Looking at the Land Court

The Zoning Act Prohibits Site Plan Review for Child Care Facilities

The Zoning Act provides a zoning protection for child care facilities. Section 3 of Chapter 40A prevents a municipality from enacting a zoning regulation which would prohibit, or require a special permit for, the use of land or structures for the primary or accessory purpose of operating a child care facility. A municipality may, however, impose reasonable regulations concerning the bulk and height of structures, yard size, lot area, setbacks, open space, parking and building coverage.

Section 3 also contains a similar zoning protection for religious and certain educational uses. In Bible Speaks v. Town of Lenox, 8 Mass. App. Ct. 19 (1979), the court concluded that the religious and educational protection prevents a community from imposing site plan review regulations on such uses.

In Cartwright v. Town of Braintree, Misc. Case No. 236228 (1997); 5 LCR 238 (1997), the Town of Braintree had enacted zoning regulations which required site plan review for child care facilities. Judge Green of the Land Court concluded that the Zoning Act also prevents a community from enacting zoning regulations which would require a child care facility to undergo site plan review.

Eminent Domain Taking Can Create an Unbuildable Lot

In Helmer v. Town of Billerica, Misc. Case No. 228924 (1997); 5 LCR 150 (1997), the Massachusetts Department of Public Works took, by eminent domain, a certain portion of land leaving a remaining parcel containing approximately 5, 727 square feet. At the time of the taking, the zoning bylaw required a minimum lot area of 7,500 square feet in order to construct a single family home.

The parcel had been held in separate ownership since the occurrence of the taking. Helmer was denied a building permit to construct a single family home on the parcel. Helmer argued that his parcel was entitled to protection under the Zoning Act as a grandfathered lot, because the parcel was rendered nonconforming by the eminent domain action of the Commonwealth, and not by any voluntary conveyance by a landowner. Judge Green ruled that the Zoning Act provides no such protection.

The Billerica zoning bylaw contained a provision which prohibited any reduction in a lot which would cause the remaining lot not to comply with the dimensional requirement of the bylaw. Exempted from this requirement was any reduction which was the result of an eminent domain taking or conveyance for a public purpose. This provision was not in effect in 1952 when Helmer's parcel became substandard as a result of the eminent domain action by the Commonwealth.

14-079-97

COMMONWEALTH OF MASSACHUSETTS
Department of the Trial Court
Land Court
Miscellaneous Case No. 236228

BRAD CARTWRIGHT, TRUSTEE of Granite Realty Trust,
Plaintiff

vs.

THE TOWN OF BRAINTREE & others,[1]
Defendants

DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter came to be heard on November 25, 1997, on plaintiff's motion for summary judgment. Plaintiff seeks a determination, pursuant to G. L. c. 240, § 14A, that certain provisions of the Braintree Zoning By-Laws (by-law) are invalid or unreasonable as applied to plaintiff's proposal to operate a child day care facility on land owned by plaintiff and located at 467 Granite Avenue, Braintree (locus).

The action commenced with plaintiff's complaint, filed on February 24, 1997. The complaint was not verified. Defendants' answer followed, on April 10, 1997. On June 19, 1997, plaintiff moved for summary judgment. Plaintiff and defendants submitted memoranda in support of their respective positions on the motion, and on November 21, 1997, plaintiff submitted a further reply brief pursuant to Land Court Rule X.

The record for purposes of summary judgment includes affidavits of Brad Cartwright

[1] Patricia Toomey, William Grove, Donna O'Sullivan, Ronald DiNapoli, Charles Kokoros, as they are members of the Braintree Planning Board, and James Chandler, as he is the Braintree Building Inspector

(plaintiff's trustee), Charles Boyne (traffic officer for defendant Town of Braintree), Patricia Petruccelli (president of Here We Grow Daycare, Inc.), and Frank A. Marinelli (counsel to plaintiff, authenticating certain materials). The Cartwright, Boyne and Petruccelli affidavits all include descriptions of locus, and plaintiff's proposed use, with reference to the conceptual site plan of locus, entitled "Conceptual Site Layout" prepared by Rizzo Associates, Inc., dated February 6, 1997, and attached to the complaint as Exhibit 4 (site plan). In addition, at oral argument, counsel for the parties stipulated to the authenticity of the copy of the by-law attached to the complaint as Exhibit 1, and to the accuracy of the information set forth on Exhibit 5 to the complaint, regarding certain other day care facilities operated in Braintree.

The following facts are not in dispute.

1. Plaintiff owns locus and proposes to construct a building and related improvements thereon for the purpose of operating a child day care facility, providing daytime custodial care, for a fee, of more than six children.

2. Locus is an unimproved nearly rectangular parcel of land containing approximately 35,855 square feet, located partially within the "Residence A" (RA) and partially within the "Residence B" (RB) use districts established under the by-law. Locus has a minimum width, and frontage, of 195 feet, and a minimum depth of 176.15 feet.

3. Locus is abutted to the north by a parcel zoned for general business use, on which is located a small retail center. Abutting locus to the south is a vacant parcel having a steep grade away from its street frontage and located, in the same manner as locus, partially within the RA and partially within the RB use districts. Locus is situated on Granite Street, a four lane striped highway. The land opposite Granite Street from locus is within the highway business use district established

under the by-law. A traffic signal is located near the southwesterly corner of locus, regulating the intersection between Granite Street and an access roadway serving an office complex opposite locus. The property behind locus, up a sharp grade, is within the RA use district.

4. The by-law contains definitions of two types of child day care uses. "Day Care, Accessory" is defined as "[t]he daytime custodial care, for a fee, of no more than six (6) children. Said center shall be accessory to a residential use." "Day Care, Commercial" is defined as "[t]he daytime custodial care, for a fee, of more than six children in a facility licensed by the Commonwealth." Plaintiff's proposed use falls into the latter category.

5. According to the Table of Principal Uses set forth in section 135-601 of the by-law, Day Care, Accessory and Day Care, Commercial are both uses permitted as of right in all zoning districts in Braintree.

6. However, Commercial Day Care is subject to further regulation pursuant to section 135-611 of the by-law, which provides

> A. General Requirements[2]
>
> 1. The administration of this By-Law shall be as required in Section 135-711.
>
> 2. Building Coverage - In residential districts, building coverage shall be limited to twenty-five hundred (2500) square feet. Buildings in other districts shall use the requirements set forth for that district.
>
> 3. Building Height - Buildings shall be limited to two (2) stories or thirty-five (35) feet in residential districts. Buildings in other districts shall use the requirements set forth for that district.
>
> 4. Setbacks - In residential districts the setback shall be seventy-five (75) feet from all property lines. Buildings in other districts shall use

[2]There is no subparagraph B of section 135-611.

the requirements set forth for that district. The sole use of this area shall be passive, unimproved open space.

5. Lot size - The minimum lot size required for the establishment of a Commercial Day Care facility in a residential district shall be one (1) acre. Buildings in other districts shall use the requirement set forth for that district.

6. Parking - The number of parking spaces shall be determined by Section 135-803 Table of Required Off-Street Parking.

7. Traffic - A traffic study shall be required if the required off street parking for the facility exceeds fifty (50) spaces.

8. Access and Egress - The applicant shall demonstrate that safe access and egress from the site have been provided. Any drop-off point shall be located on site.

9. Overlay Districts - When the requirements of an Overlay District differ from the requirements of the Zoning District, the most restrictive shall apply.

7. Section 135-711 of the by-law is titled "SITE PLAN REVIEW (SPR) OF MULTI-FAMILY, APARTMENT, BUSINESS AND COMMERCIAL DEVELOPMENTS," and sets forth provisions and procedures for site plan review of various types of uses. Section 135-803 is titled "DECREASES IN PARKING REQUIREMENTS" and sets forth procedures for a reduction in required parking pursuant to site plan review or the issuance of a special permit.[3]

8. Section 135-611 was added to the by-law by amendment approved at a special town meeting on May 6, 1991, and was approved by the office of the attorney general pursuant to G. L. c. 40, § 32, on August 27, 1991.

9. According to the Table of Dimensional and Density Regulations set forth in section

[3] A "SCHEDULE OF OFF-STREET PARKING REQUIREMENTS" appears at section 135-806.

135-701 of the by-law, the following requirements apply in the RB district:

MIN LOT (SF)	MIN WIDTH (FT)	MIN FRONT (FT)	MIN DEPTH (FT)	MINIMUM YARDS FRONT (FT)	SIDE (FT)	REAR (FT)	MAX HGT (FT)	MAX STOR-IES	MAX BLDG CVRG (%)	MAX LOT CVRG (%)	MAX OP SP (%)
15,000	100	50	100	20	10	30	35	3.0	35	70	30

10. The record does not disclose whether locus was a lot in single ownership on the effective date of the by-law. Consequently, I am unable to determine whether locus is entitled to the treatment provided by section 135-306 of the by-law.[4] However, the requirements applicable in the RA district are identical to those applicable in the RB district, except for the following increased requirements applicable in the RA district: minimum lot size (25,000 sf), minimum lot width (125 ft), minimum lot frontage (75 ft) and minimum lot depth (120 ft).

11. The facility depicted on the site plan meets or exceeds the minimum requirements specified in section 135-701 of the by-law for both the RA and RB use districts.

* * * * *

The gravamen of plaintiff's claim is that section 135-611 violates the protection afforded child day care uses by G. L. c. 40A, § 3 (the Dover Amendment), ¶3. Under that statute, child care facilities may not be prohibited, nor made subject to a special permit requirement, but may be subject

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[4]Section 135-306 of the by-law provides

> When a boundary line between use districts, height districts or area districts, as established by this Chapter and the Town's Zoning Map, divides a lot in single ownership on the effective date of this Chapter, the requirements applying to the least restricted portion of such lot shall be considered as applying to the entire lot provided that the most restricted portion of such lot is entirely within one hundred fifty (150) feet of the district dividing boundary line. The use so extended shall be deemed to be conforming.

to reasonable dimensional regulations.[5]

As observed in two recent decisions in another case in this court, no appellate decision has yet considered the third paragraph of the Dover Amendment. See Petrucci v. Board of Appeals of Westwood, Land Court Misc. Case No. 219424 (February 5, 1996 and March 18, 1997) (Lombardi, J.).[6] As also noted in the Petrucci decisions, however, the provisions of the third paragraph are sufficiently similar to the protections afforded other uses under the second paragraph of the Dover Amendment to warrant reasoning by analogy to decisions in cases decided under the second paragraph.

By its reference to section 135-711 of the by-law, section 135-611.A.1. of the by-law impermissibly imposes a requirement that a commercial day care use undergo site plan review, a point conceded by counsel for the town at oral argument. See The Bible Speaks v. Town of Lenox, 8 Mass. App. Ct. 19, 32 (1979). Accordingly, subsection 1 of section 135-611.A is void.

Plaintiff contends that the dimensional requirements imposed on child care facilities in

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[5]G. L. c. 40A, §3, ¶3 provides

> No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; 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. As used in this paragraph, the term "child care facility" shall mean a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A.

[6]An appeal of the decision dated March 18, 1997 is currently pending before the Appeals Court (Docket No. 97-P-1057, entered May 22, 1997).

residential districts by subsections 2 through 5 of section 135-611.A likewise violate the protection afforded under the Dover Amendment, in that they are not reasonable as applied to locus. I agree.

As quoted in note 5 above, the Dover Amendment expressly allows a zoning by-law to subject land or structures used for child care to reasonable regulation concerning a variety of dimensional matters. However, "the town may not, through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to 'nullify' the use exemption permitted to an educational institution." The Bible Speaks v. Town of Lenox, 8 Mass. App. Ct. 19, 31 (1979) (citing Sisters of the Holy Cross v. Brookline, 347 Mass. 486, 494 (1964)).

Plaintiff's complaint seeks a determination, pursuant to G. L. c. 240, § 14A, that section 135-611 of the by-law is null and void. Plaintiff argues that the regulations imposed by section 135-611 are so onerous, and so plainly targeted at the operation of a child care facility in a residential district, that the section is facially invalid. In support of its argument, plaintiff further suggests that the adoption of section 135-611 of the by-law was a direct response to the amendment of the Dover Amendment which added the third paragraph prohibiting regulation of day care uses by means of special permit.[7]

As applied to locus, the dimensional requirements set forth in subsections 2 through 5 of section 135-611.A would prohibit entirely the operation of a child care facility. To begin with, locus is approximately 8,000 square feet smaller than the one-acre minimum. The setback requirement of seventy-five feet, when combined with the requirement that the sole use of the setback area be as

[7]The third paragraph of G. L. c. 40A, § 3, was added by St. 1990, c. 521, § 2, approved January 2, 1991. Section 135-611 of the by-law was added by amendment approved at a special town meeting on May 6, 1991.

passive unimproved open space, would leave a usable "envelope" in the center of locus of less than 1,800 square feet on which to locate all structures and related parking needed to support the proposed use.

Moreover, the setback and minimum lot area requirements imposed on day care uses in residential districts do not appear reasonably related to any legitimate municipal concerns which might support the imposition of dimensional constraints, particularly when compared with the by-law's treatment of day care use in other zoning districts, or the treatment of other uses in residential districts.[8] A commercial day care use in any other Braintree zoning district is subject to the same underlying dimensional requirements as any other use permitted in that district. A school or church in a residential district is subject to the same setback and minimum lot area requirements as any other use in that district, though either use might well generate noise or traffic equal to or greater than that generated by a day care center.[9]

It is not sufficient for a town to suggest, as argued by Braintree in the instant case, that a landowner might seek a variance to avoid unreasonable dimensional requirements that would otherwise prevent a protected use, or seek a rezoning of land into a less restrictive district. Trustees of Tufts College v. Medford, 415 Mass. 753, 760 (1993).

Tufts suggests that the question of whether particular dimensional requirements are

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[8]As plaintiff points out, as applied to a one-acre site, the setback and maximum building areas specified in section 135-611 would produce a maximum lot coverage of 5.7%, significantly below even the 10% maximum coverage allowed in the open space and conservancy use district.

[9]Plaintiff's objection to the use designation as "commercial" day care is misplaced. Though the Dover Amendment recognizes no distinction between for-profit and nonprofit organizations, the by-law's definition of "Day Care, Commercial" applies equally to both for-profit and nonprofit operators.

reasonable generally involves a case-by-case review:

> [T]he question of the reasonableness of a local zoning requirement . . . will depend on the particular facts of each case. Because zoning laws are intended to be uniformly aplied, 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 its proposed project.

415 Mass. at 759.

However, the ordinance challenged in Tufts was different in kind and in effect from section 135-611 of the by-law. In declining to invalidate the Medford ordinance's dimensional regulations in their entirety, the Tufts Court observed that the challenged parking, setback and dimensional requirements "do not facially discriminate against educational uses and are presumptively valid under the proviso to the Dover Amendment." 415 Mass. at 765. By contrast, section 135-611 of the by-law specifically imposes setback requirements on day care facilities in residential districts that are significantly more burdensome than those placed on any other use under the by-law, in any other district.[10] While the record is not dispositive of the question, defendants' counsel stated at oral argument that he is unaware of any lot in the RB zoning district that would meet the one-acre minimum required by section 135-611 for day care uses. On their face, the provisions of section 135-611 of the by-law discriminate against the child care use protected by the third paragraph of the Dover Amendment.

In purpose and in effect, section 135-611 operates impermissibly to prohibit operation of a child day care facility in residential districts in Braintree and, thereby, to nullify the use exemption

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[10] A single, but unimportant, exception is the 100 foot front and rear yard requirement imposed in the open space and conservancy district, which appears designed for park and outdoor recreational uses.

provided to such facilities under the third paragraph of the Dover Amendment. See Radcliffe College v. Cambridge, 350 Mass. 613, 618 (1966); Sisters of the Holy Cross v. Brookline, 347 Mass. 486, 494 (1964); The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. at 33. To require case-by-case review of individual proposals under such circumstances would be to sanction the very type of ad hoc consideration of a protected use that the Dover Amendment's proscription against a special permit requirement is designed to prevent.

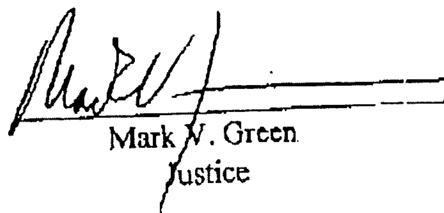
Accordingly, I find and rule that the provisions of subsections 2 through 5 of section 135-611 of the by-law are invalid.

As to the remaining provisions of section 135-611, I find that they are also invalid. Subsection 6 is at best unclear, in that its reference to section 135-803 appears to be in error; in any event it is redundant and unnecessary to the extent it means only to incorporate the general parking requirements specified in section 135-806. Subsection 7 requires preparation of a traffic study under certain circumstances, a requirement that appears designed to provide supplemental information for the site plan review required, impermissibly, by subsection 1. Similarly, the adequacy of access and egress facilities, required by subsection 8, is a subjective determination included among those made under section 135-711 as part of site plan review. Subsection 9 is inapplicable to locus but (for the same reasons described with reference to subsection 1) it is invalid to the extent that it purports to subject day care uses to special permit review under the provisions applicable to the various overlay districts established under the by-law.

For all of the foregoing reasons, section 135-611 of the by-law violates the third paragraph

of the Dover Amendment and is invalid in its entirety. Plaintiff's motion for summary judgment is therefore allowed.

Judgment to issue accordingly.



Mark V. Green
Justice

Dated: December 16, 1997

COMMONWEALTH OF MASSACHUSETTS
Department of the Trial Court
Land Court
Miscellaneous Case No. 236228

(SEAL)

BRAD CARTWRIGHT, TRUSTEE of Granite Realty Trust,
Plaintiff

vs.

THE TOWN OF BRAINTREE & others,[1]
Defendants

JUDGMENT

This matter came to be heard on November 25, 1997, on plaintiff's motion for summary judgment. Plaintiff seeks a determination, pursuant to G. L. c. 240, § 14A, that certain provisions of the Braintree Zoning By-Laws (by-law) are invalid or unreasonable as applied to plaintiff's proposal to operate a child day care facility on land owned by plaintiff and located at 467 Granite Avenue, Braintree (locus).

A decision of today's date is entered, allowing plaintiff's motion for summary judgment. In accordance with that decision, it is hereby

ORDERED AND ADJUDGED that the requirement for site plan review, contained in subsection 1 of section 135-611 of the by-law, is invalid; and it is further

ORDERED AND ADJUDGED that the dimensional requirements contained in subsections 2 through 5 of section 135-611 of the by-law are unreasonable as applied to locus; and it is further

ORDERED AND ADJUDGED that section 135-611 of the by-law violates G. L. c. 40A, §

[1] Patricia Toomey, William Grove, Donna O'Sullivan, Ronald DiNapoli, Charles Kokoros, as they are members of the Braintree Planning Board, and James Chandler, as he is the Braintree Building Inspector

3, ¶3, in that it attempts to regulate the use of land for a child care facility in such a manner as to nullify the protection of such use provided by G. L. c. 40A, § 3, ¶3; and it is further

ORDERED AND ADJUDGED that section 135-611 of the by-law is declared invalid.

By the court. (Green, J.)

Attest:

Charles W. Trombly, Jr.
Recorder

Dated: December 16, 1997

TRUE COPY
ATTEST:
Charles W. Trombly, Jr.
RECORDER

14-085-00
15pgs

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 250473

REBECCA R. and MARC L. SHAPIRO, as
Trustees of ROSEBUD REALTY TRUST,

Plaintiffs

vs.

GILBERT P. WRIGHT, JR., THOMAS W.H. PHELPS, ANDREW J. FAY, JOHN F. SYLVIA, and MARC A. KABLACK, as they are the ZONING BOARD OF APPEALS OF THE TOWN OF SUDBURY, AND R.J. HALVERSON[1], ROBERT W. SHOEMAKER, SHERVIN AYATI, MOOJAN ROUHI, JOAN SERGI, JOHN SERGI, BERNARD BONN, BONNIE BONN[2], NANCY AZZOLINO, PHIL AZZOLINO, DAVID WINDLE, DONNA HEUCHLING, and JOHN HEPTING[3], as he is the BUILDING INSPECTOR OF THE TOWN OF SUDBURY,

Defendants

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[1]The nonmunicipal defendants "are persons who, on information and belief, submitted to the Sudbury Zoning Board of Appeals [the board] some form of document or documents, purporting to constitute an appeal from an act or failure to act by the Building Inspector of the Town of Sudbury." (Compl. at ¶ 3.)

[2]Bernard and Bonnie Bonn are the only non-municipal defendants who filed an answer.

[3]Filed answer together with the Sudbury Board of Appeals.

DECISION

Plaintiffs, Rebecca R. and Marc L. Shapiro (the Shapiros), as Trustees of the Rosebud Realty Trust, appeal from an August 13, 1998, (filed with the town clerk August 25, 1998) decision (the decision) of the Sudbury Board of Appeals (the board) revoking a permit–issued by the building inspector, defendant John Hepting, on June 1, 1997–for the renovation and expansion of a barn for use as a day care center known as the "LEAP School" (the project). The board unanimously decided the project "constitutes a 'child care facility' as that term is used and defined in M.G.L. c.28A, S9 and M.G.L. c. 40A, S3." (Compl., Ex. B.) The board nonetheless revoked the permit because: (1) the Shapiros failed to obtain the board of selectmen's approval "regarding the application of 'reasonable regulations'"; (2) the Shapiros failed to obtain "Water Resource Protection" approval from the planning board; and (3) the Shapiros failed to obtain a "Public Way Access" permit from the selectmen.

The Shapiros claim the project qualifies as a child care facility within G.L. c. 40A, § 3, (§ 3) third para. (the child care exemption) and is therefore exempt from the requirements noted in the decision.

The board, the building inspector, and defendants Bernard and Bonnie Bonn filed answers. The other defendants (Halverson, Shoemaker, Ayati, Rouhi, Joan Sergi, John Sergi, N. Azzolino, P. Azzolino, Windle, and Heuchling) did not respond to the complaint. No defendant asserts a counterclaim. Defendants deny the project qualifies for the child care exemption and contend the board's decision was within the board's discretion. They have also moved for additional time to conduct discovery, pursuant to 56(f), before I rule on the Shapiros' summary judgment motion.

(2)

The Shapiros moved for summary judgment, contending the board's decision, on its face, exceeded the board's authority because of the child care exemption. The complaint was not verified. The record for purposes of this motion consists of the admitted allegations of the complaint and affidavits of: Rebecca R. Shapiro (the motion refers to her as Robin) (two affidavits); defendant R.J. Halverson; defendant Bernard J. Bonn, III, Esq.; Steven L. Ledoux, Sudbury Town Manager; and Paul Killeen, Esq. (the Shapiros' counsel). I have denied the Shapiros' motion to strike the Halverson and Ledoux affidavits.

Counsel for the Shapiros and the municipal defendants, and Mr. Bonn, pro se and for defendant Bonnie Bonn, argued the motion October 5, 1999.

This case was preceded by ten days by the filing here by the Shapiros of miscellaneous case 250247. That is against the town and Mr. Hepting, under G.L. c. 240, § 14A, asserting the provisions of the town's zoning bylaw later invoked by the board are invalid and unenforceable as applied to the project. On August 31, 1998, Judge Scheier issued a preliminary injunction in case 250247 that the Shapiros could construct the project in accordance with the building permit (that is, the one appealed in this case), at their risk. Judge Scheier amended that order on October 18, 1998, by providing for the issuance of a certificate of occupancy for the project. There have been no further proceedings in case 250247. On April 27, 1997, I denied defendants' motion to consolidate the two cases, with leave to refile after this summary judgment motion was heard. There has been no refiling of the motion to consolidate.

1. The following background facts appear undisputed (they are in some instances derived from Judge Scheier's preliminary injunction): On June 5, 1998, the Shapiros purchased a parcel of land (locus), consisting of approximately 2.5 acres, located at 123 Dakin

Road in Sudbury, in a single residence "A" zoning district. Locus was improved with a house and a barn. Prior to purchasing locus, the Shapiros and their predecessors in title together filed an application for a building permit authorizing the renovation and expansion of the barn for use as a licensed day care facility, referred to as the LEAP School. The building inspector determined that the proposed use of locus is protected by § 3, and, on June 1, 1998 he issued a building permit (# 98447) authorizing the renovations necessary to prepare the barn for that use. After securing the building permit, an on-site septic system permit designed to accommodate up to one hundred students and sixteen staff, and a driveway permit for the project, the Shapiros purchased locus for $714,000 on June 5, 1998, with mortgage financing, and entered into a contract for construction of the project. As of the date of the preliminary injunction, they had invested over $1,000,000 in the project, in anticipation of opening the day care facility in November 1998. Approximately thirty-five children were enrolled, and staff had been hired.

2. The parties disagree whether the project is in fact a "child care facility" within § 3. Defendants Bernard and Bonnie Bonn moved, pursuant to Mass. R. Civ. P. 56(f), to defer hearing of the summary judgment motion to allow additional time for discovery. On April 2, 1999, I ruled there could be no further discovery until the summary judgment motion is decided.

3. The Mass. R. Civ. P. 56(f) motion by implication raises the question of the posture of the individual defendants (other than the building inspector) in this case. Some or all of those defendants appealed to the board the grant of the Shapiro's building permit. The board's advertisement as to this matter stated it was to hear those appeals, and its decision was to grant petitioners' appeals of the building permit, for the three reasons described above. The board

voted unanimously that the project "constitutes a 'child care facility' as that term is used and defined in M.G.L. c 28A, S 9 and M.G.L c. 40A, S 3. As such, the LEAP School should have the benefits afforded day care facilities under the zoning exemptions of M.G.L c 40A, S3."[4]. None of the individual defendants appealed that determination, but the Shapiros named them as defendants. Defendants are entitled to have their claim that the project is not a child care facility resolved, but the question is, when? The building inspector and board concluded the project is a child care facility, and it is judicially economical to have that issue resolved in this case, rather than leaving defendants to an enforcement action. The case will move forward as to the Shapiros' objections to the board's reasons for the permit revocation (accepting for these purposes the board's finding as to the project's child care facility status).

4. After finding the project is a child care facility, the decision states:

> "Petitioners' appeals should be granted and Building Permit No. 98447 should be revoked as the Building Permit was issued without the benefit of appropriate review, approvals and permits applicable to the LEAP School under the Zoning Bylaw. Specifically, the Zoning Board finds that the Building Permit should be revoked for the following reasons:
>
> "1) The Board of Selectmen has not reviewed the LEAP School project under their permit granting authority regarding the application of reasonable regulations under M.G.L. c. 40A, S3, concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.
>
> "2) The Planning Board has not reviewed the LEAP School project under the permit granting authority by Section III.G. of the Zoning Bylaw ("Water Resource Protection") with respect to reasonable regulations governing those issues affecting Water Resource

[4] The board's position here - that the Shapiros have not shown they are a child care facility - is anomalous (if indeed not foreclosed) by this finding.

Districts; and

"3) The Board of Selectmen has not reviewed the LEAP School project under the permit granting authority granted in Public Way Access Permit, adopted as Article 28 by Town Meeting on April 13, 1998, with respect to reasonable regulations concerning public way access, if deemed applicable."

5. The decision included an extended "discussion", which made it clear the board was sensitive to the protections afforded the Shapiros under § 3. The discussion included admonitions to the selectmen and the planning board that in conducting their reviews they should be aware that they did not have unlimited discretionary authority and that super majority votes are not required. Each reviewing authority, warned the board, should excise those parts of its permitting review that would be in direct contravention of § 3 or otherwise rise to the level of unreasonable regulation of the project. The essence of the decision is that the reviews referred to by the board should be done by the selectmen and the planning board and not the building inspector.

6. Section 3, provides:

"No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; 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. As used in this paragraph, the term 'child care facility' shall mean a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A."

7. **Review of dimensional regulations by the selectmen.** As a "child care facility" within § 3, the project is subject only "to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." § 3. The town claims zoning bylaw §I, F, (§I, F) is such a reasonable regulation. When the board rendered its decision, that section provided:

> "F. CERTAIN OPEN SPACE AND EDUCATIONAL USES
>
> "The use of land and buildings thereon for a playground, picnic ground, for educational purposes or recreation field, or for private nursery school/kindergarten or specialty school, shall be allowed in any zone of the Town provided that a permit has first been issued for such use by the Board of Appeals and a site plan submitted in accordance with Article IX, section V, A has been approved by the Board of Selectmen. A permit may be issued provided the Board of Appeals shall find that:
>
> "1) The proposed use is not detrimental to the neighborhood, and
>
> "2) The use will not significantly alter the character of the zoning district, and
>
> "3) Such use does not nullify or substantially derogate from the intent or purpose of any other section of this bylaw.
>
> "Permits issued under this paragraph shall be for a period not exceeding two years and may be renewed. The provisions of this section shall not apply to the use of land by the Town for municipal purposes."[5]

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[5]At the annual town meeting in 1999, the by-law was amended. The language just quoted was left intact, but given a paragraph number 1. A paragraph 2 was added, as follows:

> "2. The use of land and/or buildings for religious, non-profit educational, or child care facilities or other exempt uses provided for in M.G.L. c. 40A, § 3, shall be reviewed by the Inspector of Buildings for compliance with reasonable

8. By its terms, § I, F does not purport to regulate, reasonably or otherwise, "the bulk and height of structures [or to] determin[e] yard sizes, lot area, setbacks, open space, parking and building coverage requirements", it regulates only "the use of land and buildings thereon". Although not specifically designated as such, the "permit" referred to in § I, F, is a "special permit" as referred to in § 3. In particular, the criteria set forth in § I, F, are identical or similar to those set forth in G. L. c. 40A, § 10 and § VI, C-3 of the by-law. Section I, F, as applied to the project, violates § 3, which provides "[n]o . . . by-law . . . shall . . . require a special permit for[] the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility . . ." Cf. Campbell v. City Council of Lynn, 415 Mass. 772, 775, 775 n.5 (upholding the grant of a special permit for a use within the educational exemption, stating, "As a general rule, a municipality cannot condition the use of property for an educational purpose on the grant of a special permit." (Citation omitted.)). Moreover, a special permit for use would be unnecessary given that as a § 3 child care facility, the project is permitted as of right in every zone. See The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979) ("The Legislature did not intend to impose special permit requirements, designed under c. 40A, Section 9, 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.") Accordingly, § I, F, is invalid to the extent it applies to the project.

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bulk and height of structures, yard sizes, lot area, setbacks, open space, parking, and building coverage requirements and other requirements as permitted under State or Federal law, in conjunction with the issuance of a building permit."

9. The town next points to § V, A, of the zoning bylaw (§V, A) as a "reasonable regulation[] concerning the bulk and height of structures [or] determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." § 3. Section V, A, 1, of the bylaw provides:

> "V SPECIAL REGULATIONS
>
> "A. SITE PLAN SPECIAL PERMIT - The Board of Selectmen may grant a Site Plan Special Permit in accordance with the standards of this bylaw.
>
> "1. APPLICABILITY - . . . no business, industrial, research or institutional building, nor any building to be used for any nonresidential uses designated in Section III, subsections B, C, or D of this bylaw shall hereafter be erected or externally enlarged and no area for parking, loading or vehicular service (including driveways giving access thereto) shall be established or substantially altered and no use shall be changed except in conformity with a site plan bearing an endorsement of approval by the Board of Selectmen; . . ."

Section V, A, 5, requires an application consisting of:

> "(a) A written statement detailing the proposed use . . .
>
> "(b) Site Plan(s) prepared by a Professional Engineer of Registered Land Surveyor, as appropriate to the data, showing all lot and setbacks, zoning district boundaries including flood plain; all wetlands and wetland buffer zones; all areas designated as open space; all existing and proposed topography at one foot intervals . .
>
> . . .
>
> "(c) A Landscape Plan(s) shall be prepared by a Registered Landscape Architect in [some cases] . . .
>
> "(d) A Building Plan(s) and Elevations shall be prepared . . . An architectural rendering of the appearance . . . shall also be submitted.
>
> "(e) Such other information as the Board may reasonably require

including special studies or reports, such as traffic or hydrological impact studies."

10. The requirements of § V, A are invalid as applied to the project. See The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19 (1979). See also Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 824 n.9 (1998) (discussing the child care exemption and stating in dictum "the judge ruled that the proposed exempt use could not be made subject to either variance procedures or site plan review, a conclusion in accord with Trustees of Tufts College v. Medford, 415 Mass. 753, 760, 765 (1993).").

11. Defendants contest the applicability to the present case, which concerns the child care exemption, of cases interpreting the education exemption (§ 3, second para., first sent.), and agriculture exemption (§ 3, first paragraph.). They argue:

> "The language in paragraph 3 [the child care exemption] is different than the language in paragraphs 1 [the agriculture exemption] and 2 [the education exemption] of the Dover Amendment which have been the subject of prior court decisions. Paragraph 3 provides that a town may not 'prohibit' or require a discretionary special permit[6] for the use of land or structures to upgrade a child care facility. Paragraphs 1 and 2, in contrast, provide that no zoning ordinance or bylaw shall 'regulate or restrict,' language that is not present in paragraph 3. . . . [T]he Town, consistent with the reasonable regulations recognized in paragraph 3, may regulate or restrict, to the extent appropriate, a child care facility. The statute says so, and in using different language in paragraph 3, obviously the Legislature intended some difference in approach by the towns and courts in applying paragraph 3 of the Dover Amendment to child care facilities."

(Bonn Mem. at 11.) I acknowledge the differences in language cited by defendants but I do not

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[6]The child care exemption does not, by its terms, proscribe "discretionary special permits", but "special permits".

agree that the differences permit review by the selectmen as provided in § § I, F and V, A of the by-law.

12. Section 3 allows only certain existing dimensional regulations to be applied to the project, and even then, the regulations are applied only if reasonable. Thus, the question remains whether existing dimensional regulations of locus are valid under § 3. (There are no dimensional regulations applicable specifically to child care facilities.) Attached to Mrs. Shapiro's second affidavit is a copy of a letter dated July 1, 1998, from Mr. Hepting to the selectmen and town manager, copied to the board, in which he states that it is his "opinion that the design presented [for the project] has satisfactorily and adequately addressed those criteria.", meaning those which can be "reasonably regulated" under § 3. Otherwise, there is no evidence whether the project complies with the requirements of its zone. (Although there is no affidavit as to the project's zone, the board's notice of public hearing, which is attached to the first Shapiro affidavit, indicates locus is within a "Residential Zone A-1" district.)

13. The Shapiros contend "The defendant neighbors had the obligation to identify, with specificity, the purported M.G.L. c. 40A § 15 violations of the bylaw underlying their claim that the building permit should be revoked." (Pls' Mem. Supp. Summ. J. at 7.) To the extent the Shapiros contend the burden of persuasion of showing noncompliance with dimensional and parking requirements lies with defendants, they are incorrect. "[T]he burden rests upon the applicant for zoning relief to produce evidence at trial that the statutory prerequisites have been met." Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112, 118 (1981). Here, the Shapiros wish zoning relief–to overturn the board's decision. Accordingly, the burden of persuasion at trial lies with them. In any event, in the context of a

(20)

summary judgment motion, the moving party always bears the initial burden of producing evidence or of showing such evidence will not be forthcoming. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Here there is no evidence as to compliance with dimensional and parking requirements and nothing from which I can determine such evidence will not be forthcoming. Accordingly, summary judgment cannot be entered as to whether the Shapiros have met the requirements of their underlying zoning district, whether such requirements are of the type permitted by the child care exemption, and whether such permitted requirements are reasonable.

14. To the extent the Shapiros contend this court's review is limited to the issues raised at the hearing on their application, they are incorrect. The scope of this court's review is de novo. See Pendergrast v. Board of Appeals of Barnstable, 331 Mass. 555, 558-559 (1954) (court is not restricted to the evidence that was introduced before the board).

15. **Water Resource Protection Bylaw.** The Shapiros contend the board cannot, consistent with § 3, condition a permit on review under § III.G of the zoning by-law (§ III.G), concerning Water Resource Protection Districts (WRPD's). (Section III of the by-law as a whole concerns permitted uses.) The purposes of WRPD's include promotion of the general welfare of the community, conservation of the town's natural resources, and prevention of pollution of the environment. However, the specific purpose is to protect existing and potential water supply and ground water recharge areas within the town. Three WRPD zones are established, defined by their relationship to public wells (zone I) or aquifers (zones II and III). WRPD's are overlay districts. Section III G is almost totally a use control provision. Various uses are either specifically allowed, prohibited, or allowed by special permit from the planning board (although there does not appear to be a provision relating to zone I, around well heads).

12

16. There are two instances in which use provisions are in effect building coverage requirements (reasonable ones of which are allowed under § 3): section III. G. 5. a. 5) states that the following is a permitted use in Zone II of a WRPD: "Maintenance, repair and enlargement of any existing structure provided no more than fifteen percent (15%) of the lot total is rendered impervious." Section III. G. 5. b. 14) states that the following is prohibited in Zone II: "Any use that will render impervious more than 15% of any lot, or 2500 square feet, whichever is greater, unless a special permit has been granted."

17. The record does not indicate whether any part of locus is in a WRPD, so summary judgment may not issue (even assuming the project is a child care facility). If it is in a WRPD, the question will become whether the project violates an imperviousness standard. If it does, the question will then become whether that dimensional constraint passes muster under the standards set forth in Tufts.

18. Thus, if the project is in a WRPD and implicates an imperviousness standard, there is an examination to be undertaken on that issue (again, assuming the project is a child care facility). But there may be more of a problem than the imperviousness question. The Shapiros argue that the language used in the agricultural exemption for new structures is similar to that used in the child care exemption for new and existing structures, and they quote Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 802 (1997) ("new structures may be reasonably regulated, and a special permit may be required. The provision of § 3 precluding a requirement of a special permit for existing agricultural structures remains intact."). However, none of the parties has dealt with Southern New England Conference Association of Seventh Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 707(1986), holding that "the Legislature

did not intend that § 3 of c. 40A exempt a religious use from lawful wetlands control under a local zoning by-law." I decline to develop the issue further until the facts as to the project's status as a child care facility and its zoning status - in a WRPD or not - are established and (if in, the applicability of Southern New England Conference is briefed).

19. **Public Way Access Bylaw (the access bylaw).** The Shapiros also contend their permit may not be made subject to review by the selectmen under the town's access by-law. A copy of that bylaw is attached to the complaint as exhibit C. It requires review by the planning board (for residential uses) or the selectmen (all others) where a project is to "alter" most public ways in the town. "Alter" means a new or modified access and perhaps also certain increases in the intensity of uses on existing accesses. The record does not indicate whether the LEAP project is subject to the access by-law.

20. The access bylaw is a general bylaw-- the copy attached to the complaint states it is a "General Town Bylaw[]"; it is not codified within the zoning bylaw, Article IX; and it was submitted by the town to the Attorney General as a general bylaw. (Shapiro Aff. Ex. D, first page.) The Shapiros argue the access by-law, being a general by-law, did not become effective until approved by the Attorney General on July 9, 1998, after the issuance of the building permit for the project. However, they point to no statutory or by-law provision which protects a permitted project against later-amended general by-laws (i.e., nothing analogous to G. L. c. 40A, § 6 in the zoning context).

21. The access bylaw is primarily directed at "facilitat[ing] safe and efficient roadway operations" and remedying any "condition that is unsafe or endangers the public safety

and welfare." Access Bylaw § E.(1); see also §§ E(2)-(3). It is not a zoning by-law. The responsibilities of the building inspector under G. L. c. 40A, § 7, and rights of appeal of a building inspector's actions under G. L. c. 40A, § 8, are limited to matters arising under the zoning by-law. Accordingly, the board could not premise a revocation of the building permit on the absence of review under the access by-law. The board treated review under the access by-law as a zoning matter ("Building Permit was issued without the benefit of appropriate review...under the Zoning By-Law") but it is not. [7]

22. The third reason given by the board for the permit revocation (access by-law) is invalid. Disposition as to the first and second reasons awaits further development of facts, as set forth above.

Peter W. Kilborn

Peter W. Kilborn

Chief Justice

Dated: September 18, 2000

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[7]That being the case, I am not presented with the issue whether the access by-law conflicts with § 3, see Newbury Junior College v. Town of Brookline, 19 Mass. App. Ct. 197, 206-7 (1985).

trial judge. *Commonwealth v. Daye,* 411 Mass. 719, 735, 587 N.E.2d 194 (1992).

[7] "In deciding whether a defendant's constitutional right to ⌊811cross-examine and thus confront a witness against him has been denied because of an unreasonable limitation of cross-examination, a court must weigh the materiality of the witness's direct testimony and the degree of the restriction on cross-examination." *Commonwealth v. Kirouac,* 405 Mass. 557, 561, 542 N.E.2d 270 (1989).

[8] It is undisputed that Jennifer's testimony on direct examination concerning her identification of the defendant was material to an important issue in the case. However, the record of the trial demonstrates that the judge gave the defendant the opportunity to explore in considerable detail the possibility that Jennifer mistakenly identified the defendant as her assailant.

During her direct examination, Jennifer testified that she was with the defendant for twenty minutes during which time the lights were on in her apartment. She was also close to him during the duration of the assault. After the incident, Jennifer gave a detailed description of her assailant's appearance and the clothes he was wearing.

On cross-examination, she testified that the defendant wore a bandanna beneath his nose, and that she could see enough of his hair to identify the color and to observe that he wore it pulled back or shaved on the side. When asked if she focused primarily on the defendant's eyes and nose when selecting his photograph, Jennifer testified that although she concentrated on the eyes and the nose, "they were not the only factor." She testified that she could see the defendant's hair style, his complexion, and his cheeks. The altered array was not an accurate depiction of her observations, and the judge therefore did not abuse his discretion in denying the defendant's request. In light of the defendant's extensive cross-examination of Jennifer on the question of her identification of the defendant, we hold that there was no error.

[9] 4. *The absence of a good faith mistaken identification instruction.* "Fairness to a defendant compels the trial judge to give an instruction on the possibility of an honest but mistaken identification when the facts permit it and when the defendant requests it." *Commonwealth v. Pressley,* 390 Mass. 617, 620, 457 N.E.2d 1119 (1983). Here, the trial attorney did not request it, and on appeal, the defendant argues that counsel was ineffective for not making that request. We disagree.

[10] The failure to make the request did not result in prejudice to the defendant. The judge gave the standard *Rodriguez* charge on ⌊812identification. See *Commonwealth v. Rodriguez,* 378 Mass. 296, 310–311, 391 N.E.2d 889 (1979). In light of the judge's instructions, the defendant's cross-examination of all of the witnesses, and the final argument of defense counsel, "the jury were sufficiently apprised of the possibility of a good faith mistake in identification and the Commonwealth's burden of proving the defendant's identification beyond a reasonable doubt." *Commonwealth v. Ashley,* 427 Mass. 620, 628–629, 694 N.E.2d 862 (1998).

Judgments affirmed.

45 Mass.App.Ct. 818

⌊818Joseph M. PETRUCCI

v.

BOARD OF APPEALS OF WESTWOOD.

No. 97–P–1057.

Appeals Court of Massachusetts,
Suffolk.

Argued May 27, 1998.
Decided Nov. 30, 1998.

Property owner challenged decision by Board of Appeals of Westwood denying his application for building permit to renovate and use barn on lot zoned for "single residence" as child care facility. The Land Court Department, Suffolk County, Leon J.

Lombardi, J., ordered board to issue the requested building permit. Board appealed. The Appeals Court, Laurence, J., held that: (1) proposed use of barn as child care facility qualified for statutory child care facility exemption, and (2) evidence established that imposition of town's dimensional setback and height zoning requirements on proposed use of barn was unreasonable.

Affirmed.

1. Zoning and Planning 🔑14, 76

Proposed use of barn on lot in "single residence" zoning district as child care facility fell within statutory child care facility exemption providing that no zoning ordinance or bylaw shall prohibit use of land or structures for primary, accessory or incidental purpose of operating a child care facility. M.G.L.A. c. 40A, § 3.

2. Statutes 🔑217.4, 223.2(.5)

Although clear statutory language ordinarily obviates the need to resort to rules of interpretation, both related statutes and legislative history may be referenced by way of supplementary confirmation of the intent reflected in the words used.

3. Statutes 🔑223.2(.5)

Statutory canon that use of different language in related statutes dealing with the same subject matter ordinarily indicates that different meanings were intended does not apply when the statutory language is so clear as to make extrinsic aids unnecessary, especially an aid whose application would be contrary to the Legislature's undoubted purpose.

4. Statutes 🔑189

Strictly 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.

5. Zoning and Planning 🔑382

Evidence established that imposition of town's dimensional setback and height zoning requirements on property owner's proposed use of barn as child care facility was unreasonable, where barn was rare building form that possessed historic and architectural merit deserving of protection, compliance with dimensional by-law was possible only by physically relocating barn on lot, cost of relocating barn would exceed cost of renovating it to serve as child care facility, town's concerns of safety, aesthetics, and privacy served by dimensional restrictions would be negatively affected by relocation of barn, and if barn was not moved and child care facility abandoned, all present zoning infirmities would continue to exist. M.G.L.A. c. 40A, § 3.

6. Zoning and Planning 🔑726

Land Court judge did not abuse his discretion or erroneously deprive abutting landowner's of their appellate rights by ordering Board of Appeals to issue property owner a building permit to renovate barn into child care facility, rather than remanding matter to board, where board failed to state that any such potential abutters existed or to suggest any additional issues that might be raised by such hypothetical abutters. M.G.L.A. c. 40A, §§ 3, 17.

Thomas P. McCusker, Jr., Boston, for defendant.

Mark Bobrowski, Foxboro, for plaintiff.

Before BROWN, GREENBERG and LAURENCE, JJ.

LAURENCE, Justice.

Joseph Petrucci and six family members reside in his home on a 53,000 square foot lot in Westwood's "single residence" zoning district. In 1995, he proposed to establish a child care facility in a barn located on his property. After interior renovations to the barn that would leave its exterior and footprint unchanged, the facility would serve forty-seven children daily and be staffed by six adults. The Westwood building[819] commissioner (commissioner) denied Petrucci's application for a building permit to begin the renovations. The denial was affirmed by the Westwood board of appeals (board), which agreed with the commissioner that Petrucci

was not entitled to the "child care facility exemption" he was relying on under G.L. c. 40A, § 3, third par., because the proposed use was not properly either "primary, accessory or incidental."[1] Following Petrucci's appeal pursuant to G.L. c. 40A, § 17, a Land Court judge agreed with Petrucci that the claimed exemption for a child care facility under § 3 applied and granted him partial summary judgment allowing the desired use.

The judge remanded the matter to the commissioner for review of Petrucci's application on the issue of the applicability of the "reasonable regulations" that the statute permits municipalities to impose on such a facility (see note 1, *supra*). The commissioner thereafter rejected the application because the barn failed to comply with the zoning by-law's rear yard, side yard, and height requirements. The board again affirmed the commissioner. After trial on the issue of the reasonableness of applying those regulations to the proposed project, the Land Court judge again upheld Petrucci, ruling that the imposition of the town's dimensional restrictions was unreasonable and ordering the board to issue the requested building permit. On the board's appeal, we affirm.

1. *Applicability of the § 3 exemption.* The commissioner initially denied Petrucci's application on his view that the proposed use "would result in the establishment of two princip[al] uses" on the property and was "not clearly accessory or incidental to a residential use." The board concurred, ⊥820because the proposed facility "was so intensive" as to constitute a primary use of the property, and it could find "no authority" for "two ... primary uses [to] ... be situated on one property." The board further determined that the facility was not sufficiently "subordinate and related to the primary [residential] use of the property ... [to] be construed [as] ... accessory or incidental." The judge concluded that the board's reasoning was legally erroneous. He observed that nothing in the zoning by-law prohibited either child care facilities or the existence of more than one primary or principal use on a lot. He noted that the by-law even appeared to contemplate the possibility of multiple primary uses.[2]

The judge's chief basis for endorsing Petrucci's reliance on the § 3 exemption, however, was his rejection of the board's restrictive construction of the statute. The board focused (both below and here) on the words "primary, accessory or incidental" in the third paragraph of § 3. It contended that the difference between those terms and the language of the immediately preceding (second) paragraph of § 3, providing a zoning exemption for educational or religious uses,[3] betokened a much narrower exemption intended by the Legislature for child care facilities.

The board's argument runs thus: Whereas the exemption of the second paragraph of § 3 speaks broadly and generally of "use for

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2. The judge quoted § 5 of the by-law, which states, in pertinent part: "No building or structure shall be constructed, and no building, structure or land shall be used, in whole or in part, for any purpose other than for *one or more* of the uses hereinafter set forth as permitted in the district in which said building, structure or land is located, or set forth as permissible by special permit in said district ...." (emphasis added).

3. General Laws c. 40A, § 3, second par., sets forth the so-called "Dover Amendment," inserted by St.1950, c. 325, and reinserted by St.1975, c. 808, § 3, which provides, in pertinent part, that no zoning bylaw shall "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or ... 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."

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religious . . . or for educational purposes," the third paragraph requires that the child care facility "use" be either "primary, accessory or incidental." Each of those words must be read literally so as to give them their customary meaning. |821 Since the principal use of the Petrucci property is already residential, the child care facility cannot be a "primary" use, because "[i]t is . . . clear that you cannot have two primary uses [of the property] either under the by-law or by definition." [4] Nor can the facility pass muster as an "accessory" or "incidental" use under the zoning decisions construing those terms, which hold that such a use not only must be minor in significance to the primary use but also must have a normal or customary subordinate relationship to that use. Compare *Harvard v. Maxant*, 360 Mass. 432, 438, 275 N.E.2d 347 (1971); *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 844–846, 641 N.E.2d 1334 (1994); *Gallagher v. Board of Appeals of Acton*, 44 Mass.App.Ct. 906, 907, 687 N.E.2d 1277 (1997); *Maselbas v. Zoning Bd. of Appeals of N. Attleborough*, 45 Mass.App.Ct. 54, 56–57, 694 N.E.2d 1314 (1998). Given the size of the facility (six adults and forty-seven children) in relation to the several Petrucci family members already there engaged in "typical family" residential living, it will be so comparatively large, intensive, and separate an operation as to be neither accessory nor incidental.[5]

[1] Assuming, without deciding, that the proposed child care facility cannot be deemed "accessory" or "incidental" to a residential use, we nonetheless conclude that the board was wrong and the judge correct in determining that the facility qualified for the exemption of the third paragraph of G.L. c. 40A, § 3. We need look no further than the language of the statute, which states that a zoning by-law may not "prohibit, or |822 require a special permit for, the use of . . . structures, or the expansion of existing structures, for the primary . . . purpose of operating a child care facility." Petrucci's proposal falls squarely within that injunction. His existing structure, the barn, will be used (whether or not expanded) for the primary, indeed the sole, purpose of housing a child care facility operation; it cannot, therefore, be prohibited or subject to special permit requirements.[6]

Even were the board correct in its assertion that the Westwood by-law does not permit multiple primary uses on a single lot, such a prohibition is exactly what the statute declares impermissible with respect to child care facilities. The board's reiterated assertions that the exemption applies only where the child care facility can be characterized as the sole primary use "of the property" overlook the second half of the disjunctive statutory phrase, "use of land or structures." The board thereby runs afoul of *Watros v. Greater Lynn Mental Health & Retardation Assn., Inc.*, 421 Mass. 106, 653 N.E.2d 589 (1995), dealing with the educational purpose exemption of the second paragraph of § 3.

[2–4] In dismissing the argument of abutters who challenged the proposed use on

4. The board cites no statutory or decisional authority for this proposition. As indicated in note 2, *supra*, it was not at all "clear . . . under the by-law."

5. There are no Massachusetts cases explicating the status or character for zoning purposes of a child care facility located on residential property. *Woodvale Condominium Trust v. Scheff*, 27 Mass. App.Ct. 530, 533–535, 540 N.E.2d 206 (1989), dealing with the question whether a family day care business was permissible in a unit of a condominium, the master deed of which stated that the unit could be used "solely for residential dwelling purposes," is as close as we can find. There, the court concluded that the many distinctions between normal, residential use and a busy day care operation made the latter so different from the former that it could not be deemed a usual incident of residential living. Cases in other jurisdictions appear divergent. Compare *Schofield v. Zoning Bd. of Adjustment of Dennis*, 169 N.J.Super. 150, 154–155, 404 A.2d 357 (1979) (home day care of twelve to eighteen children is not incidental to residential use), and *Metzner v. Wojdyla*, 125 Wash.2d 445, 452, 886 P.2d 154 (1994) (even small-scale child care incompatible with covenant restricting use of the property to residential purposes), with *People v. Bacon*, 133 Misc.2d 771, 776–778, 508 N.Y.S.2d 138 (N.Y.Dist.Ct.1986) (home day care of children is a permissible accessory use in a residentially zoned district).

6. The judge did not rely on the plain language of the statute in rendering judgment for Petrucci, but his correct decision may be sustained on appeal on any sound basis. See *Hickey v. Commissioner of Pub. Welfare*, 38 Mass.App.Ct. 259, 263, 647 N.E.2d 62 (1995).

residential property of a barn to house and educate retarded adults—that the exemption applied only when the educational use occupied the entire property—the court in *Watros* stressed that the second paragraph "speaks not once, but twice, of 'land or structures' as the focus of the exemption." 421 Mass. at 113, 653 N.E.2d 589. The "constrictive result" flowing from the abutters' reading of the statute was "neither required by the language of the statute nor consistent with its purpose," *id.* at 114, 653 N.E.2d 589, which was "to prevent local interference with the use of real property"—whether of land or of structures thereon—for the exempt purposes identified in the statute. *Id.* at 113, 653 N.E.2d 589. Here, also, the plain language of the statute (which, as in *Watros*, speaks not once but twice of "land or structures") and its manifest intent—to broaden, rather than narrow, the opportunities for establishing child care facilities in the Commonwealth[7]—overwhelm the board's constrictive effort to parse any ⌊823substantial child care facility on a residential property out of the statute.[8]

⌊824 2. *Reasonableness of regulations.* As in *Campbell v. City Council of Lynn*, 415 Mass. 772, 777 & n. 6, 616 N.E.2d 445 (1993), we are concerned with a prior nonconforming structure. Despite the *Campbell* precedent, however, there was no inquiry as to whether alterations necessary to transform the barn

7. Aside from the very fact that it creates an exemption from local zoning restrictions, G.L. c. 40A, § 3, third par., defines "child care facility" as a "day care center" as that term is used in G.L. c. 28A. Chapter 28A, § 1(4), inserted by St.1972, c. 785, § 1, states that it is the policy and purpose of the Commonwealth to "promote the development of day care services in order to provide that such services shall be available in every community for all families which express a need for them." Although clear statutory language ordinarily obviates the need to resort to rules of interpretation, *Bronstein v. Prudential Ins. Co. of America*, 390 Mass. 701, 704–705, 459 N.E.2d 772 (1984), both related statutes, see *Plymouth County Retirement Assn. v. Commissioner of Pub. Employee Retirement*, 410 Mass. 307, 309–312, 571 N.E.2d 1386 (1991); *Civitarese v. Middleborough*, 412 Mass. 695, 700–702, 591 N.E.2d 1091 (1992), and legislative history, see *Commonwealth v. Gove*, 366 Mass. 351, 354–355 & n. 4, 320 N.E.2d 900 (1974), may be referenced by way of supplementary confirmation of the intent reflected in the words used.

8. The board cites *Watros* as supportive of its position, because of the court's incidental observation there, 421 Mass. at 113, 653 N.E.2d 589, that the educational use exemption of G.L. c. 40A, § 3, second par., does not distinguish between "principal" and "accessory" uses, while the third paragraph of § 3 explicitly does. The board's invocation of *Watros* fails precisely because it rests on the assumption, rejected by *Watros*, that an entire parcel of "land" must be used to benefit from the exemption and ignores the presence of the word "structure" in the statute. The board cites no other relevant authority for its statutory construction argument, but presumably relies on two standard canons. First, the use of different language in related statutes dealing with the same subject matter ordinarily indicates that different meanings were intended. See 2B Singer, Sutherland Statutory Construction § 51.02 (5th ed. 1992). Cf. *Beeler v. Downey*, 387 Mass. 609, 616, 442 N.E.2d 19 (1982). However, like all such canons, this one does not apply when (as here) the statutory language is so clear as to make extrinsic aids unnecessary, especially an aid whose application would be contrary to the Legislature's undoubted purpose. See *Brady v. Brady*, 380 Mass. 480, 483–484, 404 N.E.2d 75 (1980); *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 315–316, 565 N.E.2d 1205 (1991). Second, "[w]henever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous." *International Org. of Masters, Mates & Pilots, Atl. & Gulf Maritime Region, AFL–CIO v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.*, 392 Mass. 811, 813, 467 N.E.2d 1331 (1984). Again, even if applicable, this is not an ineluctable doctrine, see *Bartlett v. Greyhound Real Estate Fin. Co.*, 41 Mass.App.Ct. 282, 289, 669 N.E.2d 792 (1996), and in any event must yield to the even more fundamental precept, expressly relied on by the Land Court judge, that "a strictly 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." *Watros*, 421 Mass. at 113, 653 N.E.2d 589. In light of our holding above, we do not have to depend upon the judge's rationale—that by use of the words "primary, accessory or incidental" in the statute "the legislature intended to cover all bases ... and to leave no type of [child care facility] use beyond the reach" of the exemption—although we find the judge's construction of this remedial statute persuasive. See *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996); *Wonderland Greyhound Park, Inc. v. State Racing Commn.*, 45 Mass.App.Ct. 226, 233, 696 N.E.2d 964 (1998). We note, in this connection, that the board has failed to identify any use or purpose that might be but was not included or encompassed within the words "principal, accessory or incidental."

into a child care facility would take it outside the protection granted by G.L. c. 40A, § 6, to prior nonconforming structures. Pursuant to G.L. c. 40A, § 3, there could be no denial of the right to use the barn as a child care facility. Accordingly, analysis pursuant to § 6 would not turn on any impact of the *use* of the barn as a child care facility but on whether the barn *structure,* as altered, would be substantially more detrimental to the neighborhood than the existing nonconforming structure.

This case was decided in the Land Court solely on the basis of G.L. c. 40A, § 3, third par., and, while it appears unlikely that the proposed renovations of the barn would fail the § 6 test, the record does not invite resolution under § 6. In any event, we conclude that Petrucci is entitled to relief based on § 3 and that there is no reason to require proceedings under § 6. See *Campbell v. City Council of Lynn,* 415 Mass. at 777–778 n. 6, 616 N.E.2d 445.

The judge ruled that Petrucci had successfully demonstrated the unreasonableness of the dimensional requirements that the commissioner and the board imposed upon the barn. The relevant sections of the by-law require a side yard width of twenty feet and a rear yard depth of thirty feet, with a maximum building height of twenty-five feet. The barn is over thirty-four feet high and is located only twelve feet from both the side and rear lot lines. Compliance with the zoning requirements is possible only if the barn is physically relocated on the lot.[9]

The parties agree that the controlling authority on the reasonableness*825 of the application of zoning regulations to exempt uses under G.L. c. 40A, § 3, is *Trustees of Tufts College v. Medford,* 415 Mass. 753, 616 N.E.2d 433 (1993),[10] which announced an ad hoc, fact-specific approach to resolving disputes in most § 3 situations:

> "[T]he question of the reasonableness of a local zoning requirement, as applied to a proposed ... [exempt] use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an [applicant] ... making challenges similar to those made by Tufts will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project. The ... [applicant] 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 ... [applicant's property], without appreciably advancing the municipality's legitimate concerns. Excessive cost of compliance with a requirement imposed [by the zoning ordinance] ..., without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation of an ... [exempt] use." (Footnote omitted.)

415 Mass. at 759–760, 616 N.E.2d 433. The judge's conclusion, that enforcing Westwood's dimensional controls in Petrucci's circumstances would be unreasonable, represented a proper application of the factors set forth in *Tufts College.*

[5] Based upon the trial testimony of Petrucci's expert witnesses on zoning issues and historic buildings and of Petrucci himself (who had been in the construction business

9. The commissioner and the board determined that, short of relocation, Petrucci would have to obtain a variance, after site plan review. On Petrucci's second motion for partial summary judgment, the judge ruled that the proposed exempt use could not be made subject to either variance procedures or site plan review, a conclusion in accord with *Trustees of Tufts College v. Medford,* 415 Mass. 753, 760, 765, 616 N.E.2d 433 (1993). The board has not questioned that ruling in this appeal.

10. In his first partial summary judgment decision, the judge ruled that the *Tufts College* analysis, though arising in an educational use context, was applicable to child care facilities (another ruling unchallenged here). The basic rationale of *Tufts College* has been applied to another provision of G.L. c. 40A, § 3. See *Prime v. Zoning Bd. of Appeals of Norwell,* 42 Mass.App.Ct. 796, 802, 680 N.E.2d 118 (1997) (involving the agricultural use exemption of the first paragraph). Given the identity of the language of the "reasonable regulations" provisions in the second and third paragraphs of § 3, the teaching of *Tufts College* regarding the scope of the educational exemption vis-à-vis local zoning regulation was properly invoked by the judge. See *Insurance Rating Bd. v. Commissioner of Ins.,* 356 Mass. 184, 188–189, 248 N.E.2d 500 (1969); *Green v. Board of Appeals of Provincetown,* 404 Mass. 571, 573, 536 N.E.2d 584 (1989).

for thirty-five ⌊826years),[11] the judge relied on the following findings and undisputed facts:[12] The two-story, 4,960 square foot barn was built between 1840 and 1850 and is "a wonderful example" of the transitional "Greek Revival Italianate" style. As such, it is "a rare building form" that possesses historic and architectural merit deserving of preservation. It is surrounded by mature trees and particularly dense foliage on the sides closest to adjoining lots. In order to comply with the by-law by relocating the barn elsewhere on Petrucci's lot, numerous mature trees would have to be cut down and removed (from both the old and the new locations), a new foundation excavated, the entire barn lifted up and moved to the new foundation, and its roof reconstructed to lower its height. 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. The cost to Petrucci to move the barn would be approximately $150,000, beyond the cost of renovating it to serve as a child care facility.[13] The municipality's legitimate concerns served by the setback and height requirements in the by-law—safety, aesthetics, and privacy[14]—would all be negatively affected by the ⌊827relocation of Petrucci's barn. In its new, unscreened location, the barn would be significantly closer and more visible to Petrucci's residence and to neighboring homes. As a result, the potential fire danger would be increased, the privacy of the Petruccis and their neighbors would be reduced, and the loss of so many trees would adversely impair the community's character. Were the barn not moved and the child care facility abandoned, all of the present zoning infirmities would continue to exist.

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 on Petrucci and effectively deny the use of the premises for a child care facility; would serve no valid goals of municipal zoning regulation, see *Campbell v. City Council of Lynn*, 415 Mass. at 779, 616 N.E.2d 445; and would, in fact, detrimentally affect neighborhood safety, aesthetics, and privacy. Therefore, he was satisfied that Petrucci had carried his burden under *Tufts College* of showing the unreasonableness of requiring compliance with those requirements. We agree.[15] Con-

11. At the trial on the issue of the reasonableness of requiring Petrucci's compliance with Westwood's rear yard, side yard, and building height requirements, the board called no witnesses and adduced no evidence to show how the imposition of those limitations on Petrucci's project would advance legitimate municipal concerns.

12. The board does not complain that any of the judge's findings or the evidence presented by Petrucci's witnesses on which the judge relied was erroneous, except with respect to the finding regarding the estimated cost of compliance to relocate the barn. The board's challenge in that respect is wrong (see note 13, *infra*).

13. The board incorrectly maintains that the evidence regarding the cost of the barn's relocation (and, hence, the "cost of compliance" highlighted by the Supreme Judicial Court in the *Tufts College* test) was tainted by hearsay. This assertion overlooks the fact that Petrucci testified to his own understanding of the cost to move the barn, based on his thirty-five years of experience as a licensed builder. See *Colangeli v. Construction Serv. Co.*, 353 Mass. 527, 529–530, 233 N.E.2d 192 (1968); *Varney v. Donovan*, 356 Mass. 739, 255 N.E.2d 605 (1970); *Larabee v. Potvin Lumber Co.*, 390 Mass. 636, 643, 459 N.E.2d 93 (1983). The judge noted that this testimony was received without objection. In any event, the judge ruled, quite appropriately in our view, that "it is a matter of common sense that the cost to move a structure of the size and age of this barn would be significant."

14. The board does not disagree that these are the municipal purposes served by the relevant by-law requirements.

15. The board's sole criticism of the judge's decision on the issue of regulatory reasonableness (other than its misplaced assertion that Petrucci's cost of compliance evidence was hearsay, see note 13, *supra*) is that Petrucci did not demonstrate what the profits might be from his venture, which, the board suggested, might easily support the cost of compliance and make it reasonable. The board's critique fails in two respects. First, it rests on the assumption, contrary to the record, that the child care facility would be a commercial, for-profit enterprise. Second, it is based on the premise that different standards for gauging the costs of compliance ought to apply for proprietary as opposed to nonprofit chid care facilities. That premise finds no support in the language of the statute, nor in its purpose. Such

trast *Tufts College*, 415 Mass. at 762–764, 616 N.E.2d 433 (challenged zoning requirements were not shown to be unreasonable as applied to project because applicant failed to put in any evidence regarding estimated cost or difficulty or hardship of compliance, whereas municipality demonstrated that compliance would enhance safety and ease serious parking problems in the affected area).

[6] 3. *Judge's ordering of the permit.* The amended final judgment ordered the board, over its objection, to issue Petrucci a building permit for the child care facility. The board charged that such an order erroneously deprived abutters of their appellate[828] rights under G.L. c. 40A, § 17. The board's theory was that so long as it was defending its decisions upholding the commissioner, abutters were adequately represented and not aggrieved; but that they might become aggrieved, on bases other than those relied on by the board, when the board issued the building permit. The judge observed that the board had failed to state that any such potential abutters even existed (much less to identify them or their supposedly novel, separate grievances) or to suggest any additional issues that might be raised by such hypothetical abutters. Consequently, he rejected the board's position as sheer speculation supported by no relevant authority. He was satisfied that the facts in this case encompassed every criticism of the project which an abutter might reasonably raise in a § 17 appeal and reflected the board's protective persistence in pursuing all legitimate issues. The judge's refusal to allow further delay in implementing Petrucci's lawful project appears eminently sound to us. It was an exercise of his discretion under § 17 to grant such relief "as justice and equity may require," since it is clear from the record that the same ultimate result would ensue from an unspecific remand as that effected by the challenged order. See *Chira v. Planning Bd. of Tisbury*, 3 Mass.App.Ct. 433, 439–440, 333 N.E.2d 204 (1975), and cases cited; *Selectmen of Stockbridge v. Monument Inn, Inc.*, 8 Mass.App.Ct. 158, 163, 391 N.E.2d 1265 (1979), and cases cited, *S. C.*, 14 Mass.App.Ct. 957, 438 N.E.2d 365 (1982). Cf. *Lapenas v. Zoning Bd. of Appeals of Brockton*, 352 Mass. 530, 533–534, 226 N.E.2d 361 (1967); *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 520, 340 N.E.2d 487 (1976); *Leominster Materials Corp. v. Board of Appeals of Leominster*, 42 Mass.App.Ct. 458, 463, 677 N.E.2d 714 (1997).

Judgment affirmed.

a discrimination on the basis of corporate form would tend to create a significant disincentive for the private sector to address the public purpose of making child care services as widely available as their need requires. See note 7, *supra*.

united for a common purpose," any of which would have described the league more accurately than "partnership."

[4] The record reflects, in the Commonwealth's words, that the league was "an association of individuals organized for the purpose of teaching young boys sportsmanship and life skills through baseball." There was no evidence that the league was organized as a profit-making venture.[5] We believe ⌊702this is a necessary component of a "partnership" for purposes of G.L. c. 266, § 92.[6]

On review of a motion for a required finding, the issue is "whether the evidence offered by the Commonwealth, together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged." *Commonwealth v. Armand,* 411 Mass. 167, 169, 580 N.E.2d 1019 (1991), quoting *Commonwealth v. Campbell,* 378 Mass. 680, 686, 393 N.E.2d 820 (1979). The evidence presented in this case failed to show that the league was one of the entities covered by G.L. c. 266, § 92. Therefore, even though the evidence may have been sufficient to permit a reasonable trier of fact to conclude that Campbell knowingly presented false financial reports, her actions did not violate the statute and her motion for a required finding of not guilty should have been allowed. See *Commonwealth v. Brown,* 391 Mass. 157, 158–160, 460 N.E.2d 606 (1984).

The judgment is reversed, the verdict is set aside, and a finding of not guilty is to be entered on remand to the Superior Court.

So ordered.

415 Mass. 753

⌊753TRUSTEES OF TUFTS COLLEGE
v.
CITY OF MEDFORD.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 2, 1993.

Decided July 9, 1993.

College brought action challenging application of dimensional, parking, and loading-space requirements of zoning ordinance to several construction projects. The Land Court, Suffolk County, Robert V. Cauchon, J., decided that ordinance could not for most part be validly applied to projects in question, and city appealed. The Appeals Court, 33 Mass.App.Ct. 580, 602 N.E.2d 1105, modified judgment, and further review was sought. The Supreme Judicial Court, Greaney, J., held that: (1) under reasonable construction of ordinance's definition of "lot," requirement regarding num-

5. The Commonwealth never addresses who the "partners" are that form the alleged "partnership." Under the Commonwealth's definition, it seems that the officers, team managers, coaches, parents, players, and fans all share in the common purpose. To suggest that all of these people were partners in the partnership and thus liable for its debts and entitled to a share of its assets further reveals the weakness of the Commonwealth's argument.

6. The Commonwealth relies on *Zimmerman v. Bogoff,* 402 Mass. 650, 524 N.E.2d 849 (1988), in which we held that "even if the arrangements at issue fall short of a textbook joint venture, they are sufficiently similar to such an endeavor to create a fiduciary relationship ... similar to that which exists among parties to a joint venture." *Id.* at 660, 524 N.E.2d 849, quoting *Shain Inv. Co. v. Cohen,* 15 Mass.App.Ct. 4, 11, 443 N.E.2d 126 (1982). We did not hold in that case, as the Commonwealth seems to believe, that the arrangement at issue *was* a joint venture; rather, we held that it resembled a joint venture so closely that we felt justified in recognizing a fiduciary relationship among the members. Additionally, *Zimmerman* involved a question of civil liability and not, as here, a question of construing a statute for purposes of criminal liability. Finally, we note that the facts in *Zimmerman* came a lot closer to the "textbook" definition of joint venture than the facts here come to the "textbook" definition of partnership.

ber of parking spaces could be applied to proposed library addition; (2) college failed to establish that application of ordinance provisions dealing with loading spaces and setbacks would be unreasonable; and (3) city could not be prospectively enjoined from applying ordinance to future construction projects in core area of campus or to future projects such as those that resulted in college's suit.

Affirmed as amended in part, vacated in part.

O'Connor, J., concurred in part, dissented in part, and filed opinion.

1. Zoning and Planning ⚷236.1

Local zoning requirements which are adopted under provision of Dover amendment authorizing municipality to adopt and apply "reasonable regulations" concerning bulk, dimensions, open space, and parking to land and structures for which educational use is proposed, and which would serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health or safety, preserving character of adjacent neighborhood, or other statutory purpose, may be permissibly enforced against educational use. M.G.L.A. c. 40A, § 3.

See publication Words and Phrases for other judicial constructions and definitions.

2. Zoning and Planning ⚷21.5

Zoning requirement that results in something less than nullification of proposed educational use may be unreasonable within meaning of Dover amendment. M.G.L.A. c. 40A, § 3.

3. Zoning and Planning ⚷236.1

Because local zoning laws are intended to be uniformly applied, educational institution challenging application of such laws to proposed educational use bears burden of proving that local requirements are unreasonable as applied to its proposed project; institution may do so by demonstrating that compliance would substantially diminish or detract from usefulness of proposed structure, or impair character of institution's campus, without appreciably advancing municipality's legitimate concerns, or by establishing excessive cost of compliance with requirement without significant gain in terms of municipal concerns. M.G.L.A. c. 40A, § 3.

4. Zoning and Planning ⚷21.5

For purposes of provision of Dover Amendment pursuant to which municipality may adopt and apply "reasonable regulations" to land and structures for which educational use is proposed, it is not necessary that local zoning requirements be drafted specifically for application to educational use in order to be considered reasonable. M.G.L.A. c. 40A, § 3.

5. Zoning and Planning ⚷21.5

Proof that local zoning law could accomplish its purpose if it were drafted in terms other than those chosen will not suffice to establish that municipality's choice of regulation is unreasonable within meaning of provision of Dover Amendment pursuant to which municipality may adopt and apply "reasonable regulations" to land and structures for which educational use is proposed. M.G.L.A. c. 40A, § 3.

6. Zoning and Planning ⚷87

Accommodation sought to be accomplished by Dover amendment, between educational use of property and matters of critical municipal concern, cannot be achieved by insisting that educational institution seek variance to obtain permission to complete its project. M.G.L.A. c. 40A, § 3.

7. Zoning and Planning ⚷236.1

Although court may consider municipality's proper concession that particular requirement of its zoning law is unreasonable as applied to proposed educational use, apart from such concession, remaining requirements of local zoning laws, if otherwise reasonable, still apply. M.G.L.A. c. 40A, § 3.

8. Zoning and Planning ⚷546

If variance is granted at request of educational institution, and not challenged by aggrieved party within time period permitted by statute, variance cannot thereafter be attacked as improper. M.G.L.A. c. 40A, § 3.

9. Zoning and Planning ⚐280

In context of provision of zoning ordinance dealing with number of additional parking spaces needed when construction was undertaken on lot, definition of "lot" as duly recorded parcel of land that was commonly owned and had definite boundaries and was not divided by street could reasonably be construed as treating discrete areas of university's core campus, bounded by streets, as single commonly owned lots; therefore, application of provision to proposed library addition that also called for new parking garage on same such lot was not unreasonable within meaning of statute dealing with application of ordinances to proposed educational uses. M.G.L.A. c. 40A, § 3.

See publication Words and Phrases for other judicial constructions and definitions.

10. Zoning and Planning ⚐233

Court should construe local zoning requirement in manner that sustains its validity if such can be done without straining common meaning of terms employed.

11. Zoning and Planning ⚐77.1

Parking, as it affects physical conditions on and around educational use, is legitimate municipal concern and proper subject of local zoning regulation. M.G.L.A. c. 40A, § 3.

12. Zoning and Planning ⚐236.1

College failed to establish that application of zoning ordinance to require additional loading spaces in connection with new construction would be unreasonable such that requirement could not be applied. M.G.L.A. c. 40A, § 3.

13. Zoning and Planning ⚐236.1

When compliance by educational institution with zoning ordinance will involve no significant cost or other hardship to institution, and does not interfere to any appreciable extent with institution's plans, institution has failed to make out case that requirement as applied to it is unreasonable. M.G.L.A. c. 40A, § 3.

14. Zoning and Planning ⚐649

Evidence did not establish that zoning ordinance's setback requirement was unreasonable as applied to college's construction of parking garage; although it was claimed that compliance with ordinance would increase cost of project, no estimate as to amount of such increase was put in evidence, and municipality showed that its setback would permit vehicles easier access to garage and thus reduce congestion and enhance safety. M.G.L.A. c. 40A, § 3.

15. Zoning and Planning ⚐568

Where requirements of zoning ordinance did not facially discriminate against educational uses and were presumptively valid, municipality could not be prospectively enjoined from applying requirements to future construction projects in core area of college campus or to future projects similar to those which brought about college's challenge to application of requirements; whether application of neutral requirement to educational project was reasonable was fact-specific inquiry. M.G.L.A. c. 40A, § 3; c. 240, § 14A.

16. Zoning and Planning ⚐21.5

Whether requirements of local zoning law are reasonable cannot be decided in the abstract.

17. Zoning and Planning ⚐86

Local zoning law that improperly restricts educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances. M.G.L.A. c. 40A, § 3; c. 240, § 14A.

Eric W. Wodlinger, Boston (Robert J. Blumsack, City Sol., with him), for defendant.

Daniel J. Gleason, Boston (Donald R. Peck & Edward C. Mendler, with him), for plaintiffs.

⌊754 David R. Rodgers & Jeffrey Swope, Boston, for Association of Independent Colleges and Universities in Massachusetts, amicus curiae, submitted a brief.

John A. Pike, Boston, for Abstract Club & another, amici curiae, submitted a brief.

Before LIACOS, C.J., and WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR and GREANEY, JJ.

GREANEY, Justice.

This case concerns whether dimensional, parking and loading space requirements of the Medford zoning ordinance (ordinance) can be applied to several construction projects planned by Tufts College.[1] After a trial on a complaint brought in the Land Court by Tufts under G.L. c. 240, § 14A (1990 ed.), a judge of that court decided that the ordinance requirements could not, for the most part, be validly applied to Tufts' projects consistent with G.L. c. 40A, § 3, second par., as inserted by St.1975, c. 808, § 3 (generally referred to as the Dover amendment).[2] Medford appealed. The Appeals Court, relying on Medford's interpretation of the ordinance requirements and concessions made by Medford, determined that the judgment should be modified to permit application to Tufts' projects of some of the provisions. 33 Mass.App.Ct. 580, 602 N.E.2d 1105 (1992). We granted further appellate review. We agree with the Appeals Court that modification of the judgment is appropriate.

|755The projects as to which there remains controversy [3] are a 96,000 square foot addition to the Wessell Library (Wessell), Tufts' undergraduate library, and a multi-level parking garage which is planned on the site of an existing building on the southern side of Boston Avenue. The garage will provide parking spaces initially for 290 vehicles with an ability to be expanded to 530 spaces. Both projects will be located in the core, or Hill, area of Tufts' campus, on land zoned by Medford for "Apartment-2 Residential" use. Tufts also sought a determination that requirements of the ordinance could not be applied to future, as yet unspecified, projects in the core area of its campus.

The requirements of the ordinance that remain at issue provide for: (1) a front-yard setback dependent on the size of the building and calculated by a formula (§ 6.3.5[c]); (2) one loading space (twelve feet in width and thirty feet in length) for each 50,000 square feet of new construction (§§ 5.3, 10.41 and 10.45); [4] and (3) one parking space for each 750 square feet of

1. Tufts' campus is partly located in the city of Somerville. Somerville was originally named as a defendant in Tufts' action, but Tufts and Somerville arrived at an agreement with regard to the construction that will occur in Somerville. The remaining matters affect the projects planned for the Medford portion of the campus.

2. The pertinent provisions of G.L. c. 40A, § 3 (1990 ed.), read as follows: "No zoning ordinance or by-law ... shall ... regulate or restrict the use of land or structures for religious purposes or for educational purposes ... 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." The history of the special zoning status granted to educational and religious uses of land is recounted in *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 27 n. 10, 391 N.E.2d 279 (1979).

3. Several matters that were the subject of controversy in the Land Court are no longer at issue. The ordinance contains a provision that requires site plan review in conjunction with an application for a special permit for projects having a significant impact on Medford. Relying on *The Bible Speaks v. Board of Appeals of Lenox, supra*, the Land Court judge concluded that the site plan review and special permit requirements of the ordinance could not be applied to Tufts' projects. Medford does not dispute this point.

Prior to trial, Medford granted Tufts a variance from the ordinance's parking and loading space requirements as to the construction of the Olin Language and Culture Center (Olin), a new classroom building. The Land Court decision nonetheless provided that the ordinance's parking and loading space requirements were inapplicable to Olin. Medford does not challenge this ruling.

Tufts also contested the application of dimensional and parking requirements to a proposed addition to its Cousens Gymnasium and Hamilton Pool facility. The judge concluded that the requirements could be applied to this project. Tufts no longer questions this conclusion.

4. A loading space is a striped-in area of pavement, adjacent to a building, reserved for trucks and other vehicles making deliveries to the building. The purpose of loading spaces is to provide off-street access to a delivery site and thus alleviate traffic congestion that may result when vehicles, particularly trucks, block busy streets while trying to make deliveries.

new construction which must be located[756] either on the same lot as the new construction or within 200 feet thereof (§§ 5.3, 10.2 and 10.24). The ordinance defines the term "lot" as a duly recorded parcel of land which is commonly owned and has definite boundaries and is not divided by a street (§ 3.30).[5]

Application of these requirements to the Wessell addition would require Tufts to provide 130 new parking spaces on the Wessell lot (or within 200 feet thereof). Assuming that the ordinance could be construed as treating each building on the campus as occupying a separate lot, see note 5 *supra*, the Land Court judge interpreted the parking requirement as necessitating "postage stamp" parking lots adjoining each project Tufts might undertake in the core area of its campus. The judge considered this requirement to be incompatible with the character of the Tufts campus. In the judge's opinion, the proposed Boston Avenue garage provided a reasonable solution to the parking problem faced by Tufts, but it was not a solution permitted under the ordinance. The judge also concluded that Wessell did not need two additional loading spaces. He therefore ruled that provisions of the ordinance requiring off-street parking and loading spaces "did not rise to the level of 'reasonable regulations' within the meaning of G.L. c. 40A, § 3, and, accordingly, [were] inapplicable to Tufts' use of its land in Medford."

The ordinance also requires a fifty-foot setback from Boston Avenue for the new parking garage (§ 6.3.5[c]). Tufts proposes a thirty-foot setback for the garage. "The evidence was to the effect that there is no absolute physical impediment to constructing a garage of the planned dimensions with a setback of fifty feet, but the cost will be increased because of the sharply rising slope of the land behind the [757]garage and because of the need that will be created to support the foundation of another building, a power plant, situated on the same hillside. No estimate of the expected cost increase was put in evidence...." 33 Mass.App.Ct. at 585, 602 N.E.2d 1105. The Land Court judge, who took a view of the campus, noted that the topography of the land at the proposed garage site might warrant the grant of a variance under G.L. c. 40A, § 10, from the setback requirement. Based on a need for a solution to a serious parking problem facing Tufts, and apparently assuming that the garage might not be built if the setback requirement was enforced, the judge concluded that full setback would unreasonably interfere with the use of Tufts' land. He declared, therefore, that the setback requirement could not be enforced. Finally, the judge extended his conclusion that the various requirements of the ordinance that were in contention could not be applied to any future construction that might be undertaken by Tufts in the core area of the campus, and, in a post-judgment order (entered on Tufts' request), the judge defined the area of Tufts that he considered to constitute the "core campus."

1. *The Dover Amendment.* We first discuss generally applicable legal principles. The Dover Amendment bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict the *use* of land for educational purposes. However, a proviso to the statute authorizes a municipality to adopt and apply "reasonable regulations" concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against an educational use, see *Newbury Junior College v. Brookline*, 19 Mass.App. Ct. 197, 205, 472 N.E.2d 1373 (1985), and honoring legitimate municipal concerns that typically find expression in local zon-

5. The ordinance also provides (§ 6.24[a]) that buildings on the same lot "shall not be less than the same distance from one another as if they were on separate lots." The Land Court judge found that application of this provision would necessitate drawing imaginary "lot lines" on Tufts' campus for purposes of calculating the required distance between buildings. Medford has conceded that this provision is unreasonable as applied to the construction of Olin, Wessell, and the Boston Avenue parking garage.

ing laws. This case requires us to address that balance in practical terms.

[1, 2] 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 promot⌊758ing public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St.1975, c. 808, § 2A, see *MacNeil v. Avon*, 386 Mass. 339, 341, 435 N.E.2d 1043 (1982), may be permissibly enforced, consistent with the Dover Amendment, against an educational use. See *Radcliffe College v. Cambridge*, 350 Mass. 613, 215 N.E.2d 892 (1966); *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 31, 391 N.E.2d 279 (1979) (a building inspector may properly deny permits to an educational institution for a structure that does not comply with "reasonable regulations"). See also *Southern New England Conference Ass'n of Seventh-Day Adventists v. Burlington*, 21 Mass.App.Ct. 701, 710, 490 N.E.2d 451 (1986) (local zoning law protecting wetlands applied to property protected by Dover Amendment). The *Radcliffe College* case suggests that a local zoning provision that requires an educational institution to adapt plans for the use of its land may be enforced, so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern. On the other hand, a zoning requirement that results in something less than nullification of a proposed educational use may be unreasonable within the meaning of the Dover Amendment. See *Radcliffe College v. Cambridge, supra*, 350 Mass. at 619, 215 N.E.2d 892 (concluding that a parking requirement could be applied, but suggesting that future application might be unreasonable if the result would require the educational institution to provide more parking spaces "than could in reason be deemed necessary to take care of the cars brought to the [area] by the use made of it by the college").[6]

[3–5] ⌊759What we have said thus far suggests that the question of the reasonableness of a local zoning requirement, as applied to a proposed educational 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

6. The legislative history supports the conclusion that G.L. c. 40A, § 3, second par., is intended to incorporate the principles enunciated in *Sisters of the Holy Cross v. Brookline*, 347 Mass. 486, 198 N.E.2d 624 (1964), and in *Radcliffe College v. Cambridge*, 350 Mass. 613, 215 N.E.2d 892 (1966). In the Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act (Jan.1972) (Report), which preceded enactment of the present Zoning Act, the statutory protection accorded educational uses was considered. See Report, 1972 House Doc. No. 5009. As to the then existing law, it was said (at p. 21) that "the scope of the [educational use protection], as presently worded, would seem to depend on whether or not the application of bulk regulations to the institution within the ambit of its protection has the effect of defacto prohibition on use as opposed to a channeling effect where alternative educational ... uses are available." With regard to proposed § 3, the Report (at p. 26) "encourag[ed] the use of [reasonable bulk, dimensional and parking] control[s] where essential to the well-being of the adjacent neighborhood, and where the regulation will not seriously jeopardize the mission of the protected institutions."

In maintaining that facially neutral zoning requirements automatically can be applied to an educational use, the dissent, *post*, fails to take into account this legislative history, and the cases cited above, which St.1975, c. 808, § 3, was intended to codify. See *Newbury Junior College v. Brookline*, 19 Mass.App.Ct. 197, 199 n. 4, 472 N.E.2d 1373 (1985); *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 29, 391 N.E.2d 279 (1979) (St.1975, c. 808, c. 3, synthesizes Dover amendment and case law construing it). The *Radcliffe College* and *Sisters of the Holy Cross* cases plainly provide that facially neutral requirements cannot be applied to educational uses without further inquiry into the outcome produced by such an application. Particularly where the requirements sought to be applied do not take into account the special characteristics of an educational use (such as on-campus living and dining arrangements and the need for large classroom and library buildings), as is the case here, application of the requirements to the property of an educational institution may be inappropriately restrictive. If the approach suggested by the dissent is followed, a set of facially neutral zoning requirements could be adopted that would, in practice, prevent almost any educational use of land.

proving that the local requirements are unreasonable as applied to its 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.[7] Excessive cost of compliance with a requirement imposed on an educational institution, without significant[760] gain in terms of municipal concerns, might also qualify as unreasonable regulation of an educational use. We reject the suggestion that only local zoning requirements drafted specifically for application to educational uses are reasonable within the scope of the Dover Amendment. Nothing in that statute mandates the adoption of local zoning laws which are tailored specifically to educational uses. See Report, *supra* at 26 (observing that *ideally* regulations should be specifically adapted to educational uses). Similarly, proof that a local zoning law could accomplish its purpose if it were drafted in terms other than those chosen will not suffice to establish that the municipality's choice of regulation is unreasonable.[8] See *Moss v. Winchester*, 365 Mass. 297, 299, 311 N.E.2d 555 (1974).

[6–8] The Appeals Court observed in this case that the Dover Amendment is intended to encourage "a degree of accommodation between the protected use ... and matters of critical municipal concern ...." (citations omitted). 33 Mass.App. Ct. at 584, 602 N.E.2d 1105. We agree with this observation, but add that such an accommodation cannot be achieved by insisting that an educational institution seek a variance to obtain permission to complete its project.[9] *Radcliffe College v. Cambridge*, *supra*, 350 Mass. at 619, 215 N.E.2d 892, citing *Russell v. Zoning Bd. of Appeals of Brookline*, 349 Mass. 532, 535, 209 N.E.2d 337 (1965). Additionally, a court may consider a municipality's proper concession, such as was made here in the course of litigation, that a particular requirement[761] of its zoning law is unreasonable as applied to a proposed educational use. Apart from any concession, the remaining requirements of the local zoning law, if otherwise reasonable, would still apply. *Doliner v. Town Clerk of Millis*, 343 Mass. 10, 15, 175 N.E.2d 925 (1961) (zoning by-law provisions treated as separable). *Attorney Gen. v. Dover*, 327 Mass. 601, 608, 100 N.E.2d 1 (1951). We now consider application of the ordinance's requirements to Tufts' projects in light of these principles and the Appeals Court's modification of the Land Court judgment.

[9] 2. *Wessell addition*. *a. Parking*. The Appeals Court modified the judgment by deleting therefrom language that declared the ordinance's parking requirements inapplicable to the Wessell addition. As the basis for so doing, the Appeals Court agreed with Medford's contention that the ordinance's definition of the term "lot," see note 5 *supra*, could be construed as treating discrete areas of Tufts' core campus, bounded by streets, as single commonly owned lots. Under this interpretation, the proposed Boston Avenue garage and Wessell would occupy the same lot. The parking that will be provided by the garage (a minimum of 290 spaces) more than satisfies the ordinance's requirement that Tufts, in conjunction with the Wessell addition, provide a minimum of 130 new

7. For example, a showing that the parking requirements of the ordinance, as applied, would necessitate that Tufts pave over significant open areas of the campus, would demonstrate the unreasonableness of the ordinance in view of the fact that construction of the proposed garage will provide an adequate solution to the parking problem.

8. For example, the fact that the Medford ordinance might alleviate the parking problem on and around the Tufts campus by means of a regulation based on the size of the student population does not prove that requiring additional parking in association with new construction is an unreasonable means of addressing an existing parking deficiency.

9. However, if a variance is granted at the request of an educational institution, and not challenged by an aggrieved party within the time period permitted by statute, the variance cannot thereafter be attacked as improper. See *O'Blenes v. Zoning Bd. of Appeals of Lynn*, 397 Mass. 555, 492 N.E.2d 354 (1986); *Bjornlund v. Zoning Bd. of Appeals of Marshfield*, 353 Mass. 757, 231 N.E.2d 365 (1967).

parking spaces on the lot containing Wessell.

[10] A court should construe a local zoning requirement "in a manner which sustains its validity," *Doliner v. Town Clerk of Millis, supra,* 343 Mass. at 15, 175 N.E.2d 925, if this can be done without straining the common meaning of the terms employed. *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham,* 382 Mass. 283, 290, 415 N.E.2d 840 (1981). *Hall v. Zoning Bd. of Appeals of Edgartown,* 28 Mass.App.Ct. 249, 254, 549 N.E.2d 433 (1990). The ordinance's definition of lot logically applies to the part of the Tufts campus in which Wessell is situated and the parking garage will be located.[10]

[11] ⌊762 Based on this interpretation, Tufts has not shown that the parking requirements of the ordinance are unreasonable as applied to the Wessell addition. It was properly found in the Land Court that there is a serious parking problem on Tufts' core campus and on public streets adjacent thereto. Parking, as it affects physical conditions on and around an educational use, is a legitimate municipal concern and a proper subject of local zoning regulation. *Radcliffe College v. Cambridge, supra,* 350 Mass. at 617 & n. 4, 215 N.E.2d 892. Compliance by Tufts with the parking requirements of the ordinance "would not require a greater number of spaces than could in reason be deemed necessary to take care of the cars brought to the [area] by the use made of it by the college." *Id.* at 619, 215 N.E.2d 892. While Tufts might prefer to defer addressing the parking problem, the ordinance's requirements can be satisfied by the construction of the parking garage, a use of Tufts' land recommended to the college by its consultants and found to be reasonable by the Land Court judge. We therefore agree with the Appeals Court that the requirements concerning parking are reasonable as applied to Tufts' campus, and that Medford can require Tufts to construct the Boston Avenue parking garage (or some equivalent which satisfies the ordinance's requirements) as a condition to building the Wessell addition.

[12] b. *Loading spaces.* The Land Court judge concluded that deliveries to Wessell would not be sufficient in number to justify the two additional loading spaces required by the ordinance. He determined, therefore, that the loading space requirements of the ordinance could not reasonably be applied to the Wessell addition. The Appeals Court revised this por⌊763tion of the judgment because of "the ease with which compliance [with the loading space requirements can be] achieved." 33 Mass. App.Ct. at 586, 602 N.E.2d 1105. Tufts contends that the notion of "ease of compliance" is foreign to Dover Amendment jurisprudence. We disagree.

[13] On this aspect of the appeal, the Appeals Court simply expressed, in different terms, the principle that the burden of proving a local zoning requirement unreasonable under the Dover Amendment falls on the educational institution challenging the requirement. When compliance will involve no significant cost or other hardship to an educational institution, and does not interfere to any appreciable extent with the institution's plans, the institution has failed to make out a case that the requirement, as

10. Tufts suggests that another provision of the ordinance, (§ 7.51) which limits structures that may be built in a rear yard, prohibits more than one major structure on a single lot, and therefore forecloses application of the ordinance's definition of "lot" to areas of Tufts' campus already containing numerous major structures. As a matter of construction, we are not persuaded by Tufts' position. The provision in question must be read in conjunction with § 6.24(a), see note 5 *supra,* which *permits* multiple structures on a single lot. We think that § 7.51 only limits structures that can be built within the rear yard setback requirement imposed by the ordinance. More to the point, the record contains no evidence that Medford has invoked § 7.51 as a basis for blocking construction of the addition to Wessell or the parking garage. Thus, we do not have occasion to construe this provision, or to consider its reasonableness, as applied to Tufts' projects. See *Doliner v. Town Clerk of Millis, supra,* 343 Mass. at 10, 14–15, 175 N.E.2d 925.

applied, is unreasonable.[11]

[14] 3. *Parking garage.* The Appeals Court also deleted the portion of the judgment that declared the ordinance's setback requirement inapplicable to construction of the Boston Avenue garage. As noted, the evidence was that the parking garage could be constructed with the fifty-foot setback required by the ordinance, but that compliance with the ordinance would increase the cost of the project. No estimate of the amount of the increase was put in evidence by Tufts. Medford, on the other hand, demonstrated that Boston Avenue, a major public way, has only one traffic lane in each direction and is heavily travelled, particularly at rush hours. The fifty-foot setback will permit vehicles easier access to the garage reducing congestion and enhancing safety. With no particularized evidence in this case as to the cost and difficulty of compliance that can be measured against Medford's legitimate concerns as to traffic congestion and safety, the Land ⌊764Court judge lacked an appropriate basis for the conclusion that Tufts had proved the setback requirement unreasonable as applied to construction of the parking garage. 33 Mass.App.Ct. at 585, 602 N.E.2d 1105.[12]

[15, 16] 4. *Future projects.* We also agree with the Appeals Court's decision to modify the judgment by deleting therefrom language declaring that Medford cannot apply ordinance requirements to future construction projects in the core area of Tufts' campus or to future projects similar to Wessell, Olin, or the parking garage. Whether requirements of a local zoning law are reasonable cannot be decided in the abstract. The central question is whether application of the requirements to a specific project in a particular setting furthers legitimate municipal concerns to a sufficient extent to warrant requiring an educational institution, a use granted special protected status by the Dover Amendment, to alter its development plans. As the Appeals Court correctly stated, this "is essentially a fact-based determination, one that cannot properly be made for possible future construction projects not detailed in the evidence." 33 Mass.App.Ct. at 583, 602 N.E.2d 1105.

Tufts argues nonetheless that the Appeals Court's deletion from the judgment of references to future, speculative projects is inconsistent with the scope of G.L. c. 240, ⌊765§ 14A,[13] the statute that confers

11. *Tisbury v. Martha's Vineyard Comm'n,* 27 Mass.App.Ct. 1204, 544 N.E.2d 230 (1989), relied on by Tufts, is not to the contrary. In *Tisbury,* the evidence established that requiring compliance with by-law provisions governing the size of oil tanks would, in practice, prohibit the landowners from using their property for agricultural purposes (also protected by G.L. c. 40A, § 3). In other words, application of the by-law provisions would nullify a protected use. This is clearly distinguishable from a situation in which compliance does not encroach to any appreciable extent on an educational institution's right to set its own priorities for the use of its land.

12. The Appeals Court went on to observe that, although Tufts had not proved the ordinance unreasonable for purposes of the Dover Amendment, it might nonetheless be entitled under G.L. c. 40A, § 10, to a variance from the setback requirement because of the topography of the Boston Avenue site. It is obvious that the Appeals Court's conclusion that the setback requirement was reasonable did not rest on the possible availability of a variance for the structure. The Appeals Court properly observed that, even though Tufts had failed to prove the setback ordinance unreasonable as applied to the parking garage (for the reasons explained above), the particular characteristics of the lot might nonetheless entitle Tufts to obtain a variance. See *Josephs v. Board of Appeals of Brookline,* 362 Mass. 290, 285 N.E.2d 436 (1972) (variance granted due in part to sloping lot and increased cost of compliance); *Broderick v. Board of Appeal of Boston,* 361 Mass. 472, 280 N.E.2d 670 (1972) (same). Tufts thus has an independent means of seeking relief from application of the setback provision if it chooses to pursue the point.

13. In full, G.L. c. 240, § 14A, as amended by St.1975, c. 808, § 5, provides: "The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter [40A] or under any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon,

authority on the Land Court to pass on the validity of local zoning requirements. This argument misconstrues the nature of the showing an educational institution must make to prevail when seeking a determination under G.L. c. 240, § 14A, as to the reasonableness of applying a local zoning law to its property.

[17] A local zoning law that improperly restricts an educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances. In this case, for example, the Land Court judge properly declared invalid the site plan and special permit requirements of the ordinance as to present *and* future, unspecified projects on the Tufts campus. *The Bible Speaks v. Board of Appeals of Lenox, supra,* 8 Mass.App.Ct. at 32–33, 391 N.E.2d 279. The Appeals Court correctly did not disturb this aspect of the judgment. The other requirements of the ordinance (parking, setback and dimensional regulations) challenged by Tufts do not facially discriminate against educational uses and are presumptively valid under the proviso to the Dover Amendment. The relief sought by Tufts pursuant to G.L. c. 240, § 14A, was a determination that, *as applied,* ⌊766 the regulations were unreasonable. As has been said, like certain other kinds of challenges to the applicability of a local zoning law, this relief presents a question that can be properly resolved only by reference to specific facts. See *Sinn v. Selectmen of Acton,* 357 Mass. 606, 610, 259 N.E.2d 557 (1970) (validity of exemption of all municipal uses from use regulations "can be determined only by examining its application in particular cases"); *Aronson v. Sharon,* 346 Mass. 598, 603, 195 N.E.2d 341 (1964) (whether by-law is sustainable exercise of municipality's police powers or a deprivation of private property without compensation "often depends upon the facts of the particular case"). See *Southern New England Conference Ass'n of Seventh-Day Adventists v. Burlington,* 21 Mass.App.Ct. 701, 710, 490 N.E.2d 451 (1986). There the Appeals Court declined to rule whether boundary established by wetlands by-law was valid as applied to the church's land, stating: "In the absence of any evidence bearing on the issue of the lawfulness of the application of the by-law to set the wetlands boundary, any attempt at decision on this record would require speculation and would be unfair to one party or the other." The Appeals Court properly concluded that the Land Court's rulings embodied in the judgment as to future, unspecified, projects of Tufts lacked a proper factual foundation, and that such projects were not an appropriate subject for relief pursuant to G.L. c. 240, § 14A.

5. *Disposition.* The judgment is amended, in numbered paragraph 2, by striking the words, "and any other future structures or additions which may be similarly situated," and by striking numbered paragraphs 3, 4, and 5. The judgment is also amended to declare that the parking requirements of the ordinance are not invalid, and that as applied to Wessell these requirements can be met by construction of the requisite number of spaces in the proposed Boston Avenue parking garage or by an equivalent solution which satisfies the requirements. As so amended, the judgment is affirmed. The order defining the phrase "core campus" is vacated.

So ordered.

⌊767 O'CONNOR, Justice (concurring in part and dissenting in part).

Statute 1950, c. 325, § 1, entitled "An Act prohibiting discriminatory zoning by-laws and ordinances," amended G.L. c. 40,

including alterations or repairs, for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition. The right to file and prosecute such a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve or repair existing structures on such land has been applied for, nor by the fact that no architects' plans or drawings for such erection, alteration, improvement or repair have been prepared. The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not."

§ 25, a predecessor of G.L. c. 40A, § 3, by adding the following words: "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." In *Attorney Gen. v. Dover*, 327 Mass. 601, 100 N.E.2d 1 (1951), the court held that a town of Dover zoning by-law prohibiting the erection, alteration, or use of a building in a residential district for a sectarian educational use was invalid under St.1950, c. 325, § 1. That act subsequently became known as the Dover Amendment. *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 27 n. 10, 391 N.E.2d 279 (1979). Statute 1950, c. 325, § 1, was susceptible to an interpretation that would invalidate any zoning ordinance or by-law (regulation) that would have imposed on a sectarian, educational use any requirement concerning bulk and height of structures, yard size, lot area, setback, open space, building coverage or parking area. Indeed, that construction appears to have been urged by the plaintiff, and accepted by the Land Court judge, in *Radcliffe College v. Cambridge*, 350 Mass. 613, 614, 215 N.E.2d 892 (1966) ("The college claims to be exempt from art. VII, § 2 [an ordinance requiring off-street parking], by reason of G.L. c. 40A, § 2, as amended through St.1959, c. 607, § 1, which provides 'that no ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid' ").

By St.1975, c. 808, § 3, the Legislature struck out G.L. c. 40A and inserted a new chapter 40A in its place. The new c. 40A provides in relevant part, "No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious [768]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." That provision, were it to be construed without reference to the proviso, would present the same ambiguity that was present in the Dover Amendment, St.1950, c. 325, § 1. Absent the proviso, the language of the statute could fairly be construed to mean that any requirement as to bulk and height of structures, yard size, lot area, setback, open space, building coverage or parking area, imposed on parcels of land devoted to religious or educational uses, is unauthorized. The obvious purpose of the proviso is to make clear that such requirements, if not intentionally or in practical effect discriminatory against the protected uses, and if rationally related to the purposes of zoning regulations enumerated in St.1975, c. 808, § 2A, are authorized, valid, and enforceable without reference to the use to which a particular parcel is put.[1, 2]

1. The court incorrectly states, *ante* at —— n. 6, that "[i]f the approach suggested by the dissent is followed, a set of facially neutral zoning requirements could be adopted that would, in practice, prevent almost any educational use of land." To the contrary, if the approach suggested by the dissent were to be followed, zoning regulations, such as those at issue in *Sisters of the Holy Cross of Massachusetts v. Brookline*, 347 Mass. 486, 198 N.E.2d 624 (1964), that would "in practice, prevent almost any educational use of land" would, for that very reason, be discriminatory against a protected use, and would therefore be unauthorized (invalid).

2. The court also states, *ante* at 438 n. 6, that "[i]n maintaining that facially neutral zoning requirements automatically can be applied to an educational use, the dissent fails to take into account" Report, 1972 House Doc. No. 5009. It is true that I do not consider that piece of legislative history significant. "Only if the statute is ambiguous, or couched in terms that suggests that [the court] do so, [does the court] look beyond the express statutory language." *Pobieglo v. Monsanto Co.*, 402 Mass. 112, 116, 521 N.E.2d 728 (1988). Neither condition for looking beyond the express statutory language is present here. However, even if one were to consider Report, 1972 House Doc. No. 5009, it would not suggest that the Legislature intended by St.1975, c. 808, § 3, to discriminate *in favor* of protected uses with respect to parking and

|769Nothing in G.L. c. 40A suggests that the Legislature intended to discriminate *in favor* of religious and educational uses. Yet, if the court is right in concluding that, in certain circumstances, a trial judge or appellate court must exempt a parcel, which is devoted to a protected use, from zoning regulations that are binding on parcels devoted to all other uses, such discrimination results. Surely, if parcels not committed to protected uses must comply with zoning regulations concerning off-street parking, setback of buildings, lot area and the like, regardless of the difficulty of compliance, but an educational institution is exempt if it demonstrates 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," or that compliance would result in "excessive cost ... without significant gain in terms of municipal concerns," as the court states, *ante* at 439, discrimination occurs of a type that is the reverse of the discrimination targeted by the Dover Amendment.

General Laws c. 40A, § 3, is clear. No zoning ordinance or by-law may "prohibit, regulate or restrict the use of land or structures for ... educational purposes on land owned or leased by ... a nonprofit educational corporation" like Tufts College, but "such land or structures may be subject to reasonable regulations [that is, reasonable regulations, although not mandated, are authorized, and such land or structures are subject to them] concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Nothing in chapter 40A authorizes a judge or a court to declare facially reasonable nondiscriminatory regulations inapplicable to a particular parcel, or to exempt a particular parcel from them, whenever the judge or court, acting as a master planner, decides that the "application of the requirements to a specific project in a particular setting |770[would not] further[ ] legitimate municipal concerns to a sufficient extent to warrant" application and enforcement of the regulations. *Ante* at 441.

The challenged requirements of the ordinance in this case are reasonable. They do not discriminate against statutorily protected land uses either by expressed intention or in practical operation. The ordinance is use-neutral. Furthermore, the ordinance is rationally related to legitimate municipal zoning objectives. No one appears to contend otherwise. In my view, contrary to the thrust of the court's opinion, the court would have no right to declare the challenged requirements inapplicable to the Tufts College property. For that reason, and not for the reasons articulated by the court, I am satisfied that the challenged requirements apply in this case. Accordingly, to the extent that the court orders numbered paragraphs 3, 4 and 5 struck from the judgment, thereby achieving that result, I concur with the order. However, because the order striking language from paragraph 2 of the judgment is premised incorrectly, I believe, on the idea that future applicability of the challenged regulations must depend on facts yet to be developed and on a "balancing" of the extent of the imposition on the use represented thereby compared to municipal concerns, I dissent from the court's order insofar as it strikes language from paragraph 2 of the judgment.

APPENDIX.

HOUSE—No. 5009

"1. *Dover Amendment.* It is unfortunate that the present state of the law is such that some communities may have legitimate doubts about the validity of regulations which would impose reasonable controls on institutions presently covered by the Dover amendment. The Department would encourage the use of such control where essential to the well-being of the adjacent neighborhood, and where the regulation will not seriously jeopardize the mission of the protected institutions.

setback and similar restrictions. The relevant recommendation contained in the Report at page 26 may be found in the appendix to this opinion.

APPENDIX.—Continued

Thus, the Department proposes to clarify the present language so as to achieve the aims of the general court in passing the original amendment while at the same time precluding unwise restrictions on the power of the communities to regulate the land use activities of churches and educational institutions. The pro⊥posed771 language, for example, would specifically authorize the imposition of reasonable regulations concerning density or intensity of occupancy, bulk and height [of] structures, yards and setbacks, as well as limitations upon the location of accessory uses which traditionally have tended to be detrimental to adjacent property. Ideally, this should be accomplished by adopting regulations specifically designed to apply to uses protected by the Dover Amendment located in otherwise restricted zones, thus avoiding the problem of attempting to apply the *same* bulk regulations to the protected uses as ordinarily apply to other permitted uses in the zone. For example, instead of attempting to apply residential dimensional regulations to churches or schools located in a residential zone (See, *Sisters of the Holy Cross v. Town of Brookline*, 347 Mass. 486 [198 N.E.2d 624] (1964)) the by-law or ordinance should establish dimensional regulations specifically applicable to churches or schools located in such zones."

415 Mass. 772

⊥772John CAMPBELL & others[1]

v.

CITY COUNCIL OF LYNN & others[2]
(and a companion case[3]).

Supreme Judicial Court of Massachusetts, Essex, Suffolk.

Argued Sept. 14, 1992.

Decided July 9, 1993.

Neighbors sought review of grant of special permit for use of property as group home for elderly, mentally ill residents. The Superior Court, Suffolk County, John T. Ronan, J., upheld special permit. Neighbors subsequently sought review of grant of building permit for alterations on premises. The Land Court, Marilyn M. Sullivan, J., upheld building permit. Neighbors appealed both judgments. The Appeals Court, Brown, J., 32 Mass.App.Ct. 152, 586 N.E.2d 1009, affirmed. Appeal was taken. The Supreme Judicial Court, Greaney, J., held that: (1) statute exempting property used for educational purposes from zoning regulation authorized grant of building permit, despite noncompliance with general bulk and dimensional requirements; (2) owners of premises could not be compelled to seek variance or permit for prior nonconforming structures; and (3) remand was required to determine whether compliance with zoning requirements for off-street parking could be demanded, without nullifying protected educational use.

Superior Court judgment affirmed; Land Court judgment vacated and remanded.

Wilkins, J., filed opinion dissenting in part in which Lynch, J., joined.

O'Connor, J., filed separate dissenting opinion.

1. Nine other residents of Lynn who live near the premises.

2. Thomas C. Goff, Jr., and James P. Lyons, the owners of the premises.

3. The companion case was brought in the Land Court by eight of the plaintiffs in the Superior Court action against the Lynn zoning board of appeals and the owners, Goff and Lyons. The cases were consolidated on appeal. In discussing the trial court actions, we refer to the neighbors as plaintiffs without differentiating one group of plaintiffs from the other.

Cite as, Mass.App., 391 N.E.2d 279

The BIBLE SPEAKS

v.

BOARD OF APPEALS OF LENOX (and four companion cases.[1])

Appeals Court of Massachusetts, Berkshire.

Argued April 25, 1979.

Decided July 3, 1979.

Appeals were taken from a judgment of the Superior Court, Berkshire County, George, D. J., in consolidated cases involving a municipality's attempts to enforce zoning restrictions on a private nonsectarian educational institution. The Appeals Court, Greaney, J., held that provisions of municipality bylaw were invalid as going beyond scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses under statute and placed board of zoning appeals in position to act impermissibly to impede reasonable use of institution's land for educational purposes.

Order accordingly.

1. Zoning and Planning ⚩327

Exclusively church-like properties may continue projects under construction without encumbrance by local zoning bylaws until June 30, 1978, irrespective of a town's earlier acceptance of statute authorizing town to impose regulations on sectarian educational uses or other religious uses which were not intrinsically accessory to a church. M.G.L.A. c. 40A § 1 et seq.

2. Zoning and Planning ⚩288

Nonsectarian educational institution was not exempt by reason of statute from town's application of restrictions adopted under statute which permits educational land or structures to be subject to reasonable regulations concerning bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. M.G.L.A. c. 40A § 1 et seq.

3. Zoning and Planning ⚩29

Provisions of municipality bylaw were invalid as going beyond scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses under statute and placed board of zoning appeals in position to act impermissibly to impede reasonable use of institution's land for educational purposes. M.G.L.A. c. 40A § 1 et seq.

Hugh C. Cowhig, Town Counsel, Lee (David O. Burbank, Pittsfield, with him), for defendants.

Andrew T. Campoli, Pittsfield, for plaintiff, submitted a brief.

Before ARMSTRONG, GREANEY and KASS, JJ.

GREANEY, Justice.

These appeals raise the question whether a town may require an application for a special permit for all new religious and educational uses, or changes in such uses, in residential districts consistent with the provisions of G.L. c. 40A, § 3, as appearing in St.1975, c. 808, § 3.[2] Specifically, we must decide whether the plaintiff, a sectarian educational institution, should have been granted building permits for certain uses attendant to its softball field, which is utilized by its elementary, high school, and college students, without the necessity of first applying under the local by-law for a

1. Two of the companion cases are also against the board of appeals, and two are against the building inspector of Lenox.

2. That section provides in relevant part that "[n]o zoning ordinance or by-law shall . . . regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased . . . 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."

special permit. We must also determine whether the Lenox board of appeals (board) could properly have conditioned the grant of permission to change the use of three of the plaintiff's existing buildings into classroom and dormitory space, either upon restrictions that affect the entire educational campus or upon restrictions that concern buildings which are not the subject of the special permit applications. All of these questions require examination of the extent to which a municipality by way of its zoning by-law may regulate sectarian and nonsectarian educational uses, a question that has remained relatively dormant since the decision in *Radcliffe College v. Cambridge,* 350 Mass. 613, 215 N.E.2d 892 (1966).

We first summarize the facts and procedural history necessary to an understanding of these issues. The Bible Speaks is a nonprofit religious and educational corporation organized under the laws of the State of Maine which has filed a certificate as a foreign corporation doing business in the Commonwealth under the provisions of G.L. c. 181, § 4.[3] On its campus in Lenox (formerly the property of a private nonsectarian educational institution) it conducts a school for grades kindergarten through twelve (approved by the Lenox School Committee pursuant to the provisions of G.L. c. 76, § 1) and a three-year college to prepare students for the ministry.[4] On May 7, 1976, the town of Lenox (town) at its annual town meeting accepted the provisions of the new zoning enabling act, St.1975, c. 808 (hereinafter c. 808). At the same meeting the town amended its zoning by-law to include a section covering "Educational/Religious Use"[5] which imposed a limitation

3. The parties stipulated that The Bible Speaks was organized on February 21, 1973, under Me.Rev.Stat.Ann. tit. 13, § 71 (1965); that it was certified as a foreign corporation by the Secretary of the Commonwealth on March 8, 1976; and that in 1976 it received a certificate of exemption under G.L. c. 64H, § 6(*d*) and (*e*), from the Sales and Use Tax Bureau.

4. There appears to be no dispute that it conducts on its campus a bona fide educational enterprise.

5. Section 9.18 of the zoning by-law ("Educational/Religious Use") provides as follows:

"Any non-municipal educational use or any religious use is subject to the following regulations: recognizing that educational and religious uses may exist in residential areas, the following regulations are drawn to minimize the probable impact of such uses upon the town in general and upon the character of the specific neighborhood. In order to assess the probable impact, a site plan and informational statement must be presented to the permit-granting authority at the time of the initial filing. The site plan at a scale of 1" = 40', prepared by a registered architect, landscape architect, or civil engineer, must show existing buildings, roads, parking areas, sewer and water lines, drainage systems, water courses, trees over 12" in diameter at breast height, and any other significant existing man-made or natural features.

"The informational statement shall detail the probable effects of the use on the following: (1) attendance at public schools; (2) increase in vehicular traffic; (3) changes in the number of legal residents; (4) increases in municipal service costs; (5) load on public utilities or future demand for them; (6) public safety, police, and fire protection; (7) changes in tax revenue; (8) changes in surface drainage; (9) increased consumption of water; (10) increased refuse disposal; (11) land erosion or loss of tree cover; (12) character of surrounding neighborhood; (13) master plan of the town; (14) any pertinent regional plans."

"Any non-municipal educational use or any religious use is subject to the following regulations:

REGULATIONS

1. Maximum building height—2 stories or 35 feet.
2. Maximum building coverage—4%.
3. Setback—two hundred (200) feet buffer surrounding the property to be kept undeveloped except for entrance and exit roadways.
4. Major access roads and major parking areas subject to frequent use day or night shall be paved. Major roads are to be eighteen (18) feet wide and shall not exceed a 7½% grade.
5. Parking areas shall be screened as provided in Section 2—definitions—screening—(a) and (c).
6. Parking areas shall be within three hundred (300) feet of the building to be served.
7. Parking requirements:
   A. Places of assembly—1 space for every three (3) seats.
   B. Classrooms and/or dormitories—
   Grades 1–10—1 space for each staff member;
   Grades 10–12—1 space for each staff member plus 1 space for every two students.

that all educational and religious purposes "may be permitted as a special exception only if the [board] so determines." [6] On July 23, 1976, the plaintiff applied to the board for a special permit to change the use of one of its buildings from a gymnasium to two classrooms for its college; on August 3, 1976, it further sought to change the use of two other buildings from classrooms and a chapel to small dormitories. On October 15, 1976, the board granted all three special permits, subject to the conditions set out in full in the margin.[7] The board went on to state in its decisions that "[t]he petitioner has complied with the first two paragraphs of section 9.18 by filing" plans and information concerning the total operation of its campus as part of the applications for special permits for changes in use of the three existing buildings. The plaintiff filed a timely action in the Superior Court seeking review of the decisions and specifically objecting to the four general conditions (conditions 4A, B, C & D in the board's decision, note 7, *supra*) upon which the special permits were granted in all three change-of-use cases.

On May 25, 1977, the plaintiff applied to the building inspector for a building permit to erect hooded lights thirty-five feet high [8] on a softball field which is part of its cam-

College—1 space for each staff member plus two (2) spaces for every three (3) students."

6. Section 6 of the zoning by-law of the town of Lenox (as amended 1976). This limitation was accomplished by amending the table of uses in § 6 of the by-law to indicate that educational or religious purposes in residential districts are "xa" uses, permitted only by special exception, as contrasted with "x" uses, which are permitted as of right.

7. "Oct. 15, 1976

"Decision of the Board of Appeals on the appeal and petitions of the Bible Speaks for

I. A change in use of Building No. I, The Old Gymnasium, to two classrooms and a lecture hall.

2. A change in use of Building No. 15, formerly Bassett Hall, from classrooms to dormitory rooms.

3. A change in use of Building No. 12, formerly Thayer Hall, from chapel and storage space to five dormitory rooms."

"Special permits are granted for each of these three petitions, subject to the following restrictions:

I. Building No. I, The Old Gymnasium—
A. The use and occupancy of this building is limited to 300 persons.

2. Building No. 15, formerly Bassett Hall—
A. The occupancy of this building is limited to 13 couples and their children.
B. There shall be no kitchen facilities provided and meals shall not be served on the premises except in an emergency.

3. Building No. 12, formerly Thayer Hall—
A. The occupancy of this building is limited to 3 couples and 10 single students.
B. There shall be no kitchen facilities provided and meals shall not be served on the premises except in an emergency.

4. The following restrictions apply to all three special permits:
A. Sufficient parking spaces are to be provided and screened to meet the requirements of the Zoning By-Laws, Section 9.18, Regulations 4, 5, 6, and 7. Reference is made to the parking site plan filed with the board.
B. The total number of students and staff living at the 40 Kemble Street facilities is limited to 325.
C. Any major differences in enrollment, residents, buildings, campus, or plans from those outlined in the master plan, drawings or informational statement presented to the Planning Board, dated June 16, 1976, shall be brought to the attention of the Planning Board and Zoning Board of Appeals immediately.
D. A sewer holding tank is to be constructed to collect the flow from Buildings No. 4 (St. Martin's Hall), No. 19 (Monks Hall) and No. 20 (Field House) during periods of high sewage flow and to release the sewage into the Town mains during periods of low volume flow. The capacity of this tank is to be determined by a licensed and certified engineer or the Tri-Town Sanitary Engineer."

Other portions of the decision express the board's opinion that the proposed use of Building No. I as a dormitory for thirteen married couples is "marginal from the standpoint of the zoning by-laws, as it makes the use of the building very close to apartments," but that the uses are "not deemed to be detrimental to the area or the community, subject to the restrictions and qualifications in this decision."

8. Section 7.6.2 of the zoning by-law states that "[i]n all zoning districts, any private outdoor lighting fixture, whether temporary or permanent, shall be so placed or hooded that the light shall not be noxious or offensive to the neighborhood," while § 8.4.5 provides that the maximum building or structure height in all districts is thirty-five feet.

pus. The building inspector refused to grant the permit. On the same date, the plaintiff requested a building permit to convert an existing shed near its ballfield into a snack bar primarily for the benefit of its students and others using the field. This request was also denied. The plaintiff appealed from both actions of the building inspector to the board. On August 29, 1977, the board issued separate decisions on the two appeals which are reproduced, insofar as material, in the margin,[9] upholding the building inspector's denial of building permits on the bases that a change in a religious or educational use required application for a special permit and that the operation of the softball field at night was not "reasonably necessary for the functioning of the religious or educational uses." The plaintiff brought separate complaints against the building inspector and the board in both the snack bar and lights cases testing the validity of these actions.

Those actions were consolidated for trial along with the pending complaints involving the three change-of-use cases. A district court judge sitting in the Superior Court under statutory authority ruled: (1) that the board had no authority to grant or deny the permit for the snack bar (as a consequence he ordered the board to refrain from interfering with the operation of the plaintiff's snack bar); (2) that the denial of a permit to erect the lights was within the power of the board (as a result he affirmed the decision of the board); and (3) that the specific conditions imposed on the special permits for change of use of the three existing buildings were valid, as restatements of the substance of the plaintiff's applications, but that the remaining four general restrictions were attempts to impose limitations on the plaintiff's general educational activities and, as such, exceeded the authority of the board (as a result he ordered these conditions annulled). Judgments were entered accordingly. The board and the building inspector took appeals from the judgments in the snack bar cases; the board also appeals from the judgment in the change-of-use cases, and the plaintiff appeals from the judgment in the lights cases.

In substance, we are content with the judge's rulings that the plaintiff may utilize its existing shed as a snack bar and that the board exceeded its authority in imposing general restrictions upon the plaintiff as preconditions to a change of use of its

9. "Decision

"The appeal of the Bible Speaks, 40 Kemble Street, from the refusal of the Building Inspector to issue them a permit for the erection of hooded lights at 35 ft. in height around their softball field, located in an area near Stockbridge Road, is *denied.*

"The Zoning Bylaws, as amended May 7, 1976 stipulate that changes in religious and educational uses require a specific permit in all zoning districts. It is the Board's opinion that the change from an unlighted softball field to one that is lighted, specifically for the purpose of extending the playing hours into the night, would constitute a significant change in use and therefore would require a special permit.

"The petitioner's point that the lighting of this softball field is an adjunct to the operation of its school was not proven. The lights are clearly meant for nightime use and the petitioner has stated that they will be used to extend the hours of play for the regional softball league (of which the Bible Speaks is a member). The operation of such lights is not considered to be reasonably necessary for the functioning of the religious or educational uses."

"Decision

"The appeal of the Bible Speaks, 40 Kemble Street, from the refusal of the Building Inspector to issue to them a permit to open a snack bar near their softball field is *denied.*

"The Zoning Bylaws, as amended May 7, 1976 stipulate that changes in religious and educational uses require a special permit in all districts, (See Bylaw Sections 6.3 and 6.6B). It is the Board's opinion that the change from a storage shed (as indicated in their master plan) to a vending operation would constitute a change in use significant enough to require a special permit.

"Zoning Bylaw Section 9.18 on religious & Educational Uses requires that such an organization file a site plan and an informational statement with the Zoning Board of Appeals when it initially files a petition. The Bible Speaks filed such a site plan and informational statement on or about June 16, 1976. In these papers the old use of the building in question (Identified as No. 22 Boat House) was for storage . . . ."

buildings. We disagree with the judge's conclusion that the board's decision as to the softball field lights was proper. Our disposition of the issues follows a different route from that taken by the judge below and is based on the conclusion that the local by-law exceeds tolerably permissible limits in its regulation of educational uses.

1. *Applicability of G.L. c. 40A.* At the outset we consider the plaintiff's contention that it is entirely exempt from the effect of the zoning enabling act, G.L. c. 40A, as formulated through c. 808, and as a result, that it is also exempt from any local zoning requirements enacted pursuant to c. 40A. It bases this contention in part upon the language which appears in c. 808, § 6, which provides, insofar as material, that "[t]he provisions of [G.L. c. 40A], as amended . . . shall not be deemed to affect any church or other facilities used for religious purposes in existence or under construction prior to [June 30, 1978]." It claims that the provisions of § 6 are designed to continue in effect the prior versions of G.L. c. 40A, which exempted religious and educational uses from zoning control under local by-laws.[10] In further support of this argument the plaintiff directs our attention to cases elsewhere which it cites as persuasive authority for the proposition that uses analogous to those present on its campus are primarily religious uses, exempt from any form of local zoning control. These decisions are four in number: *Bishop v. Ashton*, 92 Idaho 571, 574–575, 448 P.2d 185 (1968), which held that a recreational complex built by a religious organization on the same grounds as its church building was within the scope of the term "church" in an ordinance permitting church use in a residential zone; *Slevin v. Long Island Jewish Medical Center*, 66 Misc.2d 312, 317–319, 319 N.Y.S.2d 937 (Sup.Ct.1971), which determined that a drug rehabilitation center located in a church parish house was a religious use; *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 522–526, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956), which concluded that the decision of a local zoning board denying a permit to erect a church and a parochial school in a residential zone was arbitrary and unreasonable, because a church could not be unreasonably excluded from a residential zone, and a parochial

10. The history of the special zoning status for religious and educational uses is familiar lore to those conversant with the topic of land use regulation and may be summarized as follows. In 1933, the town of Dover adopted a zoning by-law prohibiting the erection, alteration, or use of any building or premises in a residential district for any purpose except enumerated purposes which, in addition to "1. detached one-family dwellings," included "3. church," and "4. educational use." On March 4, 1946, this by-law was amended in subdivision 4, so that the subdivision read, "4. educational use; if non-sectarian and if not organized or operated for private profit." In 1950, St.1950, c. 325, inserted the following language in G.L. c. 40, § 25, a predecessor of the present c. 40A, § 3: "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." In *Attorney General v. Dover*, 327 Mass. 601, 100 N.E.2d 1 (1951), the Supreme Judicial Court was called upon to consider the impact of this amendment (which is widely referred to as the Dover Amendment) on the Dover by-law. The court stated that the effect of the by-law, if valid, "would be to prohibit any use of land or buildings in a residential district for sectarian educational purposes" and agreed with the Attorney General's contention that "if the amended [by-law] was ever valid, it became invalid immediately upon the taking effect of the statute of 1950." *Id.* at 603–604, 100 N.E.2d at 3. In *Sisters of the Holy Cross of Massachusetts v. Brookline*, 347 Mass. 486, 198 N.E.2d 624 (1964), the court struck down the application of single family residence dimensional requirements to a sectarian educational institution as having the effect of virtually nullifying the Dover Amendment, though stating in dicta that there might be instances in which a municipality might permissibly impose dimensional requirements upon buildings that serve educational or religious purposes. In *Radcliffe College v. Cambridge*, 350 Mass. 613, 215 N.E.2d 892 (1966), the court refused to construe the Dover Amendment as precluding the application of offstreet parking requirements contained in the Cambridge zoning ordinance to the plaintiff, ruling that the ordinance did not impede the reasonable use of the college's land for its educational purposes. Two other cases deal with peripheral aspects of the topic. See *Worcester v. New England Institute and New England School of Accounting, Inc.*, 335 Mass. 486, 140 N.E.2d 470 (1957), *Chicopee v. Jakubowski*, 348 Mass. 230, 202 N.E.2d 913 (1964).

school was to be permitted wherever public schools were allowed; and *State ex rel. Covenant Harbor Bible Camp v. Steinke*, 7 Wis.2d 275, 281, 96 N.W.2d 356, 361 (1959), which held that a bible camp constituted a permissible use under an ordinance which authorized "churches . . . 'boarding-and-lodging parochial schools' [and] 'organized quasi-public recreational * * * buildings and grounds'," and became a nonconforming use upon passage of an amendment deleting these provisions.

The plaintiff's argument, reduced to basics, appears to draw on three premises: (1) that it is primarily a religious enterprise because its principal function is to educate and train people for the ministry; (2) that c. 808, § 6, is the legislative restatement of the Dover Amendment and exempts projects under construction by religious organizations if started prior to June 30, 1978, irrespective of the town's earlier acceptance of c. 808; and (3) that because its oar was in the water on all the proposed activities in issue prior to June 30, 1978, the town could not impose any restrictions on their completion. We are not persuaded by this argument.

The cases relied upon by the plaintiff, read in connection with the provisions of c. 808, § 6, to establish the proposition that religious uses are generally exempted from any zoning regulation, are all inapposite. The *Bishop* and *Slevin* decisions concerned themselves with proposed accessory uses to existing church facilities and did not involve sectarian educational facilities such as are in issue here. The *Rochester* decision is based on the peculiarities of the local by-law involved in that dispute, while the result in the *Harbor Bible Camp* case turns on the law relating to nonconforming uses.

Moreover, the plaintiff's argument also completely overlooks the presence of G.L. c. 40A, § 3, appearing in c. 808, § 3. This section provides, in pertinent part, that "[n]o zoning ordinance or by-law shall . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by . . . a religious sect or denomination . . . 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." It is this section, not c. 808, § 6, that is intended to synthesize the Dover Amendment and case law construing it (see note 10, *supra*). Section 6 must be viewed as a special nonconforming use provision of limited life to accommodate religious uses which were in the planning stage when c. 808 was enacted and which were likely to be built or under way by June 30, 1978.

[1, 2] Reading §§ 3 and 6 together, in the light of case law, and harmonizing the two sections in view of the purposes they seek to accomplish, we conclude that § 6 was designed to permit exclusively church-like properties to continue projects under construction without encumbrance by local zoning by-laws until June 30, 1978, irrespective of a town's earlier acceptance of c. 808, while § 3 was intended to authorize a town such as Lenox, upon its acceptance of c. 808, to impose the type of regulations described in that section on sectarian educational uses or other religious uses which were not intrinsically accessory to a church.[11] Considering the uses contemplated by the plaintiff against the broad definition of the term "education" fashioned by our case law (see e. g., *Radcliffe College v. Cambridge*, 350 Mass. at 618, 215 N.E.2d 892, 895, holding that parking, and the feeding and housing of college personnel is "within the broad scope of the educational powers," and *Harbor Schs. Inc. v. Board of Appeals of Haver-*

11. A simple example will elucidate the distinctions further. Lenox accepted c. 808 on May 7, 1976. From that date until June 30, 1978, a church if it desired could, by virtue of § 6, construct a fifty-foot steeple despite the imposition of height restrictions in the by-law. However, if it conducted a college, the church might not be able to construct a high rise dormitory on its campus by reason of the restrictions imposed under the authority of § 3. The two sections serve to denominate religious and sectarian educational uses as two separate categories.

hill, 5 Mass.App. —, — [a], 366 N.E.2d 764 (1977), quoting from *Mount Hermon Boys' Sch. v. Gill*, 145 Mass. 139, 146, 13 N.E. 354, 357 [1887], stating that "[e]ducation 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"), it is plain to us that all the plaintiff's proposed uses are educational in nature, as purposes directly related to the functioning of the sectarian educational institution maintained on its Lenox campus. It follows, as a consequence, that the plaintiff is not exempt by reason of c. 808, § 6, from the town's application of restrictions adopted under G.L. c. 40A, § 3, which permits educational "land or structures [to 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."

2. *Validity of the Lenox by-law.* By employing the language just quoted, the Legislature set out the scope of permissible regulation of religious and educational land and structures. In the context of this case, Lenox may, through the mechanism of its zoning by-law, consistent with G.L. c. 40A, § 3, regulate the bulk of buildings on the plaintiff's campus and impose dimensional and parking requirements; and the building inspector may properly deny the plaintiff permits for any structure which does not comply with such "reasonable regulations." But the town may not, through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to "nullify" the use exemption permitted to an educational institution. *Sisters of the Holy Cross of Massachusetts v. Brookline*, 347 Mass. 486, 494, 198 N.E.2d 624 (1964).

We turn then to the question whether §§ 6 and 9.18 of the town's zoning by-law, when taken together, impose the type of permissible bulk, dimensional, and parking limitations specified in G.L. c. 40A, § 3, as the defendants claim, or whether they impermissibly regulate the use of a sectarian educational institution, as the plaintiff claims.

The board points out that § 9.18 of the by-law sets out, under a heading of "Regulations," specific limitations of the sort expressly permitted under G.L. c. 40A, § 3 (see note 5, *supra*). There would be no difficulty if these constituted the only limitations which the town applied to educational institutions such as the plaintiff's campus. However, the by-law imposes several other requirements which apply to the plaintiff's educational uses within § 9.18 and § 6. Section 9.18 also requires every nonmunicipal educational institution planning any change in its buildings and structures to file with the board a site plan and an informational statement designed "to minimize the probable impact of such uses upon the town in general and upon the character of the specific neighborhood." The site plan calls for a delineation of existing buildings, parking areas, sewer and water lines, trees over twelve inches in diameter, "and any other significant existing man-made or natural features"; the informational statement must include "the probable effects of the use on [such factors as] . . . changes in the number of legal residents, . . . increases in municipal service costs, . . . changes in tax revenue, . . . land erosion or loss of tree cover, . . . character of surrounding neighborhood, . . . master plan of the town, . . . [or] any pertinent regional plans." [12] The requirement of a site plan and the type of development prospectus required by the informational statement would be perfectly appropriate for consideration of proposed subdivisions under the Subdivision Control Law, G.L. c. 41, § 81K et seq., or for the evalua-

a. Mass.App.Ct.Adv.Sh. (1977) 1012, 1018.

12. In addition, the "informational statement" also requires the educational institution to include an assessment of the probable impact of its project on attendance in the public schools, increase in vehicular traffic, increases in municipal service costs, load on public utilities or the future demand for them, public safety, police and fire protection, changes in surface drainage, increased consumption of water and increase in refuse disposal.

B.ble Speaks

tion of cluster and planned unit developments under the zoning law, G.L. c. 40A, § 9, as appearing in c. 808, § 3. But there is nothing in the language of G.L. c. 40A, § 3, which contemplates the requirement of site plans and informational statements as monitoring devices for educational uses, and it is quite obvious that an educational campus of the type under consideration in this case is neither a subdivision nor a project in the category of a cluster or planned unit development. Section 9.18 in its entirety goes beyond a collation of all of the reasonable bulk and dimensional requirements which a by-law can legitimately impose on educational buildings and districts.

The full impact of the requirements of § 9.18 must also be appraised in light of the provisions of § 6 of the by-law, which makes educational uses, such as the plaintiff's, special exceptions dependent on the discretionary grant of a special permit by the board.[13] By reliance on the criteria spelled out in the informational statement, the board is essentially attempting to exercise planning board functions and pursuing its own notions of land use planning, and to the extent that those notions become inconsistent with the presence or expansion of educational institutions within the town, the board will be able to fashion restrictions that subordinate the educational use to the board's planning goals. Any such restrictions imposed under the authority of the by-law may well have the effect of nullifying, or seriously diminishing, the educational institution's 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, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose. The board's decisions in these cases bear out these observations by indicating that the board applied the by-law to make its own determination of what constituted an educational use, and once that determination was made, to impose conditions in areas outside of those specified in the enabling statute.

In our opinion, the provisions of the by-law taken together invest the board with a considerable measure of discretionary authority over an educational institution's use of its 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, § 3. The Legislature did not intend to impose special permit requirements, designed under c. 40A, § 9, 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.[14]

[3] We conclude, therefore, that the provisions of the Lenox by-law go well beyond the scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses by G.L. c. 40A, § 3, and place the board in a position to act, as it did in this case, impermissibly to "impede the reasonable use of the [institution's] land for its educational purposes." *Radcliffe College v. Cambridge*, 350 Mass. at 618, 215 N.E.2d at 896.

3. *Relief.* The question of a proper disposition of the cases remains. The plaintiff's multiple actions are susceptible to consideration as requests for declaratory relief (*Woods v. Newton*, 349 Mass. 373, 375, 208 N.E.2d 508 [1965]) and, in reaching a disposition, we consider it appropriate to treat them in that posture. Despite the presumption of validity accorded to municipal zoning ordinances (*Crall v. Leominster*, 362 Mass. 95, 102, 284 N.E.2d 610 [1972]), we are satisfied that portions of the Lenox by-law are in conflict with the zoning enabling act. It is also clear to us that those portions of § 9.18 of the by-law which impose bulk,

13. The special exception provisions of the by-law are set forth in note 6, *supra*.

14. The board's argument that G.L. c. 40A, § 9, authorizes a special permit mechanism to afford the town leeway in regulating uses not otherwise permitted as of right in a zone simply overlooks the limitations on the town's zoning power as to religious and educational uses contained in c. 40A, § 3.

dimensional, and parking restrictions on educational uses would be valid as the type of reasonable regulations authorized by G.L. c. 40A, § 3, if they stood apart from the embroidery contained in the provisions of the by-law requiring site plans, information statements, and special permits for educational uses. We determine, however, that the bulk, dimensional, and parking regulations are severable from the balance of § 9.18, and from the provisions in § 6, and are capable of enforcement as if they were limitations applicable to all structures of a particular class, including educational buildings and structures.

The judgments are reversed, and new judgments are to be entered, declaring that § 6 and those portions of § 9.18 of the Lenox zoning by-law which impose the requirements of a site plan, informational statement, and special permit before religious and educational institutions can expand their uses are invalid; that the provisions of § 9.18, imposing bulk, dimensional, and parking requirements are valid; that the plaintiff is not required to apply for a special permit as a condition precedent to obtaining a building permit for the construction of its softball field lights; that the plaintiff is not required to obtain either a special permit or a building permit in order to use its shed as a snack bar; and that the conditions annexed to the three change-of-use cases (denominated in the decisions dated October 15, 1976 as 4A, 4B, 4C and 4D) are annulled, with the notation that occupancy of the buildings can be conditioned on compliance with the applicable parking requirements in § 9.18.[15]

So ordered.

15. Of course, all the proposed uses contemplated by the plaintiff in this case, and in particular the uses intended for the buildings, are subject to the requirements of any other applicable State or local codes such as (without limitation) health and sanitary codes, fire codes and regulations, and the State Building Code.