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Criminal Law - Failed the Breathalyzer: Just Contest the Location of the Stop - Commonwealth v. Virgilio, 947 N.E.2D 1112 (Mass. App. Ct. 2011)

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CRIMINAL LAW—FAILED THE BREATHALYZER? JUST CONTEST THE LOCATION OF THE STOP—*COMMONWEALTH V. VIRGILIO*, 947 N.E.2D 1112 (MASS. APP. CT. 2011)

In Massachusetts, the criminal act of driving under the influence of an intoxicating liquor or controlled substance is governed by Massachusetts General Laws Chapter 90, § 24(1)(a)(1) (the "Massachusetts OUI Statute").[1] In *Commonwealth v. Virgilio*,[2] the Massachusetts Appeals Court considered whether the common area entryways and parking zones of multiple unit residential buildings constitute "any place to which members of the public have access as invitees or licensees" within the meaning of the Massachusetts OUI Statute.[3] The court determined that members of the public would neither deem the driveway and conjoining parking lot as anything other than a private driveway nor infer that public use is invited and, therefore, it is not a place to which members of the public have access as invitees or licensees as provided by the governing statutory language.[4]

On May 16, 2009, Lisa Virgilio, while intoxicated, got into her car and backed into the side of her neighbor's car.[5] At the time, Virgilio was residing in a single family cottage located adjacent to the two-story, two-family dwelling where the owner of the other vehicle in the accident resided.[6] The incident occurred in a parking area located behind the two residences.[7] The parking area extended from a paved driveway traveling between the two residences stemming from a wide-mouthed entryway

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[1] *See* MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (2010). The three elements of operating under the influence are (1) operating a motor vehicle, (2) upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, and (3) while under the influence of intoxicating liquor. *See id.*

[2] 947 N.E.2d 1112 (Mass. App. Ct. 2011).

[3] *Id.* at 1114 (outlining issue).

[4] *Id.* at 1115 (setting forth holding). The court reasoned that because the location in which the Defendant was operating her motor vehicle is not governed by chapter 90, section 24(1)(a)(1) of the Massachusetts General Laws, she could not have been charged with operating under the influence of an intoxicating liquor and her motion for a required finding of not guilty should have been allowed. *Id.* at 1116.

[5] *Id.* at 1113 n.3.

[6] *Id.* at 1113-14.

[7] *Virgilio*, 947 N.E.2d at 1114. There was ample space to accommodate six to eight parked vehicles in the parking area. *Id.* at 1117 (Sikora, J., dissenting).

leading from the main road.[8]

All occupants of the two properties had access to the driveway and parking area and none of the residents could restrict access.[9] Additionally, there were no barriers or signs at the mouth of the entryway, nor were there any markings or partitions which separated any of the paved area spanning from the entryway from the main road through the parking area.[10] Any visitors travelling by motor vehicle seeking to visit the occupants of either building would drive through the entryway and park in the area located behind the residences.[11]

At trial, the sole issue was whether the location in which Virgilio was operating her motor vehicle was a "way or. . .place to which members of the public have access as invitees or licensees."[12] The trial judge denied Virgilio's motion for a required finding of not guilty and convicted her of operating a motor vehicle under the influence of intoxicating liquor.[13] Virgilio appealed this conviction, claiming the place on which she was operating her vehicle was not a way or place to which members of the public have access as invitees or licensees and, therefore, was not within the reach of the Massachusetts OUI Statute.[14] On appeal, the Massachusetts Appeals Court reversed Virgilio's conviction, finding that relevant case law had not extended the governing statute's reach to all places in which an operator may have physical access.[15] Furthermore, the court found that the lower court should have allowed Virgilio's motion for a required finding of not guilty because members of the public could not conclude the area was open to them for travel as invitees or licensees.[16]

Under its original language, the Massachusetts OUI Statute applied only to operation of a motor vehicle while under the influence "upon any way or in any place to which the public has a right of access."[17] The

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[8] *Id.* at 1114 (majority opinion); *see also id.* at 1117 (Sikora, J., dissenting) (describing how to access parking area in which accident occurred).

[9] *Id.* at 1117 (Sikora, J., dissenting).

[10] *Id.* (illustrating ease of access to parking area).

[11] *Id.* (demonstrating possible travelers on driveway and in parking area not limited to building's residents).

[12] *Virgilio*, 947 N.E.2d at 1114 (omission in original). At trial, the defendant did not dispute that she was operating a motor vehicle while under the influence of alcohol. *See id.* at 1113 n.3.

[13] *See id.* at 1113.

[14] *Id.* Virgilio also contested her sentence, claiming it was excessive. *Id.* The majority did not address the issue of excessive punishment because it had reversed her conviction. *Id.* n.2.

[15] *Id.* at 1115-16.

[16] *Id.* at 1115-16 (stating appeals court holding).

[17] Commonwealth v. Smithson, 672 N.E.2d 16, 20 (Mass. App. Ct. 1996) (highlighting language in original statute); MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (1937) (setting forth language in statute before 1961 amendment).

legislature enacted this original version of the statute to protect those traveling upon highways and it was not intended to criminalize operating a motor vehicle while intoxicated in all places within the Commonwealth.[18] The Massachusetts Supreme Judicial Court ("SJC") interpreted this language of the statute to include only public ways or ways in which the general public held an easement, not privately owned places used by the general public solely as licensees or business invitees.[19]

Responding to the SJC's interpretation of this language, the legislature amended the statute in 1961 to add "any place to which members of the public have access as invitees or licensees."[20] The purpose behind the statute is to address the dangerous risk of impaired driving while attempting to remedy the situation through deterrence, incapacitation, and reformation of the offender.[21] While the case law has not extended the

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[18] Commonwealth v. Clarke, 150 N.E. 829, 830 (Mass. 1926) (indicating purpose and limitations of statute).

[19] Commonwealth v. Paccia, 153 N.E.2d 664, 666 (Mass. 1958) (announcing areas encompassed under statute). The court went on to state that "[i]f the legislature had wished to include areas like [the area at issue], to which members of the public have access only as business invitees or licensees, within the penal prohibitions of § 24, it would have been appropriate for it to have made a clear and specific provision to this effect." *Id.* at 666.

[20] *See* MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (2010) (detailing language added in revised 1994 statute). This revision has been the subject of several opinions. *See, e.g.*, Commonwealth v. George, 550 N.E.2d 138, 140-41 (Mass. 1990) (holding public school baseball field not covered by statute); Commonwealth v. Cabral, 931 N.E.2d 44, 46-47 (Mass. App. Ct. 2010) (characterizing avenue lined with single family homes as public way); Commonwealth v. Stoddard, 905 N.E.2d 114, 117 (Mass. App. Ct. 2009) (rejecting unpaved, unilluminated, unsigned roadways of gated campground as being way or place under statute); Commonwealth v. Brown, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001) (finding roads admitting certified individuals to gated military installation covered by statute); *Smithson*, 672 N.E.2d at 20-21 (holding gated road leading into sand pit not covered by statute); Commonwealth v. Muise, 551 N.E.2d 1224, 1225-26 (Mass. App. Ct. 1990) (finding paved private way leading into trailer park covered by statute); Commonwealth v. Hart, 525 N.E.2d 1345, 1347 (Mass. App. Ct. 1988) (declaring private way extending from public road with business outlets covered by statute).

[21] *See* Commonwealth v. Blais, 701 N.E.2d 314, 317 (Mass. 1998) ("A drunk driver let loose on the highways is a deadly menace . . . to anyone sharing the highways with him."); Commonwealth v. Brooks, 319 N.E.2d 901, 903 (Mass. 1974) (noting impaired drivers likely to kill themselves or others); Commonwealth v. Davis, 823 N.E.2d 411, 413 (Mass. App. Ct. 2005) (recognizing driving under influence presents grave danger to public); Commonwealth v. Fortune, 785 N.E.2d 1274, 1275 (Mass. App. Ct. 2003) (acknowledging impaired driving affects safety of public and must be investigated by police); *see also* ch. 90, § 24(1)(a)(1) (setting forth sentencing of license revocation, incarceration and treatment programs). The statute prescribes graduated punishments for multiple offenses. Ch. 90, § 24(1)(a)(1). Multiple offenders are subject to mandatory license revocation, increasing in duration for each subsequent offense. *Id.* § 24(1)(b). Additionally, offenders could face up to two and one-half years in the house of corrections for a first offense and up to five years for a fifth offense. *Id.* § 24(1)(a)(1). A judge may also require an offender to undergo a residential treatment program. *Id.* Efforts to stop drunk driving have been seen at both the state and national level through various public awareness campaigns and the expenditure of millions of dollars by both the government and

statute's reach to all places that an operator may have physical access, the 1961 revision expanded the scope of the statute to include a greater number of possible offenders, and it illustrated the legislature's intent to further the underlying public safety concern inherent in the statute.[22]

When assessing whether a particular private way is encompassed under the revised statute, it is the status of the way, not the status of the driver, which is controlling.[23] Consequently, an impaired driver can be charged under the statute even if that driver does not have a specific license or invitation to be traveling on the way.[24] The operative test is whether the invitation or license is one that extends—or appears, from the character of the way, to extend—to the general public.[25]

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private organizations. *See, e.g.*, ALAN A. CAVAIOLA & CHARLES WUTH, ASSESSMENT AND TREATMENT OF THE DWI OFFENDER 30-31 (2002) (stating public pressured legislature for harsher OUI laws because of increasing drunk driving deaths); Kelly Mahon Tullier, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 873 & n.7 (noting almost every state has passed stricter OUI laws, including mandatory sentencing, since 1980); *Campaign to Eliminate Drunk Driving*, MADD, http://www.madd.org/drunk-driving/campaign/ (last visited May 30, 2012) (providing example of public awareness campaign).

[22] *See* Commonwealth v. George, 550 N.E.2d 138, 139 (Mass. 1990) ("We read G.L. c. 90, § 24(1)(a)(1), as reaching only those places to which members of the public have a right of access by motor vehicle or access as invitees or licensees by a motor vehicle."); *see also* ch. 90, § 24(1)(a)(1) (providing increased number of areas encompassed under statute). Not only has the scope of the location in which an individual can be charged with an OUI been widened, stricter standards have also been applied to determine whether someone is "operating" a motor vehicle and whether someone is in fact "under the influence." *See* Holly Hinte, Note, *Drunk Drivers and Vampire Cops: The "Gold Standard,"* 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 161 (2011) ("[A]ll States have passed 'illegal per se' laws that make it a crime to operate a motor vehicle with [blood alcohol content] at or above .08 . . . ." (quoting NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., REFUSAL OF INTOXICATION TESTING: A REPORT TO CONGRESS 2 (2008))); *see also* Commonwealth v. McGillivary, 940 N.E.2d 506, 509 (Mass. App. Ct. 2011) (finding defendant operating when slumped over wheel and ignition turned to "on" but engine off).

[23] Commonwealth v. Hart, 525 N.E.2d 1345, 1347 (Mass. App. Ct. 1988) (detailing elements to consider when determining whether conduct falls under prohibitions in statute).

[24] *See Brown*, 748 N.E.2d at 979 (reiterating status of driver irrelevant to determination).

[25] *See* Commonwealth v. Stoddard, 905 N.E.2d 114, 116-17 (Mass. App. Ct. 2009) (citing test used to assess whether private way covered by statute). The way will not be covered by the statute if the license or invitation is privately extended to a limited class. *Id.* at 117. The subjective intent of the property owner is irrelevant when determining the status of the way; the determination depends upon the way's objective appearance. *See* Commonwealth v. Smithson, 672 N.E.2d 16, 19 (Mass. App. Ct. 1996). While typical physical attributes of a public way may help decipher whether a way is accessible to the public under the statute, a lack of these characteristics is not dispositive. *See Smithson*, 672 N.E.2d at 20 (finding unpaved way leading into business not covered by statute on weekend when business closed); Commonwealth v. Muise, 551 N.E.2d 1224, 1225-26 (Mass. App. Ct. 1990) (concluding paved private road without curbing entering into trailer park covered by statute). *But see* Commonwealth v. Kiss, 794 N.E.2d 1281, 1283 (Mass. App. Ct. 2003) ("The characteristics of the [place in question], even during the hours that the mall shops are closed, place the parking lot within reach of G.L. c. 90,

In *Commonwealth v. Virgilio*, the Massachusetts Appeals Court considered whether the common area entryways and parking zones of multiple unit residential buildings constitute "any place to which members of the public have access as invitees or licensees" within the meaning of the Massachusetts OUI Statute.[26] The court applied the test set forth in *Commonwealth v. Stoddard*[27] in determining whether the way fell within the bounds of the statute: "if the invitation or license is one that extends (or appears, from the character of the way, to extend) to the general public, the way is covered."[28] In applying this test, the court determined that the physical accessibility of the driveway and parking area by occupants of two residential buildings was not enough to bring the way under the statute's reach.[29] The court then concluded that members of the public could not reasonably believe that the driveway was open to them for travel as invitees or licensees.[30]

In *Commonwealth v. Virgilio*, the Massachusetts Appeals Court incorrectly determined that the area in which Virgilio was operating her motor vehicle was not a way or place as provided by the Massachusetts OUI Statute.[31] In its analysis, the majority employed strict statutory

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§ 24 . . . . While the use of the parking lot after closing hours would be significantly diminished, there were services at the mall, such as pay telephones and newspaper distribution boxes . . . . [T]heir presence created the reasonable expectation among members of the public that they were welcome to operate their vehicles in the parking lot in order to access those services that were uniquely available when the shops were closed.").

[26] 947 N.E.2d at 1114 (describing issue before court).

[27] 905 N.E.2d 114 (Mass. App. Ct. 2009).

[28] *Id.* at 1115 (quoting *Stoddard*, 905 N.E.2d at 117). While the court acknowledged that there are some typical physical circumstances that may help determine whether a way is covered under the statute, it stated that these characteristics are not dispositive. *Id.* at 1115. Some of the physical circumstances that the court mentioned were the presence of street lights, hydrants, curbing, and paving. *Id.*

[29] *See Virgilio*, 947 N.E.2d at 1116. In its analysis, the court characterized the way as a private driveway and parking area that only served two residences and noted that it neither contained nor led to any businesses nor public accommodations. *Id.* at 1115.

[30] *Id.* at 1115. The court stated that there was nothing in the appearance of the way that would lead members of the general public to believe that it was anything other than a private driveway or that public use was invited. *Id.* at 1115. The court further stated that if it had ruled otherwise, it would overrule the test set forth in *Stoddard* and would essentially be reading the word "public" out of the statute. *Id.* at 1116. The court also noted that although the driveway was neither gated nor posted, there was nothing in the appearance of the way that would give an impression to the general public that public use was invited. *Id.* at 1115.

[31] *See Virgilio*, 947 N.E.2d at 1118 (Sikora, J., dissenting) (finding majority erred in determining place at issue not covered by statute). The language of the statute, the underlying purpose of the statute, and the legislative intent in amending the statute to include the clause at issue all undercut the majority's position. *See* MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (2010); *see also* Commonwealth v. Connolly, 474 N.E.2d 1106, 1109 (Mass. 1985) ("[The Massachusetts OUI Statute must be read] in light of the legislative purpose to protect the public from drivers

interpretation and surveyed existing precedent, failing to recognize that the question presented before the court was a significant issue of first impression.[32] The pertinent issue of whether the common area entryways and parking zones of multiple residential buildings fall within the Massachusetts OUI Statute as "any place to which members of the public have access as invitees or licensees" has not been addressed in any of the established case law of Massachusetts.[33]

In concluding that the common area entryways and parking zones of multiple residential buildings did not fall within the bounds of the statute, the majority utilized an unreasonably narrow interpretation of the phrase "any place to which members of the public have access as invitees or licensees."[34] The court established an overly constricted definition of "invitee or licensee," excluding specific invitees or licensees from the statute where the language of the statute does not call for such an omission.[35] The Massachusetts Legislature added the specific portion of

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whose judgment, alertness, and ability to respond promptly and effectively to unexpected emergencies are diminished because of the consumption of alcohol."); *see also* Commonwealth v. Paccia, 153 N.E.2d 664, 666 (Mass. 1958) (prompting legislature to enact 1961 amendment).

[32] *See Virgilio*, 947 N.E.2d at 1114-16 (describing court's interpretation of statute and use of existing case law to support holding); *id.* at 1116-17 (Sikora, J., dissenting) (characterizing issue before the court as a matter of first impression).

[33] *Id.* at 1116-17 (Sikora, J., dissenting) (finding issue lies open for analysis). The case law cited by the majority does not address the question at issue. *See* Commonwealth v. George, 550 N.E.2d 138, 140-41 (Mass. 1990) (determining public school baseball field not covered by statute); *see also* Commonwealth v. Cabral, 931 N.E.2d 44, 46-47 (Mass. App. Ct. 2010) (characterizing avenue lined with single family homes as public way); *Stoddard*, 905 N.E.2d at 117 (rejecting unpaved, unilluminated, unsigned roadways of gated campground as being way or place under statute); Commonwealth v. Brown, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001) (holding roads admitting certified individuals to gated military installation covered by statute); Commonwealth v. Smithson, 672 N.E.2d 16, 21 (Mass. App. Ct. 1996) (declaring gated road leading into sand pit not covered by statute); Commonwealth v. Muise, 551 N.E.2d 1224, 1225-26 (Mass. App. Ct. 1990) (holding paved private way leading into trailer park covered by statute); Commonwealth v. Hart, 525 N.E.2d 1345, 1347 (Mass. App. Ct. 1988) (finding private way extending from public road with business outlets covered by statute). Arguably, the most similar circumstances to the case at bar were set forth in *Muise* where the defendant was operating his motorcycle on the entryway of a trailer park. *See* 551 N.E.2d at 1225-26. Like the area in question in *Virgilio*, the way led from a main road into a residential area, was paved but contained no curbing, and had no signs prohibiting the public from accessing the road. *Id.* at 1225. In *Muise*, the court determined that "the physical circumstances of the way are such that members of the public may reasonably conclude that it is open for travel to invitees or licensees" thereby bringing the way within the bounds of the statute. *Id.* at 1225-26 (quoting *Hart*, 525 N.E.2d at 1347).

[34] *See Virgilio*, 947 N.E.2d at 1115 (noting if license or invitation is extended to limited class, way not covered by statute). *But see* ch. 90, § 24(1)(a)(1) (addressing members of public as whole, and not excluding ways merely accessed by limited class).

[35] *See* ch. 90, § 24(1)(a)(1) (exhibiting language of statute, which includes individuals of public specifically invited to travel on way). The language of the Massachusetts OUI Statute does not indicate "that a specific invitee or licensee, as distinguished from a random invitee or

the statute at issue in *Virgilio* in response to the SJC's narrow interpretation in *Commonwealth v. Paccia*,[36] in which the SJC determined that the statute encompassed only private ways where the general public held an easement.[37] The decision in *Virgilio* once again employs an overly narrow interpretation of the Massachusetts OUI Statute and undercuts the legislature's goal of deterring deter drunk driving in the Commonwealth, overlooking the strong public safety purpose inherent in the statute.[38]

Not only is the Massachusetts Appeals Court's decision at odds with the language, purpose, and intent of the Massachusetts OUI Statute, the precedent the decision establishes contradicts the strict standards applied to the remaining elements of the Massachusetts OUI Statute.[39] While the standard applied in determining whether an individual is "operating" a motor vehicle or "under the influence" has become harsher

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licensee, no longer qualifies as a 'member[] of the public.'" *Virgilio*, 947 N.E.2d at 1118-19 & n.3, 1123 (Sikora, J., dissenting) ("A specific invitee or licensee would be a person driving onto the 'place' for a particular purpose, such as a social guest, a deliveryman, or visiting nurse . . . ."). The way or place is encompassed in the statute if *any* member of the public has access to the way or place as an invitee or licensee; whether the person was specifically invited or given permission to travel on the way is irrelevant. *See* ch. 90, § 24(1)(a)(1). The court erroneously focused on the purpose of the driver in travelling on the way instead of the accessibility of the place in determining whether the way is covered by the statute. *Virgilio*, 947 N.E.2d at 1118.

[36] 153 N.E.2d 664 (Mass. 1958).

[37] *See id.* at 666. While the court in *Paccia* conditioned its decision by stating that the legislature would have included the phrase "business invitees or licensees" in the statute if it intended to include the area at issue in *Paccia*, the legislature opted to leave out the term "business" and amended the statute to include the unmodified phrase "invitees or licensees." *See* ch. 90, § 24(1)(a)(1); *Paccia*, 153 N.E.2d at 666 ("If the legislature had wished to include areas like [the place at issue], to which members of the public have access only as business invitees or licensees, within the penal prohibitions of § 24, it would have been appropriate for it to have made a clear and specific provision to this effect."). In Massachusetts, the phrase "invitees or licensees" includes both business and social visitors. *See* Mounsey v. Ellard, 297 N.E.2d 43, 50-52 (Mass. 1973).

[38] *See Virgilio*, 947 N.E.2d at 1115-16 (stating narrow interpretation of Massachusetts OUI statute); *see also* ch. 90, § 24 (displaying how amendment expanded chargeable class); Commonwealth v. Sudderth, 640 N.E.2d 481, 483 (Mass. App. Ct. 1994) (declaring purpose of Massachusetts OUI Statute is to deter individuals from driving while intoxicated). Congress and state legislatures have been passing stricter drunk driving laws in response to the number of deaths occurring as a result of impaired driving, supporting a broad application of the Massachusetts OUI Statute. *See* CAVAIOLA & WUTH, *supra* note 21, at 30-31 (stating public pressured legislature to create harsher OUI laws because of number of drunk driving deaths); Tullier, *supra* note 21, at 873 & n.7 (noting almost every state has passed stricter OUI laws, including mandatory sentencing, since 1980).

[39] *See* ch. 90, § 24(1)(a)(1) (setting forth "operate" and "under the influence" as two other elements in OUI statute); *see also* MASS. GEN. LAWS ch. 90, § 24 (1937) (exhibiting that before Massachusetts met national standard of .08, legal limit was .10); Commonwealth v. McGillivary, 940 N.E.2d 506, 509 (Mass. App. Ct. 2011) (finding defendant operating when ignition turned to "on" but engine off); Hinte, *supra* note 22, at 161 (noting all states criminalize operating vehicle with blood alcohol content of .08 or greater).

after public awareness and drunk driving deaths have increased, the location in which one can be charged with drunk driving is incongruent with Massachusetts's ever-increasing admonishment of the practice of driving while intoxicated.[40] The *Virgilio* decision has further narrowed the possible locations encompassed under the Massachusetts OUI statute for an offense to occur.[41] Although the area at issue in this case served only two residential buildings, the court's reasoning and analysis applies to much larger residential areas such as condominium complexes and apartment building parking areas, opening the door to a far greater number of individuals who will be in danger of injury or death when an impaired driver decides to travel throughout the common areas of these multiple resident complexes.[42]

In *Commonwealth v. Virgilio*, the Massachusetts Appeals Court considered whether the common area entryways and parking zones of multiple unit residential buildings constitute "any place to which members of the public have access as invitees or licensees" within the meaning of the Massachusetts OUI Statute. The Court determined that members of the public would not deem the driveway and conjoining parking lot as anything other than a private driveway or infer that public use is invited and, therefore, it is not a place to which members of the public have access as invitees or licensees as provided by the governing statutory language. In its decision, the appeals court erroneously relied on precedent that does not address the question at bar. The *Virgilio* decision is directly at odds with the language of the Massachusetts OUI Statute and the Massachusetts Legislature's inherent intent to safeguard the public. The overly narrow interpretation of the public access clause undercuts the legislature's goal of reducing the frequency of impaired driving by attempting to deter such conduct throughout the Commonwealth of Massachusetts.

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[40] *See Virgilio*, 947 N.E.2d at 1121-22 (Sikora, J., dissenting) (highlighting inconsistencies in lenity among three elements of OUI offense).

[41] *See id.* at 1116 (majority opinion).

[42] *See id.* at 1115 (stating area in question was private driveway). The court's main rationale for its holding was that the driveway and parking area only served two residences, containing three dwelling units in total, with no businesses or public accommodations. *Id.* As this area shares the same characteristics as larger scale housing units, it would follow that the same rationale would be applied to these more populated living complexes. *See id.* at 1123 (Sikora, J., dissenting) (comparing residential area in question to larger scale condominium complexes or apartment buildings).