fence, and onto a truck. He made this trek three or four times in the course of approximately one-half hour. Additionally, a treating surgeon at Massachusetts General Hospital stated in a letter that "[t]here is no question that the acute event of aortic dissection which was marked by the onset of very severe symptomatology occurred while at work and was related to the straining that he was doing at that time." It is beyond dispute that this acute episode occurred while "acting in the performance and within the scope of his duty without fault of his own." *G. L. c. 41, § 100.*

Witkos is not prevented, under the doctrine of issue preclusion, from claiming a causal connection between his police job and the disabling condition by the fact that he successfully obtained a disability pension **[*15]** from the Hampshire County board of retirement on the ground that he was disabled as a result of his Ware job as a fire fighter. This retirement outcome followed Ware's agreement in the grievance settlement not to oppose Witkos's application for disability retirement, which in effect allowed the causation presumption contained in the heart law, *G. L. c. 32, § 94*, to be conclusive. n12 The causation question thus was not actually litigated, an indispensable prerequisite of the issue preclusion doctrine. See *Kobrin v. Board of Registration in Medicine, 444 Mass. 837, 844, 832 N.E.2d 628 (2005).*

n12 Under the heart law, the Legislature has provided a statutory presumption that a disabling heart condition developed by a fire fighter is causally related to the job as a fire fighter. We have interpreted the heart law presumption as relating only to retirement, see *Vaughan v. Auditor of Watertown, 19 Mass. App. Ct. 244, 246, 473 N.E.2d 698 (1985)*, and thus it has no application to medical expense indemnification under *G. L. c. 41, § 100*.

**[*16]**

Furthermore, the fact that such a condition may be causally related to Witkos's job as a fire fighter does not preclude the possibility that it is also causally related to the performance of his job as a part-time police officer. A disability under the heart law is based on the presumption that heart disease is a long-term illness that can be exacerbated by the stress of working as a fire fighter. A final stressful incident which occurs while the fire fighter is working on some other job may be the immediate precipitating disabling event in a long chain of causation that included deterioration due to service as a fire fighter. In this sense the disability can logically and factually be related to both jobs. n13

n13 We do not hereby suggest that such a causation scenario, if proved in a particular case, would entitle a person to benefits under both *G. L. c. 32, § 85H*, and *G. L. c. 41, § 111F*, for disablement from the person's primary public safety occupation. As we explained in note 10, supra, there is no *§ 111F* claim against Ware before us, and thus we express no opinion on how the two statutes interact in a dual causation case.

**[*17]**

Nor is there any preclusive effect to the proceeding before the Hampshire County retirement board for accidental disability retirement benefits under the heart law and based upon the risk that Witkos might suffer another acute aortic episode in the future. Here Witkos sought indemnification for medical expenses under *G. L. c. 41, § 100*, for treatment relating to the acute event of aortic dissection that he suffered while on duty as a police officer. He is not prevented from making a claim for medical expenses.

There is support for the argument that Witkos made some application for these benefits. See *G. L. c. 41, § 100*. No particular form of application is required by statute. See ibid. The record shows that Witkos did enough to bring this claim to the attention of Hardwick to satisfy the statutory condition. Early in the process, Witkos discussed his medical bills with Hardwick's police chief and Ware's fire chief. The Ware fire chief had requested, on Witkos's behalf, that Hardwick make arrangements to pay all the medical bills associated with his treatment. In addition, Witkos's attorney submitted detailed medical bills to **[*18]** counsel for Hardwick. See *O'Donovan v. Somerville, 41 Mass. App. Ct. at 917, 918 (1996)* (employee forwarded his medical bills to the chief of the fire department).

We therefore agree with the trial judge's conclusion that Witkos is entitled to indemnification from Hardwick for his relevant medical expenses. n14

n14 Hardwick has not asserted that it would have exercised whatever discretion it may have under *G. L. c. 41, § 100* (see note 11, supra, for relevant text), to decide that reimbursement is not "appropriate under . . . the circumstances." We deem that issue waived and express no opinion thereon.

Conclusion. The stipulated facts and admissions in the pleadings show that (1) Witkos is disabled; (2) that his incapacity was sustained while he was in the performance of his duties as a Hardwick special police officer, without his fault; and (3) that, as a result, he is unable to perform the usual duties of his regular occupation as a full-time fire fighter for **[*19]** the town of Ware. Both the amended judgment in the Ware action n15 and the second amended judgment in Witkos's action are affirmed.

n15 The amended judgment in the Ware action entered in the amount of $ 31,071.64, with interest of $ 5,512.61 calculated from the date Ware filed its complaint on October 5, 1998. The trial judge did not err by adding interest from the date of the commencement of Ware's action, October 5, 1998. See *G. L. c. 231, § 6C*.

So ordered.