

Exemptions Under the Massachusetts Zoning Act

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Exemptions under the Massachusetts Zoning Act¹

1.0 Introduction

The purpose of this Module is to review several land uses and activities where the Legislature, through its Constitutional powers, has chosen to limit the reach of local government regulation.² Unlike many aspects of zoning law in Massachusetts, in the discussion that follows, local authority—autonomy—has been clearly removed or limited³.

Massachusetts is considered a “Home Rule” state, as distinguished from a “Dillon’s Rule” jurisdiction⁴. The distinction is important, as cities and towns in the Commonwealth are free to adopt any⁵ zoning ordinance or bylaw that protects the health,

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² This Module reviews many of the exemptions contained in the Zoning Act, General Laws Chapter 40A, Sections 3 and 9. Where reference is made to Section 3 or Section 9, the reference is to the Zoning Act. Also, please note that the Zoning Act (G.L. c.40A) applies to 350 of the Commonwealth’s 351 municipalities. The City of Boston has been subject to special zoning legislation since 1904 and the requirements and conditions of G.L. c.40A do not apply within the City’s corporate boundaries.

³ The limitations on local powers must be made clear by the Legislature to have the desired effect. “In deciding whether under s.6 of the Home Rule Amendment a municipal ordinance or bylaw is ‘not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court ‘by s.8 of the Home Rule Amendment, we have said that ‘the legislative intent to preclude local action must be clear.’...The task is, of course, relatively easy if the Legislature has made an explicit indication of its intention in this respect.” Wendell v. Attorney General, 394 Mass. 518, 589 (1985), citing Bloom v. Worcester, 363 Mass. 136, 155 (1973).

⁴ Judge Dillon of Iowa formulated “Dillon’s Rule” in 1911. “It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First those granted in express words; second those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objectives and purposes of the corporation—not simply convenient but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied...” Dillon, Municipal Corporations, s.237(89), 5th ed. 1911.

⁵ The use of the term “any” raises several questions beyond the scope of this Module. For example, the Zoning Act does not specifically authorize, for example, the use of transfer of development rights, yet such a planning technique neither conflicts with nor is precluded by the statute. This statement is supported by the Legislature’s establishment in 1975 of today’s Zoning Act (1975 Mass. Acts 808), specifically Section 2A of the Act. “The purposes of this act are to facilitate, encourage and foster the adoption and modernization of zoning ordinances and bylaw

safety and welfare of local residents with two exceptions. The first exception is that a local government cannot conflict with state or federal law. "Municipalities may not adopt by-laws or ordinances that are inconsistent with State law."⁶

An example of such a conflict includes the requirement that a petition for a zoning bylaw change must be followed by a public hearing, which must be advertised at least twice, once in each of two successive weeks, the first advertisement occurring at least 14 days prior to the public hearing.⁷ It would be a conflict with state law for a town to hold the public hearing on the zoning change 12 days prior to the public hearing.

The second exception, and the focus of this Module, is where the Commonwealth or the federal government explicitly or by implication prohibit a local government's action or interference in a particular field or area. This prohibition is commonly referred to as pre-emption.⁸ Where the state or federal government has precluded local involvement, the city or town has been pre-empted—blocked—from regulating or otherwise becoming involved in that particular area.

The Legislature has prepared and enacted a straightforward list of activities that it has determined should be removed from local control or local action; areas where local involvement has been more or less pre-empted. Several of these activities have little or no associated appellate case law and discussion in this Module is limited to identifying the pre-empted activity. Other activities have generated significant debate and litigation and are presented with greater detail and discussion.

An additional introductory note is important. As discussed below, the list of exempted areas comes in two varieties. First, activities that local governments are precluded—

by municipal governments...to achieve greater implementation of the powers granted to municipalities thereunder...This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following:... to conserve health, to secure safety from fire, flood, panic...to conserve the value of land and buildings, including the conservation of natural resources...Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating: 1. use of land, including wetlands...2. size, height, bulk, location and use of structures..."

⁶ Boston Gas Company v. Somerville, 420 Mass 702, 703 (1995). "To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject." Id. at 704.

⁷ See G.L. c.40A s.5

⁸ "...in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." Boston Gas, 420 Mass. at 702. See also Roberts v. Southwestern Bell Mobile Systems, 429 Mass. 478 (1999), "State law, including municipal regulations, can be preempted by an act of Congress if the State law ' conflicts with federal law or would frustrate the federal scheme, or if the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' Id. at 486, citing Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge, 395 Mass. 535, 548 (1985).

barred—from regulating. These include, for example, activities regulated by the State Building Code. The second variety, and the more difficult area in terms of differentiating how far is “too far”, are limitations, as opposed to outright prohibitions on regulation at the local level. The Legislature uses the language “to prohibit or unreasonably regulate” to signal that some (but not too much) regulation through zoning is permissible. These activities include, for example, agricultural uses; land used for religious or educational uses and lands used for day care centers.

Although discussed in greater detail below, the formula to be used in determining how far local zoning can go where, within Section 3, the Legislature has allowed local regulation, was defined in Trustees of Tufts College v. City of Medford⁹

Although the Court was resolving a challenge regarding the educational exemption (discussed in Section 3.0, below), their holding regarding the breadth of allowable local regulation under the Zoning Act’s Section 3 is instructive¹⁰.

As the material below is reviewed, please keep in mind the Court’s response as noted in footnote #10. Section 3 exemptions, where not absolute, permit local regulations, provided these regulations do not result in the unreasonable frustration—de facto prohibition-- of the protected activity.

2.0 Exemptions under the State Building Code

Section 3 precludes a local zoning ordinance or bylaw from regulating or restricting the use of materials or methods of construction of structures regulated by the state building code¹¹.

⁹ 415 Mass. 753 (1993).

¹⁰ “Local zoning requirements adopted under the proviso to the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning...may be permissibly enforced.” 415 Mass. 753, 758-759, (1993). The Court continued: “What we have said thus far suggests that the question of reasonableness of a local zoning requirement, as applied to a proposed education use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an educational institution making challenges similar to those made by Tufts will bear the burden of proving that the local requirements are unreasonable as applied to it proposed project. The educational institution might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution’s campus, without appreciably advancing the municipality’s legitimate concerns. Excessive cost of compliance with a requirement imposed on an education institution, without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation of an educational use...”. Id at 759-760.

¹¹ The State Building Code, 780 Code Mass. Regs. S202 (1997) defines the word “building” as follows: “A structure enclosed within exterior walls or firewalls, built, erected and framed of a combination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter of persons, animals or property.”

At first glance, this pre-emption seems clear. Local zoning cannot allow, for example, 2x4's where the state building code require 2x6's. Nor could a zoning ordinance alter the building code's requirements for window access or emergency door placement. Some communities have raised questions, however, about potential conflicts with local zoning and the building code preemption insofar as the zoning ordinance establishes, for example, the maximum number of bedrooms allowed within a dwelling or the maximum footprint of the dwelling¹².

It is important to note that these requirements, and ones of similar design and intent, do not run afoul of the Section 3 preemption. The purpose of the preemption is to establish a uniform set of rules and regulations governing the health and safety aspects of building construction in the Commonwealth. While local zoning may not interfere with the use of materials or methods of construction standards, local zoning *may* regulate and reasonably restrict the size, shape and location of structures.¹³

"It should be borne in mind that the purposes and operation of zoning laws and building codes are somewhat divergent... Whereas the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses... a building code 'relates to the safety and structure of buildings'".¹⁴

¹² An interesting question was asked and answered in a 1976 case involving an order by the Housing Appeals Committee to the Town of North Andover regarding construction of housing units under G.L. c40B, s20-24 (the so-called "Anti-Snob Zoning Act"). While the Housing Appeals Committee clearly has jurisdiction to override locally adopted rules and regulations that impede development of affordable housing, does the Committee have jurisdiction to override encumbering regulations passed by the Legislature? The answer is no. "We find nothing in those sections [referring to the State Building Code] or in the Hanover case which suggest that the Housing Appeals Committee has been empowered with authority to override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions." Board of Appeals of North Andover v. Housing Appeals Committee, 4 Mass.App.Ct. 676, 680 (1976), referring to Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339 (1973).

¹³ "We perceive nothing beyond the limits of proper zoning objectives in a provision of the amendment restricting apartments to three rooms, a kitchen and a bath. This, as the judge ruled, is a size description which cannot be said, as a matter of law, to be unreasonable. If that provision has any effect upon the 'density of population' in, or the 'use' of, apartment buildings, those matters constitute appropriate consideration in the framing of zoning bylaw." Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 521 (1973).

¹⁴ Enos v. City of Brockton, 354 Mass. 278, 280-281 (1968), citing Norcross v. Board of Appeal of the Bldg. Dept. of Boston, 255 Mass. 177, 182.

3.0 Exemptions for Agricultural, Religious and Educational Uses

3.1 Exemptions for Agricultural Uses

General Laws Chapter 40A Section 3 provide broad, but somewhat confusing language establishing protection from local zoning for uses generally referred to as “agricultural”.¹⁵ It is important to note at the outset that whether a land use is entitled to the statutory protection of Section 3 does not turn on whether the use was commercial—involving retail sales-- or not. An agricultural use or activity that has no retail or wholesale distribution is nevertheless protected by Section 3. “All agriculture conducted for profit is commercial in some degree.”¹⁶

Confusion has centered on several areas of the statute; notably the definition of “agriculture” and the statute’s intent regarding “majority of such products” when referring to products raised on the property being regulated. These issues are discussed in detail below.

3.1.1. Definition of Agriculture¹⁷

Faced with whether the Town of Mansfield could lawfully exclude the raising and keeping of pigs within town boundaries, the Appeals Court concluded that the plain and ordinary meaning of the phrase “agriculture” included “piggeries”. “When a statute does

¹⁵ “...nor shall any such ordinance or bylaw prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August and September or every year during the harvest season of the primary crop raised on the land of the owner or lessee, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel.” G.L. c.40A s. 3

¹⁶ Cumberland Farms of Conn. Inc. v. Zoning Board of Appeals of North Attleborough, 359 Mass. 68, 74-75. See also Prime v. Zoning Board of Appeals of Norwell, 42 Mass.App.Ct. 796 (1997), “We reject the abutters’ first argument. Their suggestion is that a ‘retail’ operation is inconsistent with the agricultural use of the land and therefore not within s.3”. *Id.* at 800. See also Town of Natick v. Modern Continental Construction, 1998 WL 517698 (1998) where the Superior Court, quoting Cumberland and Prime noted, “The exemption operates even where the agricultural use in question is retail or commercial in nature.” *Id.* at 3.

¹⁷ Note that the statute refers to agriculture, horticulture, floriculture and viticulture. Only the phrase horticulture is further defined within the statute. “For the purpose of this section, the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.” G.L. c. 40A s. 3.

not define its words we give them their usual and accepted meanings, as long as those meanings are consistent with the statutory purpose.”¹⁸

The importance of the Court’s holding in the Mansfield¹⁹ case, coupled with a subsequent Appeals Court decision originating in Tisbury is that the Court’s definition of the Legislature’s intentionally un-defined phrase “agriculture” is very broad.²⁰

This broad interpretation requires that cities and towns seeking to regulate agricultural land uses and activities do so only within the narrow options provided by the statute.

These options include local regulations that help clarify, as discussed below, the meaning of the statutory requirement that the land be used primarily for agriculture, that the majority of the agricultural products be produced on the land subject to the zoning

¹⁸ Building Inspector of Mansfield v. Curvin, 22 Mass.App.Ct. 401, 402, citing Commonwealth v. Zone Book, Inc. 372 Mass 366, 369 (1977) and others. In an interesting concurring opinion however, Justice Cutter noted: “Thus I am less certain than the majority...that...the Legislature had in mind...to include in the term “agriculture” the keeping of swine...It may be that the legislative intention was to confine the regulation of piggeries to the prevention and prohibition of nuisances by local boards of health...rather than by zoning legislation. Mansfield, 22 Mass.App.Ct. at 406.

¹⁹ Tisbury v. Martha’s Vineyard Commission, 27 Mass.App.Ct. 1204 (1989).

²⁰ “The agricultural use exemption embodied in s.3 is interpreted broadly in order to promote the economic viability of agricultural enterprises in Massachusetts”. Minty v. Arena, 1998 WL 282964, 2 (1998), citing Tisbury v. Martha’s Vineyard Commission, 27 Mass.App.Ct. 1204 (1989). See also Town of Sturbridge v. McDowell, 35 Mass.App.Ct. 924 (1993) where the Appeals Court, faced with a challenge to the raising and boarding of dogs, wrote: “We fail to see how the raising and training of dogs for sale is distinguishable from the raising and training of other domestic animals such as ponies or horses which we concluded in Steege amounted to an agricultural pursuit. Consequently, we conclude that the breeding, raising and training of dogs owed by defendant on the land is an agricultural pursuit under G.L. c. 40A s. 3”. Id. at 926. Compare the holding in Sturbridge with a 1958 Supreme Judicial Court decision stating that the raising of greyhounds for racing purposes was outside of the statutory protection afforded by s.3. “Pigs are farm animals and raising them could much more reasonably be regarded as farming than the maintenance of dogs intended for use solely for commercial racing connected with a pari-mutuel (sic) system of wagering rather than with any agricultural pursuit.” Mioduszewski v. Town of Saugus, 337 Mass. 140, 144 (1958) citing several cases from other jurisdictions. See also Modern Continental Construction v. Building Inspector of Natick, 42 Mass.App.Ct. 901 (1997) where the Court upheld the use of land for the slaughtering of livestock as consistent with agricultural activities. “We think it reasonable to regard the slaughter of animals as a normal and customary part of preparing them for market. It then follows from the acceptably broad definitions of the word ‘agriculture’ that a slaughterhouse used for the butchery of animals raised on the premises is primarily agricultural in purpose.” Id. at 902. See also Deutschmann v. Board of Appeals of Canton, 325 Mass. 297 (1950), “The fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them...We do not believe that one who on his premises processes milk and cream from cows on his premises thereby ceases to be a farmer, selling on his farm products they raise”. Id. at 301, cited in Minty, 1998 WL 282964, 2.

regulation and that the parcel being regulated is less than five acres and is not zoned for agricultural use.

To obtain protection from the statute, the land in question must: (1) be used primarily for agriculture, (2) the majority of the products sold (if any) must have been produced by the owner or lessee and (3) the parcel of land must either be greater than five acres or zoned for agricultural uses. These three criteria are discussed more fully below.

3.1.2. “Primarily for Agriculture”

The statutory protection afforded to agricultural activities under Section 3 is limited in several ways, including the requirement that the land be used for the “primary purpose of agriculture, horticulture, floriculture or viticulture”. At issue is the limiting phrase, “primary purpose”. The “primary purpose” limitation is distinguishable from the “majority of such products” and “five acre requirement” discussed in Sections 3.1.3. and 3.1.4, below.

The statute precludes local prohibition of agricultural use where the parcel is greater than five acres or in an area zoned agriculture if, the primary—principle—use of the land is agricultural.

“Section 3 does not include a definition of the word “primary” in the context of the use of land, and thus we give the word its usual and accepted meaning from ‘other legal contexts and dictionary definitions... Contrast the use of the word ‘incidental’ in the zoning context: “not...the primary use of the property but rather one which is subordinate and minor in significance.”²¹

The above-noted comments provide a recent and consistent example of the Courts’ differentiation between “primary” and “accessory” or “incidental” as these phrases relate to agricultural land use.

The distinction is important. If the use of the land is primarily for agricultural purposes, and the other relevant criteria are met, local zoning cannot “unreasonably regulate or require a special permit” for its use.²²

²¹ Town of Eastham v. Clancy, 44 Mass.App.Ct. 901, 902 (1997) citing Building Inspector of Mansfield v. Curvin, 22 Mass.App.Ct. 401, 402 (1986).

²² Note that cities and towns may require a special permit for structures associated with a protected agricultural use(s). Citing Cumberland Farms of Conn., Inc. v. Zoning Board of Appeals of North Attleborough, 359 Mass. 68 (1971), the Appeals Court held in Prime v. Zoning Board of Appeals of Norwell, 42 Mass.App.Ct. 796 (1997), that a special permit may be required for structures that are associated with agricultural uses, unless the requirement is a “sham”. “In other words, the application of the bylaw [may not] nullify a protected use.” *Id.* at 802 citing Trustees of Tufts College v. Medford, 415 Mass. 753, 763 (1993). “Local regulation of a new structure must take into account the factors mentioned in Cumberland (The court stated that the local regulation ‘must bear a reasonably direct relation to significant considerations of public health...’). *Id.* at 802, citing Cumberland, 359 Mass. at 75. Finally, and as discussed throughout this Module, note the court’s admonition regarding the use of special permits for otherwise

If the use of the land is not primarily for agricultural purposes, the ordinance or bylaw may regulate the use, either through special permit criteria and constraints or outright prohibition.

A problem arises, however, where a landowner is engaging in a protected activity (e.g. cultivating cranberries) and an accessory activity at the same time (e.g. gravel extraction). At issue is whether the accessory activity, perhaps related to the protected activity, is likewise protected by statute.

Resolution of this commonly occurring issue generally turns on the matter of degree. “Uses which are ‘incidental’ to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning bylaw.”^{23*}

The distinction between “primary” and “incidental” is further amplified—and clarified—by the Court’s “50 Percent Rule” discussed below.

3.1.3. “Majority of Such Products”: The 50 Percent Rule

The agriculture statutory exemption provides protection for two types of agricultural activities. First, as discussed above, protection is given to a broad range of agricultural land uses, regardless of the final destination point of the crops or end product of the activity. The statute protects the activity—the process – of growing crops, raising animals and other agricultural processes.

The second type of activity protected by statute, and the more commonly challenged use, is the sale of products claimed to be agricultural and thus exempt from unreasonable regulation and the requirement of obtaining a special permit.

The reach of this protection is extremely broad and in many cases, a significant problem for local communities. The reasons are simple. Those activities protected by Section 3 become those land uses a city or town can not prohibit or be forced to go through the special permit process, except as clarified by Prime, above. For example, the sale of

protected activities. “But the special permit may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the board would prefer a different use of the locus, or no use.” *Id.* at 802-803.

²³ Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 844 (1994). “The word incidental in zoning bylaws or ordinances incorporates two concepts: ‘It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance... But incidental’ when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use is subordinate; it must also be attendant or concomitant. *To ignore this latter aspect of ‘incidental’ would be to permit any use which is not primary, no matter how unrelated it is to the primary use.*” *Id.* at 845. (emphasis added).

* (inserted by DHCD 8/29/02) Town of Rowley v. Kovalchuk, 434 Mass. 1006 (2001). Based on the undisputed facts, the court found that the operation of a sawmill was not lawful as incident to a permitted agricultural use.

agricultural products grown on the property via the traditional “farm stand” is clearly protected. At issue though is the sale of dairy products not grown or raised on the farm. At what point does the “farm stand” become a “convenience store” typically not allowed in agricultural or residential zoning districts?

The answer to this commonly asked question has been phrased by the Courts as the “50 percent rule”. “...just because the locus is subject to an agricultural use exemption does not mean every facility or activity on that locus also may benefit from the exemption.”²⁴

The statute and case law are clear. To achieve the protective benefits of Section 3, at least half of the products sold on the locus must be or have been produced by the owner of the land on the land in question.²⁵ In other words, protection is not afforded to a landowner who “imports” more than fifty percent of the products for sale.²⁶

3.1.4. Parcels Less than Five Acres

“The obvious purpose of the Act...is to promote agricultural use within all zoning districts in a municipality. *Such use may not be prohibited or unduly restricted even in an area not specifically zoned for the purpose as long as the parcel being used is one of more than five acres.*”²⁷ (emphasis added).

Stated simply, a property owner with greater than five acres of land who uses her property for agricultural purposes, in keeping with the discussion above, benefits from the protections of the statute regardless of the land’s zoning designation.²⁸

²⁴ Minty v. Arena, 1998 WL 282964, 4 (Mass.Super. 1998).

²⁵ In Town of Eastham v. Clancy, the Appeals Court upheld a lower court denial of Section 3 protection to a farm stand used for the sale of produce where only one-third of the landowner’s 5.5 acres were used for agricultural production. “While Barnes did testify as to which vegetables and fruits were grown on the premises and which were bought elsewhere to be sold, we agree with the trial judge that he did not sustain his burden of proof that a majority of products for sale were produced by him.” Id. at 902. But see Steege v. Board of Appeals of Stow, 26 Mass.App.Ct. 970 (1988) where the Court wrote: “the plaintiffs purchase and raising of horses, their stabling, training through the operation of the riding school, and their participation in horse shows are all part of the one whole and constitute agriculture as that phrase is used in c. 40A s.3.” Id. at 972.

²⁶ Note the Legislature’s response in 1994 to the obvious problem encountered with the raising of trees, plants and other nursery items. “Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.” G.L. c.40A s.3.

²⁷ Building Inspector of Mansfield v. Curvin, 22 Mass.App.Ct. 401, 402-403 (1986).

²⁸ Although beyond the scope of this Module, the reader should be aware that local governments have means, other than zoning, to regulate against the sometimes-negative impacts associated with agricultural land uses. These techniques include health regulations under G.L. c.111 s. 31 and others. But note, as discussed in the introduction to this Module, local governments are pre-empted from certain activities, including those involving certain regulation of pesticides, fertilizers and herbicides. Advice from counsel should be obtained prior to developing regulations in these areas. See for example, Town of Wendell v. Attorney General, 394 Mass. 518 (1985).

3.2 Exemptions for Religious Uses and Educational Uses

It is important to note at the outset that Massachusetts's courts have consistently granted great deference to interpretations of the Legislature's exemption from local zoning for religious and educational uses. "...we do not believe it irrational for the Legislature to determine that educational and religious institutions, because of their unique locational requirements and because of their importance to society generally, may be exempted from the application of zoning laws... We deem it significant that courts of other jurisdictions have reached the same conclusion even in the absence of a statutory basis therefore."²⁹

The statutory basis found within Section 3 and reprinted below³⁰ is referred to as the "Dover Amendment". The Dover Amendment was adopted in 1950 in response to the Town of Dover's regulation of educational land uses; regulations that were ruled invalid by the Supreme Judicial Court in 1951.³¹ Although revised several times, the intent of the Dover Amendment remains unchanged: local zoning is limited in its ability to control or otherwise regulate the use of land for religious and/or educational purposes. * "Section 3 codifies the case law interpreting its statutory predecessor, the so-called Dover amendment... The amendment insures that a municipality will not express 'preferences as to what kind of...religious denominations it will welcome."³²

Relative to other sections of the Zoning Act, the exemption provisions for religious and educational uses are straightforward. Case law reflects two general concerns regarding religious and educational use exemptions. First, what defines a "religious or educational purpose"? Second, how far can local zoning controls go in their "reasonable regulations" before these regulations are tantamount to an outright, and unlawful, use prohibition?

²⁹ Sisters of the Holy Cross of Massachusetts v. Town of Brookline, 347 Mass. 486, 496, (1964), referencing case decisions from New York, Texas, Ohio and Missouri.

³⁰ G.L. c. 40A Section 3 reads, in part: "No zoning ordinance or bylaw shall regulate or restrict...the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or its agencies, subdivisions or bodies politic or by a religious sect or denomination or by a nonprofit educational corporation; provided however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."

³¹ Attorney General v. Dover, 327 Mass. 601 (1951).

* (inserted by DHCD 9/29/02). Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ and Latter-Day Saints, 434 Mass. 141 (2001). In determining the use of a structure for religious purpose, the court found that a Superior Court judge erred in deciding that the Dover Amendment was not applicable when he erroneously considered the religious purpose of a steeple rather than the religious purpose of the temple as a whole. To view each section of a structure and require an independent religious use leads to impossible results. "Is a church kitchen or church parking lot a religious use? We have not formulated the test so narrowly."

³² Southern New England Conference Association of Seventh Day Adventists v. Town of Burlington, 21 Mass.App.Ct. 701, 705-706 (1986).

3.2.1 Definition of Religious and Educational Use

The protections afforded religious and educational uses derive from the Court's broad definition of what constitutes these activities.³³

Exemptions from local zoning have been applied to religious and educational programs where the students were adults³⁴, where the institution furnished residential housing³⁵ and where the students were considered "emotionally disturbed"³⁶.

It is important to note that not all claims of religious or educational use obtain the statutory or judicial protection.

In Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham³⁷, the Appeals Court denied zoning protection where a nonprofit counseling agency sought to offer counseling services within a church. "The activity concerned is not an enterprise of the landlord church and is not designed primarily for the parishioners of that church. Specific religious doctrine is subordinated..."³⁸

³³ See for example, Mount Hermon Boys' School v. Gill, 145 Mass. 139 (1887). "...the process of developing and training the powers and capabilities of human beings...Education may be particularly directed to either the mental, moral or physical powers and faculties, but in its broadest and best sense it relates to them all." *Id.* at 146. See also Fitchburg Housing Authority v. Board of Appeals of Fitchburg, 380 Mass. 869 (1980), "This court has long recognized 'education' as 'a broad and comprehensive term.' *Id.* at 875 citing Mount Hermon, above. Not surprisingly, the Courts have had a more difficult time defining "religious" activities. "It is all very heady business and defies precision, but we emerge with the understanding that what is religious requires a system of belief, concerning more than the earthly and temporal, to which the adherent is faithful. Fortunately, the subject at hand is land use, not philosophy, and, in the more prosaic context of the former, the puzzle begins to unravel." Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham, 29 Mass. App.Ct. 31, 34 (1990).

³⁴ See, Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg, 380 Mass. 869 (1980). "The proposed facility would fulfill a significant educational goal in preparing its residents to live by themselves...Inculcating a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational purpose. *Id.* at 875.

³⁵ See, President and Fellows of Harvard College v. Assessors of Cambridge, 175 Mass. 145 (1900) and The Bible Speaks v. Board of Appeals of Lenox, 8 Mass.App.Ct. 19, 31 (1979), citing Radcliffe College v. Cambridge, 350 Mass. 613, 618 (1966), "...holding that parking and the feeding and housing of college personnel is 'within the broad scope of the educational powers...".

³⁶ See, Harbor Schools, Inc. v. Board of Appeals of Haverhill, 5 Mass.App.Ct. 600 (1977). At issue in Harbor Schools was whether a dwelling used for the treatment and care of emotionally disturbed children qualified for protections from local zoning under the predecessor to Section 3. "But 'education' and 'rehabilitation' do not denote functions so distinct that the master could be required to quantify them relative to each other. They are not mutually exclusive." *Id.* at 604.

³⁷ 29 Mass.App.Ct. 31 (1990).

³⁸ Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham, 29 Mass. App.Ct. 31, 37 (1990).

In Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, the Appeals Court withheld a decision on whether the use of a radio station ostensibly for religious broadcasting was entitled to Section 3 protection. Relying on an earlier decision regarding a purported educational exemption³⁹, the Court concluded that the claimant for the exemption must demonstrate that religious or educational content will be conveyed. “For all that appears in the record...the plaintiff’s intended use of the radio station is to provide a listening audience with programs which the plaintiff perceives to be of greater intellectual and inspirational value than those currently available. Although that purpose is laudable, it is neither religious nor educational...”⁴⁰

As the discussion above points out, the definition of religious and educational activities entitled to statutory protection are broad, but not complete. The next logical question, assuming that the activity is entitled to protection, is the extent to which local zoning can alter or otherwise regulate the eventual development footprint of the protected activity.

3.2.2 To What Extent Can the Protected Activity Be Regulated?

Simply put, local zoning can regulate and restrict religious and educational uses provided that these regulations do not result in the de facto prohibition of the use. For example, a zoning ordinance that restricts churches, synagogues or schools to impervious lot coverage of 5% would likely be invalidated. Similarly, a zoning bylaw that limited the maximum building height of churches, synagogues or schools to thirty feet would be ruled in conflict with the spirit and intent of Section 3. The problem in both scenarios is the result: neither a religious or educational institution can be reasonably constructed with a lot coverage of only 5% or a building height of thirty feet. “But the town may not, though the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to ‘nullify’ the use exemption permitted to an educational institution.”⁴¹

³⁹ “Merely an ‘element of education’, however, provided not by a formal program or trained professionals, but only informally gleaned from the interplay among residents of the nursing home community, is not within the meaning of ‘educational purpose’ pursuant to G.L. c. 40A s.3.” Whitinsville Retirement Society, Inc. v. Town of Northbridge, 394 Mass. 757, 761 (1985).

⁴⁰ Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, 22 Mass. App.Ct. 83, 89 (1986).

⁴¹ See, The Bible Speaks v. Board of Appeals of Lenox, 8 Mass.App.Ct. 19, 31 (1979). See also Sisters of the Holy Cross of Massachusetts v. Town of Brookline, 347 Mass. 486 (1964), “We think it unlikely that the Legislature would exempt religious and educational institutions from local regulations of use and at the same time permit this exemption to be virtually nullified by a requirement that such institutions construct their buildings on dimensions applicable to single family houses... We think that this bylaw as applied to Holy Cross, ‘limits the use’ of the land and therefore we think such application invalid...” Id. at 494. But compare the holdings above with the Supreme Judicial Court’s holding in Radcliffe College v. City of Cambridge, 350 Mass. 613 (1966) where the Court upheld “reasonable” off-street parking requirements for a protected educational activity. “Hence, a regulation that requires that some of the college land be used for parking does not lessen the availability of all or any of the institution’s land for some appropriate educational purpose. We think the statute does not bar such regulation. Plainly the statute does not do so in express terms. At most, the Cambridge ordinance requires choices among proper educational purposes of the institution.” Id. at 618.

Finally, the Appeals Court settled in 1979, the fact that a special permit cannot be required for religious or educational uses or development related activities⁴². While bulk, dimensional and parking regulations may be regulated; they may not be made subject to a special permit. This point is important for those cities and towns that have established site plan review procedures that require a special permit under certain circumstances.⁴³ Application of these requirements to educational and religious uses violates Section 3.

4.0 Exemptions for Governmental Uses

A detailed review of governmental immunity from zoning regulations is beyond the scope of this Module. However a quick summary should prove helpful.

First, absent a waiver of immunity, the federal government is immune from municipal zoning regulations (as well as many analogous state regulations). “The Supremacy Clause establishes federal law as the supreme law of the land...’A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.”⁴⁴

Second, absent a waiver of immunity, the state government is immune from local zoning ordinances or bylaws. “As a general proposition, the State and State instrumentalities are immune from municipal zoning regulations, unless a statute expressly provides the contrary.”⁴⁵

⁴² “Any such restrictions imposed under the authority of the bylaw may well have the effect of nullifying, or seriously diminishing the educational institutions entitlement to reasonable growth. It also, as a practical matter, enables the town to exercise its preferences as to what kind of educational or religious denominations it will welcome...In our opinion, the provisions of the bylaw taken together invest the board with a considerable measure of discretionary authority over an educational institution’s use of it facilities and create a scheme of land use regulation for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by G.L. c.40A s. 3...The Legislature did not intend to impose special permit requirements, designed under c. 40A, s9 to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone. The Bible Speaks v. Board of Appeals of Lenox, 8 Mass.App.Ct. 19, 33 (1979).

⁴³ For example, some municipalities require a site plan review special permit for uses that require more than a specified number of parking spaces (e.g. greater than 10).

⁴⁴ United States of America v. Alaska Public Utilities Commission, 23 F.3d 257, 260-261 (1994) citing Mayo v. United States, 319 U.S. 441, 445 (1943).

⁴⁵ Inspector of Buildings of Salem v. Salem State College, 28 Mass. App.Ct. 92, 95 (1989). Note that this immunity includes the state, its instrumentality’s and its agencies. For example, in an action against the Bristol County Commissioners regarding the construction of a new jail in Dartmouth, the Supreme Judicial Court held that county governments are immune from local zoning. “...an entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations (absent statutory provisions to the contrary) at least insofar as that entity or agency is performing an essential government function. Like the Massachusetts Turnpike Authority...counties also are “organized by the General Court for the convenient

For example, in Freetown v. Zoning Board of Appeals of Dartmouth, the Appeals Court was faced with a challenge to a regional landfill, authorized by statute to provide landfill services to several communities in southeastern Massachusetts⁴⁶

At issue was whether the Town could deny approval of the landfill, claiming that provisions of the Zoning Act authorize review and imposition of conditions on solid waste facility construction at the local level⁴⁷. Despite the clear language in the Zoning Act authorizing such review, the Court wrote: “Case law extending from Teasdale v. Newell & Snowling Construction Co. 192 Mass. 440 (1906) to Inspector of Buildings of Salem v. Salem State College, 28 Mass. App.Ct. 92 (1989) ‘assert the supremacy of the State over local land use regulations in connection with State construction projects, unless the Legislature has made express provision to the contrary.’”⁴⁸

Third, local governments are not immune from their own zoning⁴⁹, unless, of course, city council or town meeting chooses to exempt the respective government from compliance.⁵⁰

administration of some parts of government. They are bodies politic and corporate. They exist solely for the public welfare.” County Commissioners of Bristol v. Conservation Commission of Dartmouth, 380 Mass. 706, 710-711 (1980).

Finally, in a decision consistent with the discussion above, the Supreme Judicial Court held that the Martha’s Vineyard and Nantucket Steamship Authority was exempt from the Bourne zoning bylaw insofar as the bylaw would preclude the use of real property for commuter (e.g. ferry) parking. “There is no question that the Legislature has entrusted exclusive management of the boat line to the Authority...As a consequence, the Authority can lawfully execute the lease in issue without complying with requirements of the Bourne zoning bylaw.” Town of Bourne v. Plante, 429 Mass. 329, 334 (1999). The Court went to great lengths explaining the Authority’s need for the “off-site” parking, including the well-publicized fact that during the July 4th weekend in 1995, traffic in Woods Hole, and Falmouth in general, created extremely dangerous vehicular and pedestrian conditions. The Court’s analysis implies that the Authority’s need for the extra parking was an emergency situation (although it is not clear whether their holding would differ if exigent circumstances did not exist). Absent from the Court’s analysis, unfortunately, was the fact that the Authority exacerbated a decades old traffic problem in the summer by allowing ferry passengers to travel standby, and thus encouraged travelers to queue along Falmouth’s roadways, on the July 4th weekend. Note again, all state agencies and state instrumentalities are exempt from local zoning requirements and prohibitions.

⁴⁶ New Bedford, Acushnet, Dartmouth and Fairhaven.

⁴⁷ See G.L. c.40A s. 9.

⁴⁸ Town of Freetown v. Zoning Board of Appeals of Dartmouth, 33 Mass.App.Ct. 415, 419 (1992).

⁴⁹ “... the town was bound to comply with any general provision of its zoning bylaw applicable to it...”. Pierce v. Wellesley, 336 Mass. 517 (1957)

⁵⁰ For example, in Rose v. Commissioner of Public Health, the Supreme Judicial Court held as valid a Northampton ordinance that exempted the city from compliance with certain requirements pertaining to new landfills. 361 Mass. 625 (1972). “It more closely resembles Pierce v. Wellesley, 336 Mass. 517 (1957) where the town was permitted by its zoning bylaw to maintain parking lots in residence areas and it was held that ‘the town reserved to itself...the privilege of carrying on town functions in any zone in the town.’” Id. at 631.

5.0 Exemptions for Public Service Uses

The public service preemption in Section 3 is broad⁵¹ and has been the subject of many appellate cases since its inclusion in the statute in 1952. The preemption grants authority to the state to determine which services and service providers are offering a “necessity or convenience” that the public could not otherwise readily obtain.⁵²

The Courts have broadly interpreted the definition of which entities qualify for the Section 3 preemption.⁵³ Past cases included determinations that the preemption for public service utilities differs in a significant respect from the preemptions discussed throughout this Module. This preemption is only triggered if the department of telecommunications and energy (DTE) determines that certain aspects or provisions of local zoning impede the development of the public service utility⁵⁴. When such a determination is made, the DTE must then conclude that the public would not be injured if the zoning regulation(s) were set aside.⁵⁵

In other words, local zoning can only be set aside if the DTE concludes that “but for” the local regulations the public service utility could proceed, and proceeding would not injure public health or safety.

⁵¹ “Lands or structures uses, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and energy shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public...”. G.L. c.40A s.3.

⁵² See for example, Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975).

⁵³ “... ‘public service corporation’ is a term of art which is not limited to corporations...The zoning exemption available under G.L. c. 40A s. 3 is intended to assure utilities ability to carry out their obligation to serve the public when this duty conflicts with local interests... This concern for public service applies to all utilities, not just those operated by corporations.” Planning Board of Braintree v. Department of Public Utilities, 420 Mass. 22, 26-27(1995).

⁵⁴ “The department has the power to exempt land or structures in all respects. The exemption is based on the fact that the use is ‘reasonably necessary for the convenience or welfare of the public.’...The department can exempt specified uses of specified property from by-laws and ordinances to the extent applicable...” Id. at 29.

⁵⁵ “The issue before us is whether the proposed use is reasonably necessary for the convenience or welfare of the public....We may not ignore the fact that...Framingham has zoned the locus as a general residence district, and an exemption should be granted only on the basis of a preponderance of evidence that the public convenience or welfare would be better served if the zoning by-law were not enforced...”. New York Central Railroad Company v. Department of Public Utilities, 347 Mass. 586, 590 (1964).

6.0 Exemptions for Child Care Facilities and Family Day Care Homes

The Section 3 protections afforded family day care homes and child care facilities differ. And note that the only statutory distinction between the two types of facilities is one of size.⁵⁶ Nevertheless, the statutory protections afforded the two uses are very different.

A *family day care home* is protected as a permitted use, unless prohibited or otherwise regulated (e.g. by special permit).⁵⁷

The protections afforded *child care facilities* by Section 3 are broader. The statute states that no special permits may be required and no prohibitions may be enforced regarding the use of land or structures for the primary, accessory or incidental purposes of operating a child care facility.⁵⁸ While cities and towns are allowed to establish dimensional standards, such as bulk, lot coverage, parking requirements, height and setbacks, these standards must be “reasonable”. The “reasonable” test, as established by Tufts (discussed in Section 1.0), requires a careful balancing of the municipality’s goals with the protections afforded by Section 3.

This test is appropriate in analyzing the reasonableness of zoning regulations imposed on child care facilities. See Rogers v. Town of Norfolk, 432 Mass. 374 (2000). [Inserted by DHCD, September 15, 2000].

But as noted below, the Courts will be suspicious of regulations that impede child care facilities.

⁵⁶ G.L. c.28A, s.9 defines a “family day care home” as “any private residence which on a regular basis, receives for temporary custody and care... children under seven years of age or children under sixteen years of age...provided, however, in either case, that the total number of children under sixteen ...shall not exceed six.” A “child care facility” includes a “day care center” or a “school age child care program”. There are no enrollment limitations set by statute for these uses for the purposes of Section 3.

⁵⁷ “Family day care home, as defined in section nine of chapter twenty eight A, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinance or bylaw.” G.L. c.40A s3.

⁵⁸ In an interesting 1998 decision, the Land Court analogized the Appeals Court’s holding in Prime v. Zoning Board of Appeals of Norwell, 42 Mass.App.Ct. 796 (1997) (discussed in Section 3.0, above) to child care facilities. The Court stated that the requirement of a special permit for a child care facility could be within the municipality’s power, provided that the special permit requirement and attached conditions did not result in a preclusion of the protected use. “...I conclude that a zoning bylaw may require a special permit for the construction of a new structure to be used as a child care facility just as, under Prime, it may require a special permit for the construction of a new structure to be used for agricultural purposes. However, as in Prime, ‘the special permit may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the Board would prefer a different use of the locus, or no use.’” Campbell v. Town of Weymouth, Misc. Case No. 237269 (September 23, 1998), quoting Prime, 42 Mass.App.Ct. at 802-803.

In applying the principles from Tufts, the Appeals Court determined, for example, that local zoning requirements that would have forced the relocation of an historic barn, that was to be used as a child care facility, violated the intent of Section 3.

“All of that compliance work not only would destroy the barn’s unique Italianate cupola and Palladian window, but also would adversely change the massing of the structure, disturb the sense of the building’s continuity, and ruin both its historical character and architectural integrity....In light of this evidence, the judge determined that imposition of the town’s dimensional requirements on the project would levy excessive costs of compliance... and effectively deny the use of the premises for a child care facility...”⁵⁹

Section 9C of the Zoning Act provides interesting language pertaining to child care facilities and imposes limits on the extent that a zoning ordinance or bylaw can regulate these facilities as an accessory use.⁶⁰ General Laws, Chapter 40A, Section 9 should be read in conjunction with Section 3.

7.0 Exemptions for Hazardous Waste, Refuse Treatment and Disposal Facilities

The preemption for hazardous waste, refuse treatment and disposal facilities is not contained with Section 3, but rather within Section 9 of the Zoning Act.⁶¹ While Section 9 identifies preemptions for “hazardous waste facility” independently from “a facility” (read: solid waste facility), the preemptions are similar and limited case law regarding either “facility” exists.

⁵⁹ Petrucci v. Board of Appeals of Westwood, 45 Mass.App.Ct. 818, 827 (1998), cert. denied, 707 N.E. 2d 1079 (1999).

⁶⁰ “When any zoning ordinance or bylaw in any city or town limits the floor of any structure, such floor area shall be measured exclusive of any portion of such structure in which a child care facility is to be operated as an accessory or incidental use, and the otherwise allowable floor area of such structure shall be increased by an amount equal to the floor area of such child care facility up to a maximum increase of ten per cent.” No case law exists interpreting this clause. It appears to allow, for accessory day care uses only, an exclusion of up to 10 percent above the maximum floor area established by local zoning.

⁶¹ The preemption for hazardous waste facilities reads in part: “A hazardous waste facility as defined in section two of chapter twenty-one D shall be permitted to be constructed as of right on any locus presently zoned for industrial use pursuant to the ordinances and bylaws of any city or town provided that all permits and licenses required by law have been issued to the developer and a siting agreement has been established...following the submission of a notice of intent...a city or town may not adopt any zoning change which would exclude the facility from the locus specified in the notice of intent.” The preemption for solid waste facilities reads, in part, “A facility, as defined in section one hundred and fifty A of chapter one hundred and eleven, which has received a site assignment...shall be permitted to be constructed or expanded on any locus zoned for industrial use unless specifically prohibited by the ordinances or bylaws of the city or town...” G.L. c.40A s.9.

These preemptions are extremely broad in their application, but are clearly limited to lands zoned for industrial use.⁶²

Hazardous waste facilities can take advantage of the preemption only insofar as the land is zoned industrial or used in a manner that could otherwise be categorized as industrially used. Further, the preemption only applies where the applicant files a "notice of intent" and all other statutory requirements have been met.⁶³

For solid waste (refuse) facilities, the preemption applies *only* to those facilities that require a site assignment from the local Board of Health.⁶⁴

Put a different way, a facility that does not require site assignment is ineligible for the protections afforded by Section 9 and local zoning regulations, including use prohibitions, will control. The types of facilities that require a site assignment are somewhat counterintuitive. For example, a hazardous waste facility, as discussed above, does not require a site assignment. Nor do most industrial or manufacturing operations.⁶⁵ To repeat, if a site assignment is not required, the preemption of Section 9 does not apply.

For facilities that require a site assignment, Section 9 precludes the adoption of an ordinance or bylaw that prohibits such facility, or the expansion of an existing facility, unless the prohibition or other restriction was in effect as of July 1, 1987.

Note, however, that Section 9 allows the imposition of special permit controls on a facility requiring a site assignment. Consistent with previous discussions regarding

⁶² In the most comprehensive case on this issue to date, the Supreme Judicial Court held that "zoned for industrial use" is to be liberally interpreted. Thus a municipality that seeks to avoid the preemption of Section 9 could not do so, for example, by labeling what would otherwise be classified as "industrial use" as "heavy commercial". At issue of course is the distinction between "industrial" and "commercial" as it relates to this preemption. "We construe the words 'zoned for industrial use' as referring to land on which industrial uses are permitted, because they are not prohibited, by the town's bylaws. We hold, therefore, that the town's by-law...which would exclude from the town any hazardous waste facility that would store, treat or dispose of wastes generated outside the town is inconsistent with G.L. c.40A s9 and is, therefore, unenforceable. Warren v. The Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 122 (1984).

⁶³ These include compliance with G.L. c.21 D, 990 CMR s1.00-16.00 and G.L. c. 111 s.150B. "The filing of the notice of intent and the site specification had the effect of establishing the right of IT Corporation to build and operate the proposed facility if the other statutory requirements are met...To the extent that the town's powers have been affected by reasons of the action of IT Corporation, that is the result of a determination by the Legislature that the siting procedure be initiated by the developer's act." Warren v. The Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 123 (1984).

⁶⁴ G.L. c.111, s150A and 310 CMR s16.20 (12) establish the standards for site assignment approval.

⁶⁵ For a complete list of those facilities and uses that require a site assignment, see 310 CMR 16.05. "310 CMR 16.00 shall govern the process of application, review, public hearing and decision for a site assignment to expand a solid waste management facility or establish a new solid waste management facility at an unassigned site." 310 CMR 16.05 (1).

“reasonable regulations”, these controls can be used to mitigate potential impacts, but they cannot be tantamount to prohibiting the use allowed under an approved site assignment.

Finally, the Section 9 preemption does not apply to lands identified as “zones of contribution of existing or potential public supply wells” or “recharge areas of surface drinking water supplies.”⁶⁶ This fact provides a strong inducement for cities and towns to ensure that these resource areas, whether in current use or for future use, are delineated in compliance with procedures established by the Department of Environmental Protection.

8.0 Exemptions for Scientific Research Facilities

There is no case law clarifying the purpose or intent of this portion of Section 9⁶⁷. The point of this clause is to ensure that cities and towns allow, either by right or by special permit, uses that are accessory to scientific research or scientific development, whether or not the principle use is on the same parcel. The statute clearly provides local governments with options.

First, zoning could allow by right, accessory uses for scientific development or research provided the accessory use is on the same parcel as the principle use or activity⁶⁸.

In the alternative, and following the provisions of this portion of Section 9, zoning must allow by special permit an accessory use for scientific development or research on a *different* parcel than the principle use, provided that the “activities are necessary in connection with scientific research or scientific development” *if* the principle use is “permitted as a matter of right”.

It is important to consider what scientific research or scientific development uses are generally permitted as of right. Clearly, as discussed in Section 3.0 of this Module, Section 3 precludes the imposition of special permit requirements on educational and religious institutions⁶⁹. Thus for example, the Marine Biological Laboratory in Woods

⁶⁶ G.L. c.40A s.9. The reference to “recharge areas of surface drinking water supplies” likely refers to the watershed of the surface water body.

⁶⁷ “Zoning ordinances or bylaws shall also provide that uses, whether or not on the same parcel as activities permitted as a matter of right, accessory to activities permitted as a matter of right, which activities are necessary in connection with scientific research or scientific development or related production, may be permitted upon the issuance of a special permit provided the granting authority finds that the proposed accessory use does not substantially derogate from the public good.” G.L. c.40A s.9.

⁶⁸ In most instances where uses are allowed only by special permit, it is the principle use so constrained. Accessory uses are typically allowed by right.

⁶⁹ As noted previously, special permits are not permissibly imposed upon religious or educational uses, “The Legislature did not intend to impose special permit requirements, designed under c.40A, s9 to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.” *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 33 (1979).

Hole, or the University of Massachusetts in Amherst or Tufts University in Medford could qualify for the scientific research protections afforded by Section 9. Similarly, hospitals, veterinary clinics and other institutions classified as educational or religious conducting scientific research qualify for this narrow exemption.

Note also that the special permit granting authority must find that the accessory use “does not substantially derogate from the public good.” This language is in addition to Section 9’s more comprehensive requirement that “special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or bylaw”. At issue is whether the special permit must meet the lesser “does not substantially derogate” test, or the greater “in harmony” test. Conservative advice is to follow the lesser standards set by the language “does not substantially derogate from the public good”, although as noted, no case law exists helping clarify this issue.

9.0 Exemptions for Amateur Radio Operators and the Telecommunications Act

While the 1996 Telecommunications Act has caused a significant stir among local governments throughout the state (and nation), the pre-emption clause included within Section 3 is targeted solely at “federally licensed amateur radio operators”. While there are few cases on point regarding amateur radio operators, there is likely to be many in the next several years regarding the Telecommunications Act. A discussion of both follows.

The Section 3 exemption regarding amateur radio operators is confusing. Unfortunately, there are no reported decisions since this exemption was codified by the Legislature in 1995.

On one hand, and consistent with language governing other topics in this Module where case law does exist, the statute allows limited local regulation of radio towers used for amateur radio operations. For example, while a zoning ordinance cannot prohibit the construction or use of an antenna structure for an amateur radio operator, the ordinance may regulate the antenna’s height and/or location. (As discussed below, this is consistent with interpretations of the Telecommunications Act.)

On the other hand, however, is the statute’s concluding phrase that the regulation be the “minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or bylaw.” The problem, of course, is whether limiting radio towers to specified districts and within those districts, limiting towers to specified heights, complies with the spirit and intent of the statute. A quick answer is “yes”, but it is accompanied by the same warnings that have been discussed previously.

A reviewing court is likely to rule invalid any regulation that purports to allow a use but in practice, amounts to a de facto prohibition. For example, an ordinance that allows radio towers in specified districts, but limits those towers to 25 feet, will likely be ruled in conflict with the Section 3 pre-emptions. At best, the reviewing court would require the municipality to demonstrate how such a height limitation was the minimum practicable

regulation necessary to accomplish local planning goals. At worst, the reviewing court would see the height limitation as a crude way of avoiding the protection afforded by Section 3 and strike down the ordinance and its application.

In a case that pre-ceded the preemption language within Section 3, the Appeals Court ruled that Federal law did not preempt local regulation of radio towers⁷⁰. Interestingly, such regulation is similarly not pre-empted under the new Telecommunications Act.

The Telecommunications Act of 1996⁷¹ was designed to “accelerate private sector deployment of new telecommunications technologies”.⁷² In less formal language, the Act was intended to allow for unimpeded mobile telecommunications (e.g. mobile telephones) on a national level. Despite local concerns to the contrary, the Act does not prohibit local regulation of telecommunication towers. While local governments may not prohibit, either directly or indirectly telecommunication towers, the Act allows significant latitude in local government planning and regulation of telecommunication towers and related devices^{73*}.

This fact, read in conjunction with the previous discussion regarding Section 3, in general, provides broad opportunities to local governments to develop a plan for the most appropriate locations for telecommunications towers and their accessories⁷⁴. Neither Section 3 nor the Telecommunications Act preclude local regulations governing where

⁷⁰ In Sleeper v. Old King’s Highway Regional Historic District Commission 11 Mass.App.Ct. 571 (1981), the Appeals Court held that the Regional Historic District Commission’s (Cape Cod) denial of a 68-foot amateur radio tower based on aesthetic concerns was a legitimate action, and that the tower was not protected by federal or state law. “Although the Federal Communications Act of 1934...preempts “local regulation of radio transmission...it does not purport to regulate the manner in which physical structures involved in radio transmission have an impact upon local land use considerations. The regulation, for example, of antenna height is a matter of local concern, not national interest.” Id. 575.

⁷¹ For an excellent summary of the Act, see “Update on the 1996 Telecommunications Act: Personal Wireless Services”, in *Law Use Law& Zoning Digest*, April 1998.

⁷² Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 487 (1999).

⁷³ While much litigation has focused on local moratoria on new towers, the Act nevertheless does not preclude short-term, temporary moratoria on new towers while the municipality develops a plan to accommodate towers in the future. For an interesting discussion from the carrier’s perspective, see David Hughes, “When NIMBYS Attack: The Heights to Which Communities Will Climb To”, 23 J. Corp. L. 469 (1998).

*(inserted by DHCD 9/29/02). Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F. 3d 51 (1st Circuit 2001). Zoning Board decision denying a permit based on the negative aesthetic impact was upheld by the court.

Building Commissioner of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. (2000). The court concluded that the town’s actions seeking to remove a telecommunications tower erected in a residential neighborhood did not violate the provisions of the Federal Telecommunications Act.

⁷⁴ See for example, a report prepared by the Cape Cod Commission entitled “Siting Criteria for Personal Wireless Service Facilities, 1997 as well as a model regulation, also prepared by the Commission, for the siting of telecommunication towers.

these towers are located, at what height they can be built, what they must look like, or whether they must be “co-located” such that one tower accommodates several carriers⁷⁵.

10.0 Exemptions for Solar Energy Systems

No case law exists on this pre-emption, although the preemptive language is consistent with that used throughout the statute. “No zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building or structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.”

This preemption allows local governments to regulate solar energy systems and their appurtenances⁷⁶, provided the regulation is not tantamount to a prohibition of the system. As noted previously, the phrase “unreasonably regulate” should be construed as liberal language allowing local government control over aspects of height, bulk, setback and visual quality, provided that the control does not lead to a de facto prohibition. Note also that the operative language does not preclude requiring a special permit for solar energy systems.

Note that the Zoning Act contains several mechanisms for local governments to encourage and to some extent, guarantee solar access, including establishing a special permitting process to ensure that solar access is protected.⁷⁷

11.0 Exemptions for Handicapped Access Ramps

Section 3 provides broad preemption against local zoning regulation of handicapped access ramps “used solely for the purpose of facilitating ingress or egress of a physically handicapped person...”⁷⁸. The preemption prohibits zoning regulations that would

⁷⁵ “...except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government’ over siting decisions of PWS facilities...The legislative history is equally clear: ‘The conference agreement creates a new section 704 which prevents [FCC] preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in limited circumstances set forth in the conference agreement...Particularly where the subject of the Federal provisions at issue, here zoning and local land use regulation, is one traditionally within the purview of State and local government. Federal law will not preempt unless that is the clear and manifest intent of Congress. Roberts, 429 Mass. at 487.

⁷⁶ G.L. c.40A s.1A defines “solar access” as “the access of a solar energy system to direct sunlight”. “Solar energy system” is defined as “a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating or water heating.”

⁷⁷ See G.L. c.40A s.9B.

⁷⁸ “Physically handicapped person” is defined by G.L. c.22, s.13A, in part, as “any person who has a disability that substantially limits one or more major life activities, including but not limited to,

preclude or influence the placement of access ramps including, but not limited to front, rear or side yard setbacks or open space requirements often contained in local zoning. By implication, this likely includes restrictions on lot coverage as well. No case law exists interpreting this preemption.

12.0 Exemptions for Temporary Mobile Homes

The exemption language for temporary mobile homes is clear and no case law exists in Massachusetts on this provision⁷⁹. Zoning may not prohibit the placement of a mobile home for a period of up to twelve months, where fire or other disaster destroyed the owner's original dwelling. Note that the statute requires that there existed a dwelling that was destroyed, prior to the allowance that a mobile home be placed on the lot. Note also that the mobile home must be on the same lot as the dwelling that was destroyed, and is now in the process of being rebuilt.

such functions as performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

⁷⁹ "No zoning ordinance or bylaw shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a manufactured home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such manufactured home shall be subject to the provisions of the state sanitary code." G.L. c.40A s.3.

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