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Chandler v. County Commissioners of Nantucket County: Why the Massachusetts Statute Authorizing Takings by Eminent Domain for Highway Purposes Should Not Serve as a Mechanism for Conservation

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I. Introduction

Massachusetts, like many other states along the eastern seaboard, utilizes the natural beauty of its coastline to fuel its state economy. Massachusetts' 1,500 miles of coastline has made the New England state a vacation destination for many. Businesses, tourists, and Massachusetts residents alike are attracted to the state's coastline for the wide range of opportunities it offers.¹ According to a recent report by the Coastal Alliance, the coastal industries contribute approximately \$70.7 billion to the Massachusetts economy.² Since tourism, shipping, and commercial fishing industries are among the most important contributors to the state economy, protecting and preserving Massachusetts' coastal resources is paramount.³ Nantucket is one of the more popular coastal resorts in Massachusetts that places an emphasis on coastal and environmental conservation.

Nantucket is a fifty-square mile island situated about sixteen miles south of the Cape Cod shoreline.⁴ Known for its history, well-preserved architecture, and beautiful beaches, Nantucket has served as a vacation resort for thousands, particularly during

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1. MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT, ABOUT THE MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT, at <http://www.state.ma.us/czm/aboutCZM.htm> (last modified Oct. 9, 2003).

2. *Id.*

3. *Id.*

4. MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, NARRATIVE ON NANTUCKET, at <http://www.state.ma.us/dhcd/profile/201.pdf>.

the summer months.⁵ Indeed, the island's economy is based in large part on tourism.⁶ Nantucket has a year-round population of slightly over 6,000 residents, while the town sees a spike of approximately 30,000 people in the month of August.⁷ Visitors traveling to the island either by air or via the ferry service are attracted to Nantucket for its beaches and clean environment.⁸ In order to ensure the preservation of these valuable natural resources, the Nantucket Land Bank ("Land Bank") was founded in 1984.⁹ The Land Bank, which receives funding from local real estate transaction fees, has purchased over 1,000 acres of open space to date.¹⁰ However, conservation efforts can be and have been, at times, at odds with Nantucket's other major industry, second-home development.¹¹ The island's beauty has led many visitors to invest in vacation homes on the island—beachfront properties have been among the most desirable and expensive. Thus, there is no surprise that tensions run high when the island's conservation efforts and the interests of beachfront property owners collide.

In the past fifteen years, the Supreme Court has attempted to define more clearly the authority of governing bodies with respect to regulatory takings.¹² Cases such as *First English Evangelical Lutheran Church v. Los Angeles*,¹³ *Nollan v. California Coastal Commission*,¹⁴ *Lucas v. South Carolina Coastal Commission*,¹⁵ and *Dolan v. City of Tigard*¹⁶ have established a general framework from which state and local governing bodies may regulate private land use. A governing body may convert private property to public use by exercising the right of eminent domain.¹⁷

Eminent domain is an inherent power of a governmental entity to take privately owned property, especially land, and convert

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 4.

11. *Id.*

12. See Gregor I. McGregor, *The Police Power and Regulatory Takings*, 3 MASS. ENVTL. L. § 29.1 (2002).

13. 482 U.S. 304 (1987).

14. 483 U.S. 825 (1987).

15. 505 U.S. 1003 (1992).

16. 512 U.S. 374 (1994).

17. See U.S. CONST. amend. V.

it to public use, subject to reasonable compensation for the taking.¹⁸ State statutes delegate which government entities have the authority to take land, the process by which a taking must be effectuated, the formula for providing adequate compensation, and approaches for dealing with many types of unique takings situations.¹⁹ Takings statutes are a governing reality because they empower state and local governments to take privately owned land when the needs of a state and/or local community dictate. However, the right to property, particularly the enjoyment of one's property, is a fundamental right articulated in the Fourteenth Amendment to the Constitution;²⁰ thus, tension may exist in the takings process, even when such taking is legally permissible. In Massachusetts, as in many states, common law has attempted to combat this tension by requiring that an authority, in exercising the right of eminent domain, strictly observe the enabling statute.²¹

The tension between a local authority attempting to exercise the right of eminent domain and private landowners objecting is illustrated in the case of *Chandler v. County Commissioners of Nantucket County*.²² There, local county commissioners (the "Commissioners") were petitioned to exercise the right of eminent domain over beachfront private property in the Surfside area of Nantucket County.²³ Plaintiffs, landowners in the Surfside Association, brought a certiorari action²⁴ against the Commissioners in protest of the takings.²⁵ The Commissioners sought to take land in order to preserve public access to the beach since the "historic rights of way" to the beach were submerged under water as a result of beach erosion.²⁶ However, the plaintiffs argued that the Commissioners' purpose for taking the land was to establish public access rights to the beach over the plaintiffs' privately owned

18. BLACK'S LAW DICTIONARY 541 (7th ed. 1999).

19. See MASS. GEN. LAWS ANN. ch. 79, § 1 (West 1999).

20. U.S. CONST. amend. XIV, § 1.

21. See *Chwalek v. City of Pittsfield*, 329 N.E.2d 156 (Mass. App. Ct. 1975); *McAuliffe & Burke Co. v. Boston Hous. Auth.*, 133 N.E.2d 493 (Mass. 1956); *Shea v. Inspector of Bldgs.*, 83 N.E.2d 457 (Mass. 1949); *Walker v. City of Medford*, 172 N.E. 248 (Mass. 1930).

22. 772 N.E.2d 578 (Mass. 2002).

23. *Id.* at 579.

24. "An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

25. *Chandler*, 772 N.E.2d 578, 579.

26. *Id.* at 579-80.

land, which was not supported by the statute under which the Commissioners were proceeding.²⁷ The Commissioners proceeded under a statute which granted them the authority to take land "necessary, for the purpose of laying out, altering or relocating a highway. . . ."²⁸ The issue in the case was whether the Commissioners could proceed with the taking under Massachusetts General Law Annotated, chapter 82 ("Chapter 82"), section 7, even if they had no intention of laying out, altering, or relocating a highway over the land subject to the takings.

The *Chandler* case is significant for two reasons. First, the case illustrates that any governmental authority exercising its power of eminent domain must do so in strict conformity with the enabling statute.²⁹ Second, the court's statutory analysis of the enabling statute illustrates how a court should scrutinize a governmental authority's actions, like that of the Commissioners', when such actions are challenged for being outside of the statutory grant of authority.³⁰ In *Chandler*, the court conducted a plain meaning analysis of the statute in question, relied on extrinsic evidence such as legislative history, and applied the canons of statutory construction in ascertaining the statute's true meaning.³¹ The court also suggested, in *dictum*, that the Commissioners had more plausible statutory avenues they could have traveled in order to effectuate a valid taking.³² The court's holding and reasoning explains that a governmental authority, like the Commissioners, can be challenged on a takings order if it fails to connect its purpose for the taking with the appropriate statutory authority.³³

This casenote is divided into four sections. Part II of the casenote provides background on some of the statutes and cases the *Chandler* court considered in rendering its decision. Part III is a

27. *Id.* at 579.

28. MASS. GEN. LAWS ANN. ch. 82, § 7 (West 1999).

29. *See Chandler*, 772 N.E.2d 578, 579.

30. *Id.* *See also* *Perry v. Commonwealth*, 780 N.E.2d 53 (Mass. 2002); *Wong v. Univ. of Mass.*, 777 N.E.2d 161 (Mass. 2002).

31. *Chandler*, 772 N.E.2d 578, 582-85.

32. *Id.* at 585. *See also* MASS GEN. LAWS ANN. ch. 34, § 25 (West 1999); MASS. GEN. LAWS ANN. ch. 40, § 8C (West 1999); MASS. GEN. LAWS ANN. ch. 40, § 14 (West 1999).

33. *Chandler*, 772 N.E.2d 578, 579. *See also* *City of Tacoma v. State*, 29 P. 847 (Wash. 1892) (holding that eminent domain authority is improper where legislature fails to prescribe process by which such authority is executed); *Harden v. Superior Court*, 284 P.2d 9 (Cal. 1955) (holding that statute did not confer upon city the authority to exercise eminent domain power outside of the city limits).

discussion of the *Chandler* case, which outlines the case from its facts and procedural history to its holding and reasoning. Part IV of the casenote provides a more detailed analysis of the court's decision, including how the court framed the issue, a review of its statutory analysis, and the significance of the decision. In part V, the casenote concludes with a summary of the court's holding and judgment and a commentary on why *Chandler* was properly decided.

II. Background

A Massachusetts town's authority to take privately owned property exists only where the state legislature has delegated power in express terms or by necessary implication.³⁴ In most states, legislatures pass laws that delegate this authority when certain conditions are satisfied. In Massachusetts, county commissioners are empowered to take land for the following purpose:

If it is necessary, for the purpose of laying out, altering or relocating a highway, or establishing a building line in connection therewith, . . . the commissioners shall, at the same time that the highway is laid out, altered or relocated, take such land, easement or right by eminent domain under chapter seventy-nine.³⁵

The relevant question posed by the construction of this statute in *Chandler* was its scope. The statute on its face authorizes takings for the purpose of "laying out, altering or relocating a highway" when necessary;³⁶ however, the determinative question was how the terms "highway" and "necessary" were to be defined and applied.

The word "highway" denotes "ways laid out or constructed to accommodate modes of travel and other related purposes that change as customs change and as technology develops."³⁷ Although relevant, this definition only took the *Chandler* court so far. The more significant determination was when such authority was to be exercised. The court observed that under Chapter 82, three different sections refer to the term "common convenience

34. See *Trs. of Reservations v. Town of Stockbridge*, 204 N.E.2d 463 (Mass. 1965).

35. MASS. GEN. LAWS ANN. ch. 82, § 7 (West 1999).

36. *Id.*

37. *Opinion of the Justices to the Senate*, 352 N.E.2d 197 (Mass. 1976).

and necessity" in explaining when a highway should be laid out, repaired, or altered.³⁸ For instance, section 32A states:

[U]pon finding that a city or town way or public way has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the city or town shall no longer be bound to keep such way or public way in repair. . . .³⁹

In reading this section in conjunction with other relevant sections of the statute, the court concluded that the purpose of Chapter 82 was to authorize the exercise of eminent domain solely when the construction or repair of the road is necessary for travel.⁴⁰

The legislative history of Chapter 82, section 7, supported the court's conclusion that the statute was intended to be narrowly construed.⁴¹ In discussing the historical evolution of the statute, the court explained that when it was first enacted in 1639, the statute stated that "[t]o the end there may be convenient Highwayes for Travellers . . . all Country Highwayes shall be such as may be most easie and safe for Travellers."⁴² In 1693, the highway statute was modified. The purpose remained highway construction for the purpose of travel,⁴³ but such highways were to be constructed only when judged to be of "common necessity or convenienc[e]."⁴⁴ In 1825, the General Court repealed all prior highway statutes and enacted a new law. However, the statute remained committed to highway construction, while adding a duty for the roads to be constructed, relocated, or repaired in an effort to promote the public interest.⁴⁵ The 1825 statute has undergone minor changes in its evolution to the current version of Chapter 82, section 7.⁴⁶

When there is a taking by eminent domain, the Commissioners' procedure must be derived from the enabling statute.⁴⁷ This

38. MASS. GEN. LAWS ANN. ch. 82, §§ 2, 4, 32A (West 1999).

39. *Id.* § 32A (1999).

40. *Chandler*, 772 N.E.2d 578, 583.

41. *Id.* at 583-84.

42. *Id.* at 584.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Chandler*, 772 N.E.2d 578, 584-85 (explaining subsequent amendments of the 1825 statute).

47. See *Curtis v. City of Boston*, 142 N.E. 95 (Mass. 1924); *State v. McCook*, 147 A. 126 (Conn. 1929); *Rochester Ry. Co. v. Robinson*, 30 N.E. 1008 (N.Y. 1892).

notion of strict adherence to statutory authority is a requirement that authorities, in exercising the power of eminent domain, must observe in order for the taking to be valid.⁴⁸ A challenge to the exercise of eminent domain may be raised only by "owners or occupiers of land to be taken, and possibly such owners or occupiers of land to be specially and peculiarly injured as may have a right to damages[,] and although other persons may be heard, "they are not persons interested, and cannot cause the decree to be reviewed by certiorari."⁴⁹ The Massachusetts legislature has provided a statutory procedure which includes a hearing to an interested person who objects to a proposed takings plan.⁵⁰

III. Discussion

On September 21, 1998, sixteen citizens of Nantucket, pursuant to Chapter 82, section 2, petitioned the Commissioners requesting that they lay out for highway purposes and acquire by eminent domain the fee simple title to certain land in the Surfside area of the island.⁵¹ On December 8, 1999 the Commissioners held a public hearing, wherein, the proposed taking was discussed, particularly with regard to the privately owned beach-front rights-of-way, which were approximately 200 feet apart.⁵² At the hearing, the Commissioners observed an old subdivision grid plan recorded in 1889, which indicated that most of the ways marked on the plan were never laid out, improved, used, or dedicated as streets.⁵³ In fact, over the past 100-plus years, it became clear that, due to erosion, many of the ways were either partially or completely under water.⁵⁴ Several of the private landowners (the "Landowners") present at the hearing objected to the proposed plan, which prompted a second hearing.⁵⁵

At the second hearing, the Commissioners presented a revised takings plan that excluded the land submerged under

48. See *Chwalek v. City of Pittsfield*, 329 N.E.2d 152, 157 (Mass. App. Ct. 1975); *McAuliffe & Burke Co. v. Boston Hous. Auth.*, 133 N.E.2d 493, 495 (Mass. 1956); *Shea v. Inspector of Bldgs*, 83 N.E.2d 457, 458 (Mass. 1930).

49. *L'Homme v. Town of Winchendon*, 192 N.E. 614, 615 (Mass. 1934) (citations omitted). See also *State ex rel. Bd. of County Comm'rs v. Barton*, 30 N.W. 454 (Minn. 1886).

50. MASS. GEN. LAWS ANN. ch. 82, § 5 (West 1999).

51. *Chandler*, 772 N.E.2d 578, 579.

52. *Id.* at 580.

53. *Id.*

54. *Id.*

55. *Id.*

water.⁵⁶ In further support of the plan, a letter to the Commissioners from the Nantucket Planning and Economic Development Commission (NPDC) stated "its strong support for the efforts . . . to acquire rights of way to shoreline access in the Surfside area."⁵⁷ The Commissioners argued that the taking was consistent with the NPDC's "goal of acquiring twenty five percent of the shoreline by the year 2025."⁵⁸ The Landowners challenged the Commissioners as to their lack of a conservation plan for the land in question and as to the legality of the taking under Chapter 82.⁵⁹ The Landowners argued that the Commissioners were acting outside of the said statute.⁶⁰ The Commissioners responded to the Landowners' argument by claiming that they had "no plan to do anything with the land" and claimed that the purpose of the taking was to "ensure that generation upon generation upon generation can use the . . . rights of way to the ocean without landowners blocking them off."⁶¹

The Commissioners, in the midst of this second hearing, explicitly stated their desire not to pave a road on the land taken for a long time, but elaborated on reasons why said land was the subject of the taking.⁶² First, the Commissioners asserted that they would be "preserving historic rights [of way] to the sea."⁶³ The Commissioners were concerned that future landowners would not be as "willing" as current landowners to allow people access over their property to the beach.⁶⁴ The Commissioners claimed that in taking this land, they would be in a better position to manage the "assets" and ensure things like better parking in the area and access for emergency vehicles.⁶⁵ After the vote was taken, a Nantucket resident placed an article on the Nantucket town meeting; a "warrant 'to repeal, amend or veto' the takings, or in the alternative, to 'enact takings in the Surfside area pursuant to a beach access management plan to be formulated in conjunction with Surfside residents and Massachusetts Coastal Zone Manage-

56. *Id.*

57. *Chandler*, 772 N.E.2d at 580.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Chandler*, 772 N.E.2d at 580.

64. *Id.*

65. *Id.*

ment.”⁶⁶ The article failed to achieve the two-thirds majority vote needed to pass.⁶⁷

The land subject to the taking consisted of fourteen forty-foot wide strips of land ranging in length from roughly 250 to 2,200 feet, located within a primarily unpopulated one-half-mile area of the beach and beachfront property.⁶⁸ Twelve of the fourteen strips ran perpendicular to the ocean at approximately 200-foot intervals, and all but one of the strips were laid out partly in the sand and terminated in the ocean.⁶⁹ The other two proposed strips paralleled the shoreline, and one lay entirely on the sand.⁷⁰ One-half to one-third of the total area of land subject to the taking was laid out on the beach and sand seaward of a clearly delineated coastal bank and subject to the “ebb and flow of the tide.”⁷¹ The plaintiffs claimed that the revised takings plan took roughly two acres of coastal beach.⁷²

In the Supreme Judicial Court of the County of Suffolk, the plaintiffs requested an injunction barring the Commissioners from recording or registering any order of taking in accordance with the January 26, 2000 vote.⁷³ The plaintiffs sought a declaration that the Commissioners’ actions were not a valid exercise of their authority under Chapter 82, and requested a judgment to quash.⁷⁴ The case was transferred to the Superior Court, where the plaintiffs, after filing the administrative record of the proceedings before the Commissioners, moved for judgment on the pleadings.⁷⁵ After a hearing, the motion was denied and the complaint was dismissed.⁷⁶ The Supreme Judicial Court of Massachusetts granted the plaintiffs’ application for direct appellate review.⁷⁷

The plaintiffs argued that the purpose of the takings orders was to establish access rights to the beach over their property;⁷⁸ thus, the takings were not authorized under Chapter 82, section

66. *Id.* at 581.

67. *Id.*

68. *Id.*

69. *Chandler*, 772 N.E.2d at 581.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Chandler*, 772 N.E.2d at 581.

76. *Id.*

77. *Id.*

78. *Id.* at 579.

7.⁷⁹ Indeed, the Commissioners conceded that they had no intention of taking the land to build or improve a roadway, but rather, were using their authority to “preserve historic rights [of way] to the sea.”⁸⁰ The Commissioners argued that the ways or land taken, “consist either of connections to existing public ways or are newly established public ways for preserving historic rights of way connecting one portion of the island to another.”⁸¹ The Commissioners further argued that pavement of the land taken was not necessary under Chapter 82 and thus they acted within the authority of the statute.⁸²

The court articulated that the issue in the case was whether the takings exceeded the proper scope of the Commissioners’ power under Chapter 82.⁸³ In summarizing the key facts, the court defined the issue more narrowly as:

[W]hether land may be taken under G.L. c. 82 in effect to acquire beach areas for public use, and to prevent the owners of the land contiguous to that beach from inhibiting the public from traversing their land, where the taking authority has expressly disavowed any intention of building a highway.⁸⁴

The court held that the land may not be taken under Chapter 82 and vacated the takings orders.⁸⁵ The court reasoned that the Commissioners’ actions were invalid because they went beyond the scope of Chapter 82, section 7.⁸⁶

In reaching its conclusion, the court first engaged in a statutory analysis to determine the power of the Commissioners and whether they reached beyond it. First, the court found that Chapter 82, section 1, authorized the Commissioners to “lay out, alter, relocate and discontinue highways and order specific repairs thereon.”⁸⁷ In conjunction with that authority, section 7 of the statute empowered the Commissioners to take by eminent domain the land “necessary” for the purposes of laying out, altering or relocating such highways or establishing lines in connection

79. *Id.*

80. *Id.* at 580.

81. *Chandler*, 772 N.E.2d at 586 (quoting Commissioners brief).

82. *Id.* at 583.

83. *Id.* at 579.

84. *Id.*

85. *Id.* at 579, 586.

86. *Id.* at 582.

87. *Chandler*, 772 N.E.2d at 582 (quoting statutory language cited therein).

therewith.⁸⁸ The court, in looking at the language of the statute, explained that central to the exercise of this authority was determining when it could be exercised.⁸⁹ The court reasoned that the language, "common convenience and necessity," which appeared in three different sections of Chapter 82, was to be given one consistent meaning.⁹⁰ The court explained that "common convenience and necessity" meant that a new, altered, or repaired highway must be "required" to facilitate "reasonably safe and convenient . . . travel."⁹¹ Read as a whole, the court concluded that Chapter 82 authorizes takings for a new highway only where the construction or physical improvement of a highway "necessary for travel" is contemplated.⁹²

After ascertaining a permissible basis for action under Chapter 82, the court considered whether the Commissioners' actions were within the scope of the statute.⁹³ The court rejected the Commissioners' argument that the land taken "consist[s] either of connections to existing public ways or are newly established public ways for preserving historic rights of way connecting one portion of the island to another."⁹⁴ The court reasoned that the Commissioners had specifically disavowed any intent to build roadways on the land taken and thus, the stated goals of "preserving historic rights of way" and connecting on paper "existing public ways," did not bring the takings within the scope of Chapter 82.⁹⁵ The court went on to explain that the Commissioners intended to lay out only "paper" roads by these takings, but, without more, the lines on paper failed to establish the takings for highway purposes under Chapter 82.⁹⁶ The court reversed the judgment of the Superior Court and vacated the takings orders enacted under Chapter 82, section 7.⁹⁷

88. MASS. GEN. LAWS ANN. ch. 82, § 7 (West 1999).

89. *Chandler*, 772 N.E.2d 578, 582.

90. *Id.* (citing *Arnold v. Comm'rs of Corps. & Taxation*, 100 N.E.2d 851 (Mass. 1951)).

91. *Id.* at 583 (quoting statutory language cited therein).

92. *Id.*

93. *Id.* at 582.

94. *Id.* at 586 (quoting Commissioners brief).

95. *Chandler*, 772 N.E.2d at 586.

96. *Id.* (comparing *Perry v. Planning Bd. of Nantucket*, 444 N.E.2d 389 (Mass. App. Ct. 1983)).

97. *Id.*

IV. Analysis

In rendering its decision, the court properly analyzed the language of the enabling statute and the Commissioners' authority and purpose for the taking. In its analysis, the court acknowledged that the "Commissioners have long exercised broad discretion in determining whether a new highway is warranted."⁹⁸ Although certiorari review of such discretionary action is not typically available, the court concluded that such review is appropriate when determining if an action was arbitrary and capricious.⁹⁹ Here, the plaintiffs' principle challenge to the takings orders was that the Commissioners were not acting in accord with Chapter 82, section 7, which essentially argued they were proceeding arbitrarily.¹⁰⁰ Indeed, in an eminent domain proceeding, the acting authority (here, the Commissioners) must be sure to take action in strict observance of the enabling statute.¹⁰¹ Thus, since the Commissioners were challenged for acting outside the authority of Chapter 82, the court applied the appropriate standard of review.

The court reached its determination of the appropriate standard of review because it properly framed the issue in the case. The court stated that the general issue in the case was whether the takings exceeded the proper scope of the Commissioners' power under Chapter 82.¹⁰² The validity of the takings order was to be determined by the scope of Chapter 82, particularly if it authorized the Commissioners to acquire privately owned beach areas for public use while disavowing any intent to build a highway.¹⁰³ The framing of the issue and subsequent analysis emphasized the need for governing authorities, like the Commissioners, to strictly conform to the appropriate enabling statute.

The court began its analysis in *Chandler* with a plain reading of Chapter 82, section 7.¹⁰⁴ The court explained that it interprets a statute "according to the intent of the Legislature ascertained

98. *Id.* at 581.

99. *Id.* at 581-82 (citing *Emerson College v. City of Boston*, 462 N.E.2d 1098 (Mass. 1984)). See also *Brazil v. Sibley County*, 166 N.W. 1077 (Minn. 1918).

100. *Contra* *McMichael v. County Comm'rs*, 197 N.E.2d 883 (Mass. 1964) (holding petition was properly denied since the petition did not allege facts showing any failure to comply with applicable statutory provisions).

101. See *Chwalek v. City of Pittsfield*, 329 N.E.2d 156, 157 (Mass. App. Ct. 1975); *McAuliffe & Burke Co. v. Boston Hous. Auth.*, 133 N.E.2d 493, 495 (Mass. 1956); *Shea v. Inspector of Bldgs.*, 83 N.E.2d 457, 458 (Mass. 1949); *Walker v. City of Medford*, 172 N.E. 248, 250 (Mass. 1930).

102. *Chandler*, 772 N.E.2d 578, 579.

103. *Id.*

104. *Id.* at 581-82.

from all its words construed by the ordinary and approved usage of the language . . . to the end that the purpose of its framers may be effectuated.”¹⁰⁵ From the language in Chapter 82, section 1, it is clear that the Commissioners possessed the authority to construct and alter highways and order repairs thereon. It was also apparent that the Commissioners, under Chapter 82, section 7, were empowered to exercise this authority through the acquisition of land by eminent domain.¹⁰⁶ However, the court’s analysis became more difficult when trying to determine if such authority could be exercised in the absence of physically paving a roadway or path on the taken land.

In arriving at a determination as to scope of the Commissioners’ authority under Chapter 82, section 7, the court analyzed, according to canons of statutory construction, multiple provisions of Chapter 82.¹⁰⁷ The court noted that nine different sections of Chapter 82 referred to the construction of roadways.¹⁰⁸ The court concluded that, read as a whole, Chapter 82 authorized takings for a new highway only where the construction or physical improvement of a highway for travel is contemplated,¹⁰⁹ a reading that was supported by the court’s “plain language” analysis.

The court’s interpretation of Chapter 82 hinged on defining the phrase “common convenience and necessity.”¹¹⁰ This language, which appeared in three different places in the statute, led the court to appropriately prescribe one consistent meaning.¹¹¹ Section 32A explicitly states that if in the interest of “common convenience and necessity,” there is a need for public ways to be maintained in a condition “reasonably safe and convenient for travel.”¹¹² Other sections of the statute, besides section 7, support the interpretation of physical construction or repair of roadways. Section 10 of the statute empowers commissioners “[a]t the time of the ordering specific repairs upon a highway, [to] direct it to be closed for public travel for a reasonable time.”¹¹³ Section 12 per-

105. *Id.* at 582 (quoting *Hanlon v. Rollins*, 190 N.E. 606, 608 (1934)).

106. *Id.*

107. *Id.* at 582-83.

108. *Chandler*, 772 N.E.2d at 582. *See also* MASS. GEN. LAWS ANN. ch. 82, §§ 8, 9, 11A, 12, 14, 24, 25, 35, 38 (West 1999).

109. *Chandler*, 772 N.E.2d 578, 583.

110. *Id.* at 582.

111. *Id.* (citing *Arnold v. Comm’rs of Corps. & Taxation*, 100 N.E.2d 851 (Mass. 1951)). *See also* MASS. GEN. LAWS ANN. ch. 82 §§ 2, 4, 32A (1999).

112. MASS. GEN. LAWS ANN. ch. 82, § 32A.

113. MASS. GEN. LAWS ANN. ch. 82, § 10.

mits commissioners to allocate the "cost of construction" among the county or towns where the "highway" is located.¹¹⁴ Although these provisions, among others, supported the court's initial interpretation of the meaning and scope of the statute, the court deepened its analysis.

The court decided to rely on extrinsic evidence, in the form of legislative history, to further aid in its interpretation of Chapter 82, section 7.¹¹⁵ The legislative history further supported the court's conclusion that the purpose of Chapter 82, section 7, was for the Commissioners to acquire land for the construction or alteration of a highway for travel when common convenience and necessity dictate.¹¹⁶ The court's research of over 300 years of the statute's legislative history indicated that the purpose of the legislation was and has remained the construction, alteration, or repair of highways to accommodate travel.¹¹⁷ Although the statute has not been free from change since its enactment in 1639, the statute's purpose of efficient roadways for travel has remained the same.¹¹⁸ Thus, the Commissioners' proposed takings to preserve and conserve public access to the beach are not supported by any reading or interpretation of Chapter 82, section 7.

The issue of coastal conservation is complex and involves a number of different issues and players at both the state and local levels. Beach erosion is a natural phenomenon and reality that exists along the Pacific, Atlantic, and Gulf coasts of the United States.¹¹⁹ Coastal erosion is caused by a number of factors, which can be placed into two broad categories: (1) sand migration along the shore, and (2) rising sea levels.¹²⁰ Although the general causes of beach erosion may be identified, states along the Pacific, Atlantic, and Gulf coasts seem to address the problem in different ways. Many densely developed resorts engage in an expensive process referred to as beach nourishment, the periodic pumping of sand onto the beach.¹²¹ In lightly developed areas, many states

114. MASS. GEN. LAWS ANN. ch. 82, § 12.

115. See *Barclay v. Deveau*, 429 N.E.2d 323 (Mass. 1981); *J.A.L. v. Wisconsin*, 471 N.W.2d 493 (Wis. 1991); *Kaczorowski v. Mayor of Baltimore*, 525 A.2d 628 (Md. 1987); *Doctors Council v. New York City Employees' Ret. Sys.*, 525 N.E.2d 454 (N.Y. 1988).

116. *Chandler*, 772 N.E.2d 578, 580.

117. *Id.* at 584.

118. *Id.* at 585.

119. See James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998).

120. *Id.* at 1298-99.

121. *Id.* at 1299.

focus on preventing the erection of structures that would impede the natural erosion of the shore,¹²² while other state and coastal towns require new construction to be “setback from the shore by forty to one-hundred times the annual rate of erosion.”¹²³ Whatever remedies a coastal state or local town chooses, the fact remains that careful planning is required for effective implementation.

Beach erosion is a serious concern for coastal resort towns like Nantucket since smaller beaches can have a negative impact on the tourism industry. However, combating the problems caused by beach erosion can be complex and expensive since a careful balancing of science, law, and public policy is required.¹²⁴ Therefore, efforts to control or combat the effects of erosion and preserve beach access require the collaboration of several government agencies at the state and local level. In Massachusetts, the Coastal Management Program is implemented through several agencies within the Executive Office of Environmental Affairs (“EOEA”) and through the coordination efforts of the Massachusetts Office of Coastal Zone Management (“CZM”).¹²⁵ CZM brings together marine specialists to work with regional coordinators and local governments in order to effectively conserve the state’s coastline.¹²⁶ Nantucket’s Economic Development Commission, Conservation Foundation, and Land Council are the local bodies responsible for assessing coastal conservation needs and developing a strategy for implementation.¹²⁷ The existence of these agencies and the statutes requiring the submission of a coastal management plan places in perspective why the Nantucket Commissioners were trying to proceed under Chapter 82.

It is undisputed that a subdivision grid plan recorded in 1889 with the Nantucket County registry of deeds indicated that many of the ways provided for beach access have fallen victim to erosion.¹²⁸ Indeed, several of the ways are now partially or com-

122. *Id.* at 1300.

123. *Id.* at 1301.

124. MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT, ABOUT THE MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT, at <http://www.state.ma.us/czm/aboutCZM.htm> (last modified Oct. 9, 2003).

125. *Id.*

126. *Id.*

127. *See* TOWN OF NANTUCKET, TOWN DEPARTMENTS, at <http://www.nantucket-ma.gov/departments.html> (last visited Oct. 17, 2003).

128. *See Chandler*, 772 N.E.2d 578, 580.

pletely under water.¹²⁹ Thus, a plausible argument exists that there is a need to preserve some of the ways subject to the taking for the sake of ensuring public access to the beach and ensuring the ability to manage the beach "assets." This argument is strengthened by the fact that open access to the beach is critical to a vibrant Nantucket tourism industry. However, the Commissioners do not have the authority to lay highways over navigable waters or on land below high water mark.¹³⁰ Further, this need for beach access does not authorize the Commissioners to use the highway statute as a device for conservation. Simply stated, the Commissioners' intent is suspect in light of the fact that the Massachusetts' Legislature has provided other avenues for commissioners to travel in pursuit of conservation.¹³¹

Andrew J. Ley, counsel for the plaintiffs in the *Chandler* case, questioned the town planners' motivations in this matter.¹³² He suggests that the Surfside town counsel appeared to support promoting tourism through the taking because they openly stated at the first public hearing that the takings procedure under the highway statute was proper.¹³³ The intent to promote tourism was also evidenced during the public hearings when the Commissioners mentioned preserving historic rights of way to the beach and potentially creating parking spaces for the public on the land.¹³⁴ The Commissioners voiced their concern, during said hearings, that the private landowners would block public access to the beach, a result that could impair tourism.¹³⁵ Promoting tourism in a beach resort is a permissible objective for town planners and town council, particularly where many of the beach access points are in private hands; however, the means for opening beach access points must be legal. In this case, the town council's support was misplaced since the Commissioners were acting outside of the authority granted by Chapter 82, section 7.

129. *Id.*

130. *Inhabitants of Marblehead v. County Comm'rs*, 71 Mass. (5 Gray) 451, 452 (1855); *Frederick Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532 (E. & A. 1870).

131. *See* MASS. GEN. LAWS ANN. ch. 34, § 25 (West 1999); MASS. GEN. LAWS ANN. ch. 40, § 8C (West 1999).

132. E-mail from Andrew J. Ley, Attorney for Chandler, to John Tenaglia, J.D. Candidate, Pace University School of Law (Jan. 7, 2003, 18:09:00 EST) (on file with author) [hereinafter "Email from Ley"].

133. *Id.*

134. *Chandler*, 772 N.E.2d 578, 580.

135. *Id.*

The Commissioners had a more plausible statutory authority available to secure public access to the beach: Massachusetts General Law Annotated, chapter 34 ("Chapter 34"), section 25.¹³⁶ Under this statute:

[C]ommissioners may, subject to appropriation, acquire by eminent domain, or by purchase or otherwise, the fee or other lesser interest in such real property within their respective counties as may be necessary to maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces, and may control and manage same; provided that such acquisition has been approved by the department of environmental conservation and the conservation committee of the city or town within such land lies, or if such city or town has no conservation committee . . . by two thirds vote of board of selectmen. . . .¹³⁷

The Commissioners could have attempted to secure the land in question under the authority granted in the above statute. Indeed, the court stated in a footnote that although "open space" is not expressly defined in Chapter 34, section 25, it would include space on a public beach.¹³⁸ The court reasoned that Chapter 12, section 11D, includes "'open spaces' in a noninclusive list of land that may be subject to 'damage to the environment': 'seashores, dunes, marine resources, underwater archaeological resources, wetlands, open spaces, natural areas, parks or historic districts or sites.'" ¹³⁹ Although this statute appears to be the more appropriate avenue for the Commissioners to have traveled, it would also have been a more expensive and time-consuming avenue to travel. Even if the Commissioners agreed that the beach access points were open spaces within the definition of the statute and that it should be taken by eminent domain in order to conserve and/or protect the future use of the same, the Commissioners would still have had to develop a conservation plan and have that plan approved by the State Department of Environmental Protection and the Nantucket County Conservation Committee.¹⁴⁰

It is the additional obstacles in the process under the above-mentioned statute that likely prompted the Commissioners to pro-

136. *Id.* at 585.

137. MASS. GEN. LAWS ANN. ch. 34, § 25 (West 1999).

138. *Chandler*, 772 N.E.2d 578, 585 n.7.

139. *Id.* See also *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Ret. Bd.*, 419 N.E.2d 277 (Mass. 1981) (stating a statute's "generic phrase" takes its meaning from an analysis of the whole).

140. See *Chandler*, 772 N.E.2d 578, 586.

ceed under the less burdensome highway statute. Indeed, Mr. Ley, in discussing the Commissioners' actions, stated that he believes the Commissioners proceeded under the highway statute because there were "fewer obstacles in terms of time, money and public process."¹⁴¹ He explained that at the public hearing, the Commissioners were talking to a tribunal who, in his opinion, had already made up its mind to support the Commissioners in their proposed takings.¹⁴² Therefore, the Commissioners likely believed they could successfully proceed under the highway statute and circumvent the additional processes needed to obtain approval from the Department of Environmental Protection and local Conservation Commission. Thus, by proceeding under Chapter 34, section 25, the Commissioners would have had to address cost and need issues that, according to Mr. Ley, were a concern of the Commissioners.¹⁴³ Although the highway statute also required a hearing, the forum was far from neutral, since the Commissioners themselves comprised the tribunal holding the hearing.¹⁴⁴

For the Commissioners' not to proceed under Chapter 34, section 25, seems unusual, even in light of the apparent obstacles of time and money. In 1984, Nantucket formed the nation's first local land trust, the Nantucket Land Bank, whose primary purpose was to acquire "open space."¹⁴⁵ The Land Bank has acquired over 1,000 acres of open space since 1984;¹⁴⁶ thus, not only is there an interest on the part of the bank to acquire open land, but it has been successful in doing so. This suggests that Nantucket is not opposed to the public acquisition of open space if needed to foster conservation. If the Commissioners were so concerned about preserving open access to the beach, why did they not argue, pursuant to Chapter 34, section 25, that the "access points" in question were in fact open space needed for conservation purposes? On an island that appears willing to acquire open space for the betterment of its residents and visitors alike, this argument would appear plausible. Although it may be suggested that the Commissioners, Land Bank, and Conservation Foundation may share divergent views on conservation, the fact remains that the

141. E-mail from Ley, *supra* note 132.

142. *Id.*

143. *Id.*

144. *Id.*

145. MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 4.

146. *Id.*

Commissioners could have attempted to acquire the financing necessary to acquire the privately owned beach-front property by eminent domain under Chapter 34, section 25.

Another statutory avenue the Commissioners could have explored was the acquisition of land by eminent domain, pursuant to Massachusetts General Law Annotated, chapter 40 ("Chapter 40"), section 8C.¹⁴⁷ This provision provides that a city or town, after establishing a conservation commission, may "upon the written request of the commission, take land by eminent domain under chapter seventy-nine . . . in any land or waters located in such city or town," as is deemed necessary to "acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas within [the commission's] city or town. . . ." ¹⁴⁸ Nantucket already has a conservation commission,¹⁴⁹ which makes this an even more viable statutory avenue that the Commissioners could have pursued.

As with Chapter 34, section 25, the same disincentives exist if the Commissioners chose to proceed under Chapter 40, section 8C. For instance, the Commissioners would be required to develop and submit a conservation plan which would be subject to approval by a two-thirds vote of the town counsel.¹⁵⁰ This vote would be necessary because the land in question would have to be acquired by eminent domain.¹⁵¹ Thus, this statute would force upon the Commissioners a process that is more expensive and time-consuming than proceeding under the highway statute. However, since the intent of the Commissioners was in fact to conserve the access points to the beach, this time-consuming and perhaps more expensive process is necessary. As discussed above, combating erosion through different types of conservation efforts is a complex process, which requires the collaboration of different government agencies. The plain language of Chapter 34, section 25, suggests the Massachusetts state legislature believed that this more expensive and time-consuming process was necessary for conservation. Since the *Chandler* court properly identified the intent of the Commissioners as conservatory in nature, it appropriately dis-

147. *Chandler*, 772 N.E.2d 578, 585.

148. MASS. GEN. LAWS ANN. ch. 40, § 8C (West 1999).

149. Conservation Commission homepage, at <http://www.nantucket-ma.gov/departments/concom.html> (last visited Oct. 17, 2003).

150. MASS. GEN. LAWS ANN. ch. 40, § 14 (West 1999).

151. 8 Op. Att'y. Gen. 73, 83 (1969).

cussed, in *dictum*, statutes that offered a more plausible basis for the taking of privately owned land.¹⁵²

Lastly, the Commissioners also decided not to proceed with the takings under Chapter 40, section 14.¹⁵³ This statute empowers selectmen, which in Nantucket are the commissioners, to:

[T]ake by eminent domain under chapter seventy-nine, any land, easement or right therein within the city or town not already appropriated to public use, for any municipal purpose for which the purchase or taking of land, easement or right therein is not otherwise authorized or directed by statute [provided that] the taking or purchase . . . has previously been authorized . . . by vote of the town, nor until an appropriation of money, to be raised by loan or otherwise, has been made for the purpose by a two thirds vote of the city council or by a two thirds vote of the town, and no lot of land shall be purchased for any municipal purpose by any city subject to this section for a price more than twenty-five per cent in excess of its average assessed valuation during the previous three years.¹⁵⁴

The Commissioners could posit the argument that securing public access to the beach is a "municipal purpose" within the meaning of the statute and that the land has not already been appropriated for public use.¹⁵⁵ Although the Commissioners would have to define the "municipal purpose" and appropriate the necessary financing to obtain authorization from this statute to take said land, this statute still appears more plausible on its face than the highway statute.

The likely reason this statute was less attractive to the Commissioners was because it required them to jump more procedural hurdles. For instance, if the Commissioners were to effectuate a valid taking of the land in question for purposes of conservation, it would have to be founded upon a written request by the conservation commission.¹⁵⁶ Further, there would be financing requirements that must be fulfilled prior to the takings order being valid; as the statute articulates, "[u]pon a [two-thirds] vote, a city or town may expend monies in the fund, if any, established under the provision of this section for the purpose of paying, in whole or in part, any damages for which such city or town may be liable by

152. *Chandler*, 772 N.E.2d 578, 584-85.

153. *Id.* at 585.

154. MASS. GEN. LAWS ANN. ch. 40, § 14 (West 1999).

155. *Chandler*, 772 N.E.2d 578, 580-81.

156. MASS. GEN. LAWS ANN. ch. 40, § 8C (West 1999).

reason of any such taking.”¹⁵⁷ Thus, under this statute, the Commissioners would have to provide the conservation commission with a written request proving need and raise the necessary financing before the town could even consider the takings order.¹⁵⁸

The court in this case properly framed the issue, analyzed the facts, applied the appropriate cannons of statutory construction, and in the end, rendered the just decision. The Commissioners had no intention of using the plaintiffs’ beachfront land for constructing a highway; however, it proceeded under the highway statute to further its conservation efforts. Although the court’s decision precluded the Commissioners from taking the land pursuant to Chapter 82, section 7, the questions that remain are: whether or not the plaintiffs’ land is safe from takings efforts; and what is the scope and impact of the decision rendered by the *Chandler* court?

Mr. Ley suggested that the plaintiffs’ beachfront land is not safe from a future taking because there are other ways to take access points.¹⁵⁹ He pointed out that several citizen articles for town meeting have already been submitted, which supports the notion that the plaintiffs’ beachfront property may still be taken.¹⁶⁰ A debate that has likely ensued amongst the town planners, as a result of this case, is whether it is cost-effective to proceed under a statute, such as Chapter 34, section 25, that has a more detailed procedural process. In discussing the impact of the case on the issue of takings in either Nantucket County or the state of Massachusetts, Mr. Ley stated that the case has had a minimal impact.¹⁶¹ He explained that the case “has been quoted in a few subsequent cases, but only with respect to statutory construction issues.”¹⁶² Mr. Ley suggested, however, “had the case gone the other way,” there would have been, as he stated, “all sorts of mischief wrought not just in Nantucket, but wherever some government entity could exercise highway lay-out authority.”¹⁶³ Indeed, a decision by the *Chandler* court in favor of the

157. *Id.*

158. *Id.*

159. E-mail from Ley, *supra* note 132.

160. *Id.*

161. *Id.*

162. *Id.* See also *Perry v. Commonwealth*, 780 N.E.2d 53, 55 (Mass. 2002) (citing *Chandler* for statutory interpretation principles); *Wong v. Univ. of Mass.*, 777 N.E.2d 161, 162 (Mass. 2002) (citing *Chandler* for the proposition that it is appropriate to examine legislative history when interpreting statutes).

163. E-mail from Ley, *supra* note 132.

Commissioners would have validated their ability to exercise authority not explicitly granted to them by an enabling statute; a ruling contrary to the basic tenets of administrative law.

V. Conclusion

The authority to exercise the right of eminent domain is a powerful right delegated to local governing authorities, like the Commissioners. The Commissioners proceeded under a statute authorizing the taking of land for the purpose of constructing, altering, or repairing highways, but disavowed any intent to do so with the land taken.¹⁶⁴

Thus, the court properly concluded that the Commissioners acted outside of the scope of Chapter 82, section 7, and invalidated the takings orders.¹⁶⁵ The court properly rejected the Commissioners' arguments that the taken land would be connecting "existing public ways" and that Chapter 82 did not require pavement.¹⁶⁶ There were also alternative statutory avenues available to the Commissioners, which the court considered more viable, but which the Commissioners decided not to pursue.¹⁶⁷ The court itself suggested that the Commissioners might have declined to proceed under Chapter 34, section 25, because it was more restrictive of the Commissioners' authority than Chapter 82.¹⁶⁸ Although the precise reasoning for the Commissioners' actions is unknown, the fact remains that a valid exercise of the right of eminent domain requires authorities, like the Commissioners, to work within the narrow confines of the enabling statute.¹⁶⁹

The court's holding and reasoning in *Chandler* was sound and consistent with the purpose of Chapter 82, section 7. Coastal conservation is an important objective of the state of Massachusetts and Nantucket County. However, with an economy dependent in large part on tourism and second-home development, Nantucket finds herself in a precarious position. The Commissioners are trying to ensure that "rights of way" to certain beaches in the Surfside area remain open to the public in the future, a result that will benefit the tourism industry and island's economy, while at the

164. *Chandler*, 772 N.E.2d 578, 579-82.

165. *Id.* at 586.

166. *Id.* at 583.

167. *See id.* at 586.

168. *Id.* at 586.

169. *Id.*

same time try to be sensitive to the interests of beach-front property owners. In balancing these interests, there are appropriate statutory avenues the Commissioners can travel in order to determine if a taking of privately owned land is needed to further public conservationist ends. In *Chandler*, the Commissioners did not proceed under the appropriate statute in trying to effectuate a taking by eminent domain; thus, they were properly precluded from using the Massachusetts state highway statute as a device for furthering conservation.