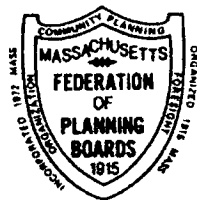


# ZONING GUIDEBOOK



Carol A. Rolf, J.D.  
for the  
Massachusetts Federation of Planning and  
Appeals Boards, Inc.



### **Bio for Carol A. Rolf, J.D.**

Carol A. Rolf is a licensed attorney in Massachusetts and New Hampshire. Before becoming an attorney, Ms. Rolf worked as a town planner and also for the former Executive Office of Community Development n/k/a Department of Housing and Community Development. During her tenure at EOCD, Attorney Rolf provided assistance to the public and municipal officials concerning various land use laws including the The Zoning Act, The Subdivision Control Law, and Chapter 40B -- affordable housing. In the past Attorney Rolf has represented municipalities and developers in court and in carrying out municipal land use law, including preparation of zoning by-laws and ordinances. Currently, Attorney Rolf is an assistant professor at Rivier College in Nashua, New Hampshire and teaches legal and criminal justice courses. Ms. Rolf continues to provide municipal assistance in all areas of land use law, is a trainer for the Citizen Planner Training Collaborative, and actively participates in making presentations and preparing materials for the Massachusetts Federation of Planning and Appeals Boards.

## **PREFACE**

The purpose of the Zoning Guidebook is to assist those involved in land use regulation of private property through zoning. Specifically, the Guidebook addresses The Zoning Act, M.G.L., ch. 40A, §§ 1-17. Each section begins with the law and annotations. The annotations are not part of the statute and are included in each section simply to assist in locating certain provisions of the law. Next, the legislative history is provided, followed, if applicable to the section, by permissible and required actions under the statute, related case law, and some cautionary notes. If applicable, sample forms and other useful material will be included after the cautionary notes in some sections. Some sections will also include a highlighted discussion of a particular topic. Finally, links to useful websites and references to related sections of the Zoning Guidebook or to other publications of the Massachusetts Federation of Planning and Appeals Boards are included at the end of most sections.

Case law, known as common law, is important, as both the general laws adopted by the legislature and the common law decided by the judiciary must be used in order to understand zoning law. The author has tried to include a significant amount of case law under each section, including the most important case law for that section, but not all of the case law that may pertain to a section is included if the rule of the case is included in other cases. The related case law provides citations (in most cases citations to both the Massachusetts and regional reporters where available, but for some of the more recent slip opinions only a year and court is specified) and parenthetical summaries that should not be substituted for a full reading of the actual case. In complex cases or where indecision exists, seek legal advice, as this Guidebook is exactly that -- a guide -- and should not be used for purposes of arriving at definitive legal answers.

Attorney Carol A. Rolf has compiled this 2004 revision with assistance from members of the Board of Directors of the Massachusetts Federation of Planning and Appeals Boards. Copies of this Guidebook and other publications may be obtained from the Massachusetts Federation of Planning and Appeals Boards. Contact the executive secretary at (508) 754-3068.

## **INTRODUCTION TO THE ZONING ACT**

The right of municipalities to use the police power known as zoning has existed in Massachusetts since 1920 (St. 1920, c. 601, §§ 1-9, codified under M.G.L. Ch. 40, §§ 25-30A). This 1920 statute was amended in 1954 and the legislature replaced it with "The Zoning Enabling Act" (St. 1954, c. 368, §2, codified under M.G.L. Ch. 40A, §§ 1-22). When the legislature adopted the most recent zoning codification in 1975, which included "The Zoning Act" (St. 1975, c. 808, §§ 1-7, Section 3 of Chapter 808 was codified under M.G.L., Ch. 40A, §§ 1-17 as "The Zoning Act"), thus replacing the 1954 law. Chapter 808 suggested specific objectives for adopting zoning, as the 1975 law had as one of its purposes the modernization of zoning by municipalities through use of the Massachusetts Home Rule Amendment to the Constitution (Art. 89 of the Amends. of Mass. Const.). The legislature thus turned over control of substantive zoning provisions to cities and towns, while standardizing mainly administrative procedures. These objectives, as found under Section 2A of Chapter 808 of the legislative acts of 1975, include, but are not limited to, the following:

- To lessen congestion in the streets;
- To conserve health;
- To secure safety from fire, flood, panic and other dangers;
- To provide adequate light and air;
- To prevent overcrowding of land;
- To avoid undue concentration of population;
- To encourage housing for persons of all income levels;
- To facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements;
- To conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment;
- To encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and
- To preserve and increase amenities by the promulgation of regulations to fulfill said objectives.

Said regulations may include but are not limited to restricting, prohibiting, permitting or regulation:

1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;
2. size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;
3. uses of bodies of water, including water courses;
4. noxious uses;
5. areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;
6. density of population and intensity of use;
7. accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and
8. the development of the natural, scenic and aesthetic qualities of the community.

## TABLE OF CONTENTS

| <u>ITEM</u>   | <u>PAGE</u> |
|---|-------------|
| Preface.....  | iii         |
| Introduction to "The Zoning Act".....                                     | iv          |
| Section 1: Title of Chapter.....  | 1.1         |
| Section 1A: Definitions.....  | 1A.1        |
| • "Permit granting authority".....  | 1A.1        |
| • "Solar access".....   | 1A.1        |
| • "Solar energy system".....  | 1A.1        |
| • "Special permit granting authority".....                                | 1A.1        |
| • "Zoning".....   | 1A.1        |
| • "Zoning administrator".....   | 1A.1        |
| Section 2: (Section Repealed).....  | 2.1         |
| Section 3: Subjects Which Zoning May Not Regulate; Exemptions.....        | 3.1         |
| • Agricultural uses exempt.....   | 3.1         |
| • Horticultural uses exempt.....  | 3.1         |
| • Floricultural uses exempt.....  | 3.1         |
| • Viticultural uses exempt.....   | 3.1         |
| • Structures for selling produce related to agriculture, etc. exempt..... | 3.1         |
| • 5 acre limit on agricultural and related uses.....                      | 3.1         |
| • No exemption of land from flood plain and wetland requirements.....     | 3.1         |
| • No regulation of interior of dwelling.....                              | 3.2         |
| • Religious and educational uses exempt.....                              | 3.2         |
| • Reasonable regulations applied to religious and educational uses...     | 3.2         |
| • Telecommunication and energy uses exempt.....                           | 3.2         |
| • Hearing by DTE.....   | 3.2         |
| • Child care facility exempt.....   | 3.2         |
| • Reasonable regulations applied to child care facility.....              | 3.3         |
| • No discrimination against disabled persons.....                         | 3.3         |
| • Congregate living arrangements.....                                     | 3.3         |
| • Family day care home.....   | 3.3         |
| • Must amend zoning to change district boundary line.....                 | 3.3         |
| • Temporary manufactured housing use.....                                 | 3.3         |
| • Handicapped access ramps not subject to dimensional regulations..       | 3.4         |
| • Solar energy systems.....   | 3.4         |
| • Antenna structures for amateur radio operation.....                     | 3.4         |
| Section 4: Uniform Districts.....   | 4.1         |
| • Uniform regulation of similar classes of uses and structures.....       | 4.1         |
| • Zoning map required.....  | 4.1         |
| • Assessor's map may be used to prepare zoning map.....                   | 4.1         |
| • <i>Topic Discussion – Spot Zoning</i> .....                             | 4.2         |
| Section 5: Adoption and Amendment of Zoning.....                          | 5.1         |

|   |      |
|---|------|
| • Initiation of a zoning change.....                                  | 5.1  |
| • Submission of zoning proposal to planning board.....                | 5.1  |
| • Planning board and city council notice and public hearings.....     | 5.1  |
| • Notice to nonresident property owners.....                          | 5.2  |
| • Waiver of notice.....   | 5.2  |
| • Notice to Farmland Advisory Board.....                              | 5.2  |
| • Planning board report.....  | 5.3  |
| • Time for acting on zoning proposal.....                             | 5.3  |
| • Extra-majority vote.....  | 5.3  |
| • Protest petition.....   | 5.3  |
| • Unfavorable vote and reconsideration.....                           | 5.3  |
| • Submission of town zoning by-law for attorney general approval..... | 5.4  |
| • Effective date of zoning.....                                       | 5.4  |
| • Posting and publishing adopted zoning.....                          | 5.4  |
| • Appeals for procedural defects.....                                 | 5.4  |
| • Sample notice of public hearing.....                                | 5.8  |
| • <i>Topic Insert – Holding the Public Hearing</i> .....              | 5.8  |
| • <i>Topic Insert – Power to Regulate Real Property</i> .....         | 5.14 |
| Section 6: Nonconformities, Zoning Freezes.....                       | 6.1  |
| • Application of zoning to pre-existing nonconformities.....          | 6.1  |
| • Application of zoning to nonconforming single and two-family.....   | 6.1  |
| • Finding to allow extension and alteration to nonconformities.....   | 6.1  |
| • Six months to commence use or construction.....                     | 6.2  |
| • Abandonment and non-use.....  | 6.2  |
| • Grandfather exemption for lots in separate ownership.....           | 6.2  |
| • Grandfather exemption for up to 3 lots in common ownership.....     | 6.2  |
| • Zoning freeze (dimensions and uses) for subdivisions.....           | 6.3  |
| • Zoning freeze (uses) for lots shown on 81P plan.....                | 6.3  |
| • Staying of zoning freeze.....                                       | 6.3  |
| • Extension of zoning freeze.....                                     | 6.4  |
| • Waiver of zoning freeze.....  | 6.4  |
| Section 7: Enforcement; Violations; Penalties.....                    | 7.1  |
| • Zoning enforcement, responsible party.....                          | 7.1  |
| • Withholding a permit.....   | 7.1  |
| • Request for enforcement.....  | 7.1  |
| • Penalties for violations.....                                       | 7.1  |
| • 6 year statute of limitation for use enforcement.....               | 7.2  |
| • 10 year statute of limitation for structural enforcement.....       | 7.2  |
| • Criminal and civil actions.....                                     | 7.2  |
| • Superior court jurisdiction.....                                    | 7.2  |
| • Injunctive relief.....  | 7.2  |
| • Sample Zoning Enforcement Ordinance/By-law.....                     | 7.15 |

| ITEM  | PAGE |
|---|------|
| Section 8: Administrative Appeals.....                                    | 8.1  |
| • Administrative appeal to permit granting authority.....                 | 8.1  |
| • Who may file appeal.....  | 8.1  |
| Section 9: Special Permits.....   | 9.1  |
| • Zoning to provide for special permits.....                              | 9.1  |
| • Required finding to grant.....  | 9.1  |
| • Conditions, safeguards, and limitations.....                            | 9.1  |
| • Bonus density special permits.....                                      | 9.1  |
| • Special permit for residential uses in non-residential district.....    | 9.1  |
| • Cluster developments.....   | 9.2  |
| • Planned residential developments.....                                   | 9.3  |
| • Shared elderly housing.....   | 9.3  |
| • Designation of Special Permit Granting Authority.....                   | 9.3  |
| • Rules and regulations required.....                                     | 9.3  |
| • Associate planning board members.....                                   | 9.3  |
| • Filing application for a special permit.....                            | 9.4  |
| • Procedure for processing special permit application.....                | 9.4  |
| • Time for decision.....  | 9.4  |
| • Extension of time for decision.....                                     | 9.4  |
| • Voting requirement.....   | 9.4  |
| • Constructive grant.....   | 9.4  |
| • Detailed record.....  | 9.5  |
| • Lapse.....  | 9.5  |
| • Special permit accessory to scientific research.....                    | 9.6  |
| • Hazardous waste facility.....   | 9.6  |
| • Solid waste disposal facility.....                                      | 9.6  |
| • <i>Topic Insert – Site Plan Review and Approval</i> .....               | 9.8  |
| • Sample application for a special permit.....                            | 9.23 |
| • Sample decision for a special permit.....                               | 9.26 |
| • Sample clerk's certificate for constructive grant of a special permit.. | 9.28 |
| Section 9A: Regulation of Adult Uses.....                                 | 9A.1 |
| • Adult uses permitted by special permit.....                             | 9A.1 |
| • Distance regulations for adult uses.....                                | 9A.1 |
| • Adult uses defined.....   | 9A.1 |
| • Special permit process.....   | 9A.2 |
| • Constructive grant.....   | 9A.3 |
| • Lapse.....  | 9A.3 |
| • Permit for existing adult uses.....                                     | 9A.3 |
| • No limitation on municipal right to adopt adult use zoning.....         | 9A.3 |
| Section 9B: Protection of Solar Access.....                               | 9B.1 |
| • Encouragement of solar energy systems.....                              | 9B.1 |
| • Permissible solar regulations.....                                      | 9B.1 |

| ITEM   | PAGE  |
|--|-------|
| • Solar energy access special permit.....                              | 9B.1  |
| • Zoning may provide process for issuing solar access permits.....     | 9B.2  |
| • Solar maps permitted.....  | 9B.2  |
| Section 9C: Child Care Facilities.....                                 | 9C.1  |
| • Child care facility defined.....                                     | 9C.1  |
| • Increase in floor area.....  | 9C.1  |
| • Board of appeals' permission to have use other than child care.....  | 9C.1  |
| • Owner may charge operator for limited costs.....                     | 9C.1  |
| • Income limits on children using facility.....                        | 9C.2  |
| Section 10: Variances.....   | 10.1  |
| • Hardship finding.....  | 10.1  |
| • Detriment to public good finding.....                                | 10.1  |
| • Derogation from intent and purpose of zoning finding.....            | 10.1  |
| • Use variances.....   | 10.1  |
| • Conditions, safeguards, and limitations not including ownership..... | 10.1  |
| • Lapse.....   | 10.2  |
| • Extension of variance.....   | 10.2  |
| • <i>Topic Insert – No One Is Entitled to a Variance</i> .....         | 10.6  |
| • Sample petition for a variance.....                                  | 10.19 |
| • Sample decision for a variance.....                                  | 10.22 |
| • Sample clerk's certificate for constructive grant of a variance..... | 10.24 |
| Section 11: Public Hearings.....                                       | 11.1  |
| • Notice.....  | 11.1  |
| • Certification of parties in interest by assessor.....                | 11.1  |
| • Waiver of notice.....  | 11.1  |
| • Contents of notice.....  | 11.2  |
| • No hearing on day of election.....                                   | 11.2  |
| • Review by others.....  | 11.2  |
| • Failure to report after review deemed lack of opposition.....        | 11.2  |
| • Recording of decision.....   | 11.2  |
| • <i>Topic Insert – Who Receives Notice?</i> .....                     | 11.4  |
| • Sample Notice of Public Hearing.....                                 | 11.6  |
| • <i>Topic Insert – Holding the Public Hearing</i> .....               | 11.8  |
| Section 12: Establishing the Board of Appeals.....                     | 12.1  |
| • Appointment of members.....  | 12.1  |
| • Employment of experts and clerical help.....                         | 12.1  |
| • Removal of members.....  | 12.1  |
| • Filling vacancies.....   | 12.1  |
| • Associate members.....   | 12.1  |
| • Operational rules required.....                                      | 12.2  |
| • Sample Operational Rules for a ZBA.....                              | 12.4  |
| Section 13: Zoning Administrators.....                                 | 13.1  |

| ITEM  | PAGE  |
|---|-------|
| • Zoning may provide for zoning administrator.....  | 13.1  |
| • Board of appeal may delegate duties to zoning administrator.....                                | 13.1  |
| • Time limit for acting on matters delegated.....   | 13.1  |
| • Appeal of zoning administrator's decision.....  | 13.1  |
| • Failure to act on time deemed denial.....   | 13.1  |
| Section 14: Powers of the Zoning Board of Appeals.....  | 14.1  |
| • Power to decide administrative appeal.....  | 14.1  |
| • Power to decide special permit.....   | 14.1  |
| • Power to decide variance.....   | 14.1  |
| • Power to decide appeal from zoning administrator.....   | 14.1  |
| • Actions board of appeals may take.....  | 14.1  |
| Section 15: Actions by the Zoning Board of Appeals.....   | 15.1  |
| • Procedure for filing administrative appeal.....   | 15.1  |
| • Procedure for appealing zoning administrator's decision.....                                    | 15.1  |
| • Appeals barred if filed late.....   | 15.1  |
| • Transmission of record.....   | 15.2  |
| • Filing procedure for special permit or variance.....  | 15.2  |
| • Time for holding public hearing.....  | 15.2  |
| • Voting requirements.....  | 15.2  |
| • Time for making decision.....   | 15.2  |
| • Constructive grant.....   | 15.2  |
| • Detailed record.....  | 15.3  |
| • Notice of decision.....   | 15.3  |
| • Sample application for an administrative appeal.....  | 15.13 |
| • Sample decision for a an administrative appeal.....   | 15.16 |
| • Sample clerk's certificate for constructive grant of relief on an<br>administrative appeal..... | 15.18 |
| Section 16: Unfavorable Decisions; Reconsideration; Withdrawal.....                               | 16.1  |
| • Reconsideration of an unfavorable decision.....   | 16.1  |
| • Findings required to reconsider.....  | 16.1  |
| • Planning board consent.....   | 16.1  |
| • Withdrawal of application, petition, or appeal.....   | 16.1  |
| Section 17: Court Appeals.....  | 17.1  |
| • Aggrieved person may file appeal.....   | 17.1  |
| • Courts with jurisdiction to hear zoning appeals.....  | 17.1  |
| • Process for filing appeal.....  | 17.1  |
| • Prayer.....   | 17.1  |
| • Notice to the city or town clerk.....   | 17.1  |
| • Expedited service of process.....   | 17.2  |
| • Appeal concerning defect of notice.....   | 17.2  |
| • Provision of counsel, costs, and posting of bonds.....  | 17.3  |
| • <i>Topic Insert – Inverse Condemnation Claims</i> .....   | 17.7  |
| Index.....  | xi    |

## **SECTION 1.**

### **TITLE OF CHAPTER**



#### **THE LAW**

This chapter shall be known and may be cited as "The Zoning Act".

#### **ANNOTATIONS**

*Title of General Law,  
chapter 40A*

#### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3; amended by St. 1977, c. 829, § 3a.

#### **PERMISSIBLE/REQUIRED ACTIONS**

☛ "The Zoning Act" or M.G.L. Chapter 40A was adopted as Section 3 of Chapter 808 of the 1975 legislative session. The previous title for the state zoning law was "The Zoning Enabling Act." By renaming the law and deleting the term "Enabling" from its title, the legislature's intent was to encourage municipalities to be creative in regulating land use by adopting innovative and modern provisions under the Home Rule Amendment of the Massachusetts Constitution (Art. 89 of the Amends. to the Mass. Const.)

#### **RELATED CASE LAW**

- 📖 *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 128 N.E.2d 772 (1955) (although purpose of zoning is to protect uses in one area from uses in another area of the municipality, zoning should remain flexible).
- 📖 *Church v. Building Inspect. of Natick*, 343 Mass. 266, 178 N.E.2d 272 (1961) (earlier interpretations under prior zoning laws do not become invalid when the legislature repeals or amends the law).
- 📖 *Circle Lounge & Grille v. Board of Appeal of Boston*, 324 Mass. 427, 86 N.E.2d 920 (1949) (purpose of zoning is to protect neighborhoods from deleterious uses).
- 📖 *Collura v. Arlington*, 367 Mass. 881, 329 N.E.2d 733 (1975) (zoning powers are not to be interpreted narrowly).
- 📖 *Decoulous v. City of Peabody*, 360 Mass. 428, 274 N.E.2d 816 (1971) (zoning powers are not to be interpreted narrowly).
- 📖 *Dowd v. Board of Appeals of Dover*, 5 Mass. App. Ct. 148, 360 N.E.2d 640 (1977) (municipality has power to regulate uses as it deems necessary).

📖 *Enos v. Brockton*, 354 Mass. 278, 236 N.E.2d 919 (1968) (zoning provisions require an extra-majority vote to adopt and thus should have some permanency; zoning is to stabilize land uses, while building code is to regulate safety and structure of buildings).

📖 *Everpure Ice Mfg. v. Board of Appeals of Lawrence*, 324 Mass. 433, 86 N.E.2d 906 (1949) (purpose of zoning is to stabilize uses and municipalities are not required to afford nonconforming uses advantages beyond those provided by The Zoning Act).

📖 *Kaplan v. Boston*, 330 Mass. 381, 113 N.E.2d 856 (1953) (purpose of zoning is to protect neighborhoods from deleterious uses).

📖 *Rayco Inv. Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385, 331 N.E.2d 910 (1975) (zoning is one of police powers available to municipalities to regulate land use).

📖 *Sinn v. Board of Selectmen of Action*, 357 Mass. 606, 259 N.E.2d 557 (1970) (zoning may be adopted in order to protect health, safety, convenience, morals, and welfare of the public).

📖 *Vazza v. Board of Appeals of Brockton*, 359 Mass. 256, 269 N.E.2d 270 (1971) (persons who purchase real estate should be able to rely on zoning in determining uses permitted on private property).

📖 *Wyman v. Zoning Bd. of Appeals of Grafton*, 47 Mass. App. Ct. 635, 715 N.E.2d 459 (1999), *rev. denied*, 430 Mass. 1112, 722 N.E.2d 977 (because zoning law provides adequate remedies for administrative errors, alleging due process and equal protection violations is usually not warranted).

## **CAUTIONARY NOTES**

✓ "The Zoning Act" provides standardized procedures for municipalities to follow in adopting and amending zoning; holding public hearings; making decisions on petitions, applications, and administrative appeals; rehearing cases; and filing court appeals. These procedures are standardized and in many cases mandatory and failure to follow some of the procedures may result in automatic approvals as discussed under specific sections of the law that follow.

## **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

🔗 <http://www.socialaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Low and Moderate Income Housing Primer (2004).

📁 Mass. Fed. Plan. & Appeals Bds. Subdivision Control Guidebook (2002).

## SECTION 1A.

### DEFINITIONS



#### **THE LAW**

As used in this chapter the following words shall have the following meanings:

"Permit granting authority", the board of appeals or zoning administrator.

"Solar access", the access of a solar energy system to direct sunlight.

"Solar energy system", a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating.

"Special permit granting authority", shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by zoning ordinance or by-law for the issuance of special permits.

"Zoning", ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.

"Zoning administrator", a person designated by the board of appeals pursuant to section thirteen to assume certain duties of said board.

#### **ANNOTATIONS**

*Permit granting authority*

*Solar access*

*Solar energy system*

*Special permit granting authority*

*Zoning*

*Zoning administrator*

#### **LEGISLATIVE HISTORY**

Added by St. 1977, c. 829, § 3A; Amended by St. 1985, c. 637, § 1; St. 1987, c. 685, § 1.

#### **REFERENCES**

☞ Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 3, 4, 5, 6, 9, 9B, 10, 11, 13, & 15 (2004).

## **SECTION 2. (Repealed)**



### **LEGISLATIVE HISTORY**

Repealed by St.1987, c. 685, § 2.

This section previously addressed special permits for cluster development, which is now covered under section 9.

## SECTION 3.

### SUBJECTS WHICH ZONING MAY NOT REGULATE: EXEMPTIONS



#### THE LAW

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year or during the harvest season of the primary crop raised on land of the owner or lessee, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law. For the purpose of this section, the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be

#### ANNOTATIONS

*Zoning may not regulate use of materials or methods of construction*

*Zoning may not unreasonably regulate or require a special permit for agriculture and related uses*

*Existing agricultural structures and regulation thereof*

*Zoning may limit agricultural uses to five acres*

*Zoning may not exempt land from flood plain or wetlands regulations*

*Horticulture defined*

produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law 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 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. Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and energy shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and energy shall after notice to all affected communities and public hearing in one of said municipalities, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

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,

*Zoning shall not regulate or restrict the interior area of a single family dwelling*

*Zoning shall not unreasonably regulate educational and religious uses and structures*

*Reasonable regulations may be adopted to regulate educational and religious uses*

*Exemption of certain telecommunications and energy uses and structures from zoning after hearing and exemption by DTE*

*Notice for hearings on public service corporation exemptions*

*Zoning may not prohibit or require a special permit for child care facilities; however, such facilities may be subject to reasonable regulations*

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.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Family day care home and large family day care home, as those terms are defined in section nine of chapter twenty-eight A, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.

No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.

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

*Child care facility defined*

*Land use, health, and safety laws may not discriminate against disabled persons*

*Regulation of congregate living among unrelated persons may not discriminate*

*Family day care home and large family day care homes are allowed unless expressly prohibited in a zoning ordinance or bylaw*

*District zoning boundary lines may only be changed by adoption and amendment of zoning*

*Owner occupier of residence destroyed by fire or other natural holocaust may reside in manufactured house for 12 months while residence is rebuilt*

|  |  |
|--|--|
| <p>No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two.</p>   | <p><i>Dimensional zoning may not apply to handicapped access ramp</i></p>  |
| <p>No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.</p>  | <p><i>Zoning may not prohibit or unreasonably regulate solar energy systems</i></p>  |
| <p>No zoning ordinance or by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator. Zoning ordinances and by-laws may reasonably regulate the location and height of such antenna structures for the purposes of health, safety, or aesthetics; provided, however, that such ordinances and by-laws reasonably allow for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or by-law.</p> | <p><i>Zoning may not prohibit construction or use of antenna structures for federally licensed amateur radio operation, but may reasonably regulate location and height of such structures</i></p> |

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3; Amended by St. 1977, c. 860; St. 1982, c. 40; St. 1983, c. 91; St. 1985, c. 637, § 2; St. 1987, c. 191; St. 1989, c. 106, § 1; St. 1989, c. 341, § 117; St. 1989, c. 590; St. 1990, c. 521, § 2; St. 1991, c. 481, § 6; St. 1993, c. 450.

## **PERMISSIBLE/REQUIRED ACTIONS**

- For public policy reasons, the legislature has determined that many uses should be exempt from zoning or at least be permitted by a special permit, rather than allowing the municipality to prohibit the use.
- These exempt uses are generally set forth under this section of The Zoning Act, although others such as shared elderly housing, accessory uses to scientific research, hazardous waste facilities, and solid waste facilities are provided exemption-type treatment under section 9 of The Zoning Act.
- Those primary uses, or accessory and incidental uses as noted below, that are exempt from zoning outright under this section, such that they are

Massachusetts Federation of Planning and Appeals Board 1960  
(Revised 1969, 1973, 1977, 1988, 1997, 2004)

permitted by right, albeit subject to some reasonable regulations, and no special permit may be required for such uses, include the following:

1. agriculture – raising animals and growing crops, but may not include raising of animals as pets
  - The courts have determined many uses that are considered agriculture and thus are exempt from zoning. Uses include the following:
    - a piggery. *Building Inspect. of Mansfield v. Curvin*, 22 Mass. App. Ct. 401, 494 N.E.2d 42 (1986).
    - purchase and raising of horses. *Steege v. Board of Appeals of Stow*, 26 Mass. App. Ct. 970, 527 N.E.2d 1176 (1988).
    - training of horses at a riding school. *Id.*
    - participation in horse shows. *Id.*
    - raising of Christmas trees for later sale (may also be horticulture). See *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 641 N.E.2d 1334 (1994) (growing of Christmas trees is an exempt agricultural use, but removal of gravel is not, as it is not accessory to an agricultural use). But see *Building Inspect. of Peabody v. Northeast Nursery, Inc.*, 418 Mass. 401, 636 N.E.2d 269 (1994) (selling trees and shrubs grown elsewhere is not agriculture or horticulture use).
    - a barn for housing dairy cows. *Kirker v. Board of Appeals of Raynham*, 33 Mass. App. Ct. 111, 596 N.E.2d 398 (1992).
    - Greenhouse and accessory fuel tanks to operate greenhouse (may also be horticulture). *Town of Tisbury v. Martha's Vineyard Comm'n*, 544 N.E.2d 230 (Mass. App. Ct. 1989).
    - A facility for slaughtering animals raised on the premises and preparing them for market. *Modern Continental Const. Co. v. Building Inspect. of Natick*, 42 Mass. App. Ct. 901, 674 N.E.2d 247 (1997)
2. horticulture – growing and keeping of nursery stock and the sale of such stock, and may include greenhouses that meet the requirements of this section.
  - The stock is considered to be produced by the owner or lessee of the land as long as it is nourished, maintained and managed while on the premises.
3. floriculture – growing of flowers
4. viticulture – growing of grapes
5. use of any facility or structure, whether newly constructed, expanded, or reconstructed for selling products (and produce) related to agriculture, horticulture, floriculture, or viticulture, including wine and dairy products

- the facility or structure must be located on the land where the products are produced
- during the months of June, July, August, and September or during harvest season of the primary crop raised on the land of the owner or lessee, the majority of the products for sale in the facility or structure must have been produced by such owner or lessee
  - majority of products for sale is based on either gross sale dollars or volume
- such facilities must be located on the land where the products are produced, raised, or grown.

**ZONING MAY PROVIDE THAT THE ABOVE USES ARE NOT PERMITTED, EXCEPT ON A PARCEL OF LAND THAT IS FIVE ACRES OR MORE IN ZONING DISTRICTS WHERE SUCH USES ARE NOT PERMITTED BY RIGHT. LAND DIVIDED BY A PUBLIC OR PRIVATE WAY OR WATERWAY SHALL BE CONSTRUED AS ONE PARCEL IN DETERMINING THE FIVE ACRE MINIMUM.**

Based on the so-called 1950 "Dover Amendment"

6. religious uses and structures (includes buildings) on land owned or leased by a religious sect or denomination or by a nonprofit educational corporation
7. educational uses and structures on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a nonprofit educational corporation
  - The courts have determined many uses that are considered educational and thus are exempt from zoning. Uses include the following:
    - residential care facility in which mentally disabled adults are trained in such areas as money management, health education, cooking, and hygiene. *Gardner-Athol Area Mental Health Ass'n v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 513 N.E.2d 1272 (1987); *Fitchburg Housing Auth. v. Board of Zoning Appeals*, 308 Mass. 869, 406 N.E.2d 1006 (1980). *But see Whitinsville Retirement Society, Inc. v. Northbridge*, 394 Mass. 757, 477 N.E.2d 407 (1985) (nursing home facility that offered crafts is not the same as a formal program of education by trained professionals and thus is not exempt from zoning) and *Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham*, 29 Mass. App. Ct. 31, 557 N.E.2d 43 (1990) (use of space in church for psychological counseling center with religious component did not qualify for exemption from zoning for religious purposes, as it resembled a mental health clinic).

- group care facility for emotionally disturbed children. *Harbor Schools, Inc. v. Board of Appeals of Haverhill*, 5 Mass. App. Ct. 600, 366 N.E.2d 764 (1977).
  - group home for elderly, mentally ill persons. *Campbell v. City of Council of Lynn*, 415 Mass. 772, 616 N.E.2d 445, appeal denied, 415 Mass. 772, 515 N.E.2d 445 (1993).
  - nonprofit educational institution for accountants. *Worcester v. New England Inst. & New England School of Accounting, Inc.*, 335 Mass. 486, 140 N.E.2d 470 (1957). But see *Kurz v. Board of Appeals of No. Reading*, 341 Mass. 110, 167 N.E.2d 627 (1960) (dancing school not educational use exempt from zoning).
8. uses and structures accessory and incidental to such religious and educational uses, including the following:
- sports fields, lights, and snack bars. *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 391 N.E.2d 279 (1979).
  - facilities for feeding and housing college personnel. *Radcliffe College v. Cambridge*, 350 Mass. 613, 215 N.E.2d 892 (1966).
  - radio station. *Worcester County Christian Comm'rs. v. Board of Appeals of Spencer*, 22 Mass. App. Ct. 83, 491 N.E.2d 634 (1986)
  - dormitories. *Commissioner of Code Inspection v. Worcester Dynamy, Inc.*, 11 Mass. App. Ct. 97, 413 N.E.2d 1151 (1980).

**ZONING MAY PROVIDE THAT THE ABOVE USES AND STRUCTURES ARE SUBJECT TO REASONABLE REGULATIONS (REASONABLE MEANS IF THE REGULATIONS ARE APPLIED THEY WOULD NOT PROHIBIT THE USE OUTRIGHT) CONCERNING THE FOLLOWING:**

- bulk and height of structures
- yard sizes
- lot area
- setbacks
- open space
- parking
- building coverage requirements

NOTE: The regulations applied do not need to be tailored specifically for educational and religious uses. *Trustees of Boston Univ. v. Licensing Bd. of Boston*, 24 Mass. App. Ct. 475, 510 N.E.2d 283 (1987).

9. land, buildings, or structures to be used by a public service corporation
- may only be exempted upon petition of the corporation to the Department of Telecommunications and Energy (formerly Department of Public Utilities) that may grant such exemption after notice and hearing

- notice must be given in accordance with section 11 of The Zoning Act
- the public hearing must be held in the city or town where the use is proposed
  - if multiple municipalities are involved, notice must be given to all such municipalities as required by section 11, but the hearing must take place in only one of the municipalities.
- the Department of Telecommunications and Energy must determine the exemptions required after making the following findings:
  - that local zoning will not permit the public service corporation to use its land, building, or structure as proposed because:
    - the use is not allowed
    - the lot is too small
    - there is not sufficient frontage
    - the proposed structure or building exceeds height requirements
    - such other factors which prevent the use under existing zoning
  - that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.
    - The "reasonably necessary" finding must look at not only the suitability of the property involved, but also the impact regionally and on the public service corporation if the exemption is not granted. *New York Cent. R.R. v. Department of Pub. Utilities*, 347 Mass. 586, 199 N.E.2d 319 (1964).
- If such uses are permitted by special permit or could be permitted after notice, hearing, and finding concerning change or extension to a nonconforming use or structure, the public service corporation must first exhaust these remedies before seeking an exemption from the Department of Telecommunications and Energy.
- The courts have determined what qualifies as a public service corporation and have developed the following three considerations in making such determination:
  - Is the organization under a state franchise that has as its purpose the provision of a necessity or convenience to the public, which is not provided by a private business;

- Is there a high degree of governmental control and regulation; and
- Is there a public benefit derived from the service provided by the organization.
- The courts have determined that the following entities qualify as public service corporations:
  - Railroads. *Town of Westborough v. Department of Pub. Utilities*, 358 Mass. 716, 267 N.E.2d 110 (1971); *Town of Framingham v. Department of Pub. Utilities*, 351 Mass. 127, 218 N.E.2d 89 (1966).
  - Liquid natural gas company. *Save the Bay, Inc. v. Department of Pub. Utilities*, 366 Mass. 667, 322 N.E.2d 742 (1975); *Town of Wenham v. Department of Pub. Utilities*, 333 Mass. 15, 127 N.E.2d 791 (1955).
  - companies constructing electrical transmission lines. *Town of Framingham v. Department of Pub. Utilities*, 355 Mass. 138, 244 N.E.2d 281 (1969).
  - tour company that transported sightseers in eight-passenger vehicles. *Town of Truro v. Department of Pub. Utilities*, 365 Mass. 407, 312 N.E.2d 566 (1974).

10. primary, accessory, or incidental child care facilities, including uses of land, existing structures, and expansion of existing structures.

- The definition of a child care facility for purposes of this section is "a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A)."
- Section nine provides the following definition of a child care program and facility:
  - a program that provides supervised group care for the following:
    - children who are of kindergarten age or
    - children up to the age of 16 years, if the child has special needs.
  - a day care program facility would include the following:
    - child play school
    - progressive school
    - child development center
    - preschool
    - any facility which receives children under seven years of age or under 16 years of age if the children have special needs.
  - the facility may be open before and after school and during school vacations and holidays

- the facility should provide a daily program of activities for the children
- such a facility does not generally include public or privately organized education systems.

See discussion under section 9C of this Guidebook for discussion of child care facility regulations.

**ZONING MAY PROVIDE THAT THE ABOVE USES AND STRUCTURES ARE SUBJECT TO REASONABLE REGULATIONS CONCERNING THE FOLLOWING:**

- bulk and height of structures
- yard sizes
- lot area
- setbacks
- open space
- parking
- building coverage requirements

11. family day care home and large family day care home, unless a municipality specifically regulates such use in its zoning ordinance or by-law.
  - As defined under M.G.L. ch. 28A, § 9, these facilities are regulated by the state and are defined as a private residence used on a regular basis to temporarily house children under the age of 7 or under the age of 16 who have special needs.
12. manufactured home to temporarily replace a residence that was destroyed by fire or other natural holocaust, if it meets the following conditions:
  - The manufactured home must be placed on the site of the residence that was destroyed;
  - No one may reside in the manufactured home for longer than 12 months while the residence is being rebuilt; and
  - The manufactured home is subject to the provisions of the state sanitary code.
13. handicapped access ramp on private property used for ingress or egress by physically disabled persons, which may not be subject to any dimensional lot requirements, not limited to setback, yards, or open space.
  - A physically disabled person as defined under M.G.L., ch. 22, § 13A is a person with a disability that limits a major life activity.
14. solar energy system installations, including the buildings or structures that facilitate the collection of solar energy
  - Regulations may be imposed if they are necessary to protect the public health, safety or welfare.

See additional requirements under section 9B of this Guidebook.

15. antenna structures constructed or used by federally licensed amateur radio operators.

- The location and height of such antenna structures may be reasonably regulated in order to protect the public health and safety, as well as aesthetics.
  - Such regulations must provide for sufficient height of antenna structures to accommodate amateur radio communications
  - Such regulations must constitute the minimum practicable regulation necessary to accomplish the municipality's legitimate governmental purposes.

16. Although not expressly exempted by this section, governmental uses are also exempt from zoning by court decisions or common law, unless the governmental entity expressly requires compliance with local zoning.

- This exemption does not include municipal uses. A municipal zoning by-law or ordinance must specifically exempt municipal uses or they are otherwise subject to zoning. *Ouellet v. Board of Appeals of Dover*, 355 Mass. 77, 242 N.E.2d 759 (1968).
- Some of the common law governmental exemptions include the following:
  - uses of land or buildings owned or leased by the federal government for a post office. *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450, 488 N.E.2d 6 (1986).
  - uses of land or buildings by the Commonwealth or its bodies politic for a house of correction. *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 380 Mass. App. Ct. 706, 405 N.E.2d 637 (1980).
  - any use on state owned or leased land. *Medford v. Marinucci Bros. & Co.*, 344 Mass. 50, 181 N.E.2d 584 (1962).
  - state owned colleges, which are not subject to the reasonable regulations imposed on other educational uses. *Inspector of Bldgs. of Salem v. Salem State College*, Mass. App. Ct., 546 N.E.2d 388 (1989).
  - county government uses that perform essential governmental functions. *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 380 Mass. App. Ct. 706, 405 N.E.2d 637 (1980).
  - uses of land by the Metropolitan District Commission. *Teasdale v. Newell & Spaulding Const. Co.*, 192 Mass. 440 (1960).
  - Regional refuse disposal district. *Town of Freetown v. Zoning Bd. of Appeals of Dartmouth*, 33 Mass. App. Ct. 415, 600 N.E.2d 1001 (1992).

✦ Unless expressly regulated in a zoning by-law or ordinance, uses accessory to primary uses are normally permitted, subject to dimensional requirements. A use is considered accessory if:

- It is incidental to the primary use and subordinate and minor in significance and
- Customarily associated with the primary use and reasonably related to the function of the primary use.

✦ Those uses, exemptions, or restrictions that may never be regulated or permitted by zoning, as set forth under this section, include the following:

- the use of materials or methods of construction of structures regulated by the state building code.
- the exemption of land or structures from flood plain or wetlands regulations.
- the restriction of the interior area of a single family residential building.
- the imposition of any local land use and health and safety laws, regulations, practices, ordinances, by-laws, or decisions that discriminate against a disabled person.

- Discrimination shall include the imposition of such requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons.

✦ Other limitations on a municipality's police power to adopt zoning, as set forth under this section, include the following:

- the establishment of zoning districts by any boundary line change that is not adopted in accordance with section 5 of The Zoning Act.

### **RELATED CASE LAW**

📖 *APT Asset Management v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 735 N.E.2d 872 (2000) (assisted living residence that provided medical care is not exempt from zoning as a dormitory for a medical use).

📖 *Aronson v. Board of Appeals of Stoneham*, 349 Mass. 593, 211 N.E.2d 228 (1965) (zoning may not result in the taking of property for public purposes).

📖 *Attorney General v. Inhabitants of Dover*, 327 Mass. 601, 100 N.E.2d 1 (1951) (general court has power to determine validity of zoning; local zoning pre-empted by state exemption from zoning for educational and religious uses, as long as not for profit).


















📖 *Barbato v. Board of Appeal of Chelsea*, 355 Mass. 264, 244 N.E.2d 308 (1969) (ten-wheel dump truck or backhoe is not an automobile).

📖 *Barney & Carey Co. v. Town of Milton*, 324 Mass. 440, 87 N.E.2d 9 (1949) (zoning is one of police powers).

- ☞ *Bateman v. Board of Appeals of Georgetown*, 56 Mass. App. Ct. 236, 775 N.E.2d 1276 (2002) (raising, training, and boarding horses and giving riding lessons are exempt agricultural uses).
- ☞ *Bell v. Zoning Bd. of Appeals of Cohasset*, 14 Mass. App. Ct. 97, 437 N.E.2d 532, *rev. denied*, 387 Mass. 1101, 440 N.E.2d 21 (1982) (accessory tennis court use not clearly prohibited by zoning).
- ☞ *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 391 N.E.2d 279 (1979) (zoning may not require special permit or site plan for accessory uses to religious and educational uses, such as sports fields, lighting, snack bars, and dormitories).
- ☞ *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 294 N.E.2d 393 (1973) (zoning may not thwart implementation of other laws; neither zoning nor home rule by-law or ordinance may regulate civil matters regulated by other laws).
- ☞ *Board of Appeals of Southampton v. Boyle*, 4 Mass. App. Ct. 824, 349 N.E.2d 373 (1976) (board of appeals may deny use that would overtax water supply and impair health and safety of inhabitants).
- ☞ *Board of Selectmen of Hatfield v. Garvey*, 362 Mass. 821, 291 N.E.2d 593 (1973) (zoning provision must be given meaning within context).
- ☞ *Board of Selectmen of Tewksbury v. Granfield*, 17 Mass. App. Ct. 1011, 460 N.E.2d 199 (1984) (must exhaust administrative remedies before seeking zoning exemption).
- ☞ *Bourne v. Plante*, 429 Mass. 329 (1999) (municipalities may not regulate governmental agencies in a manner that interferes with their legislatively mandated purpose).
- ☞ *Building Comm'r of Franklin v. Dispatch Comms. of New England*, 48 Mass. App. Ct. 709, 725 N.E.2d 709, *rev. denied*, 431 Mass. 1004, 733 N.E.2d 125 (2000) (company's use not permitted, as it did not seek an exemption under this section as a public utility; where no exemption sought, municipality may refuse cell tower when three such towers already exist in residential zones in town, as long as there is no discrimination among providers and wireless service is not prohibited).
- ☞ *Building Comm'r of Medford v. C. & H. Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946) (municipality may regulate dump independent of zoning and require board of aldermen approval).
- ☞ *Building Inspect. of Holden v. Johnstone*, 357 Mass. 768 (1977) (discussing accessory uses as related to uses in the area).
- ☞ *Building Inspect. of Mansfield v. Curvin*, 22 Mass. App. Ct. 401, 494 N.E.2d 42 (1986) (a piggery is a permitted agricultural use).
- ☞ *Building Inspect. of Peabody v. Northeast Nursery, Inc.*, 418 Mass. 401, 636 N.E.2d 269 (1994) (selling trees and shrubs grown elsewhere is not agriculture or horticulture use).

- 📖 *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 128 N.E.2d 772 (1955) (zoning is a local matter).
- 📖 *Burnham v. Hadley*, 58 Mass. App. Ct. 479, 790 N.E.2d 1098 (2003) (activity of a certain magnitude is not longer incidental use).
- 📖 *Caires v. Building Comm'r of Hingham*, 323 Mass. 589, 83 N.E.2d 550 (1949) (zoning is one of police powers).
- 📖 *Cameron v. Zoning Agent of Bellingham*, 357 Mass. 757, 260 N.E.2d 143 (1970) (municipality has discretion to classify uses; use of dwelling as group residence for 15 elderly, mentally ill individuals is exempt from zoning as nonprofit educational facility; special permit upheld that relieved owners mental health educational facility of dimensional and parking requirements).
- 📖 *Campbell v. City of Council of Lynn*, 415 Mass. 772, 616 N.E.2d 445, *appeal denied*, 415 Mass. 772, 515 N.E.2d 445 (1993) (municipality may not require special permit for educational use, which is a group home for elderly, mentally ill persons, and may not impose unreasonable bulk and dimensional requirements).
- 📖 *Cape Resort Hotels v. Alcoholic Licensing Bd. of Falmouth*, 385 Mass. 205, 431 N.E.2d 213, *appeal after remand*, 388 Mass. 1013, 446 N.E.2d 1070 (1982).
- 📖 *City of Pittsfield v. Oleksak*, 313 Mass. 553, 47 N.E.2d 930 (1943) (municipality should consider future uses in zoning undeveloped areas).
- 📖 *City of Woburn v. McNutt Bros. Equip. Corp.*, 16 Mass. App. Ct. 236, 451 N.E.2d 437 (1983) (must exhaust administrative remedies before seeking zoning exemption).
- 📖 *City of Worcester v. Bonaventura*, 56 Mass. App. Ct. 166, 775 N.E.2d 795 (2002) (holding that definition of family unit constitutional).
- 📖 *Collura v. Arlington*, 367 Mass. 881, 329 N.E.2d 733 (1975) (town may adopt interim zoning).
- 📖 *Com. v. Brask*, 354 Mass. 416, 237 N.E.2d 686 (1968) (ordinance that is penal in nature is to be strictly construed).
- 📖 *Com. v. Maletsky*, 203 Mass. 241, 89 N.E. 245 (1909) (municipality may not regulate building materials and construction without legislative authority).
- 📖 *Commissioner of Code Inspection v. Worcester Dynamy, Inc.*, 11 Mass. App. Ct. 97, 413 N.E.2d 1151 (1980) (living quarters of nonprofit educational institution exempt from zoning).
- 📖 *Costello v. Department of Public Utilities*, 391 Mass. 527, 462 N.E.2d 301 (1984) (DPU must make finding that utility use is reasonably necessary for public convenience and welfare).
- 📖 *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 380 Mass. App. Ct. 706, 405 N.E.2d 637 (1980) (zoning may not prohibit uses, such as a house of correction, on land owned or leased by the Commonwealth or its bodies politic).
- 📖 *Cunha v. City of New Bedford*, 47 Mass. App. Ct. 407, 713 N.E.2d 385 (1999) (incidental means minor or of lesser importance).

- 📖 *Dowd v. Board of Appeals of Dover*, 5 Mass. App. Ct. 148, 360 N.E.2d 640 (1977) (town has wide latitude in differentiating between uses; a nursery is a commercial use and is not exempt as an agricultural use).
- 📖 *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450, 488 N.E.2d 6 (1986) (uses of land owned or leased by federal government for governmental purposes such as a post office are exempt from zoning).
- 📖 *Eastham v. Clancy*, 44 Mass. App. Ct. 901, 686 N.E.2d 1093 (1997) (greenhouse and farm stand did not qualify for agricultural exemption as only small portion of products sold were raised on property).
- 📖 *Enos v. Brockton*, 354 Mass. 278, 236 N.E.2d 919 (1968) (purpose of zoning is to protect property from objectionable uses, while purpose of building code is to ensure safety of buildings and structures; zoning may not regulate matters covered in the building code).
- 📖 *Everpure Ice Mfg. v. Board of Appeals of Lawrence*, 324 Mass. 433, 86 N.E.2d 906 (1949) (zoning should have some permanency).
- 📖 *Fitchburg Housing Auth. v. Board of Zoning Appeals*, 308 Mass. 869, 406 N.E.2d 1006 (1980) (residential facility to train mentally disabled adults is a public educational use exempt from zoning).
- 📖 *Foster v. Mayor of Beverly*, 315 Mass. 566, 53 N.E.2d 693 (1944) (zoning terms must be construed in accordance with their common and approved meanings).
- 📖 *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 415 N.E.2d 840 (1981) (discussing regulation of abortion clinic).
- 📖 *Gallagher v. Board of Appeals of Acton*, 44 Mass. App. Ct. 906, 687 N.E.2d 1277 (1997) (a four-unit rooming house is not accessory to a single-family residence as it is not subordinate to and minor when compared with the primary use).
- 📖 *Garabedian v. Westland*, 59 Mass. App. Ct. 427, 796 N.E.2d 439 (2003) (airstrip and hangar are not permissible accessory uses as they are not generally customarily incidental and subordinate to single-family residential use).
- 📖 *Gardner-Athol Area Mental Health Ass'n v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 513 N.E.2d 1272 (1987) (residential care facility for mentally disabled adults in which money management, health education, cooking, and hygiene are taught are exempt from zoning as educational use).
- 📖 *Golden v. Board of Selectmen of Falmouth*, 358 Mass. 519, 265 N.E.2d 573 (1970) (zoning may protect natural resources within coastal areas).
- 📖 *Greater Lawrence Sanitary District (GLSD) v. Town of No. Andover*, 439 Mass. 16, 785 N.E.2d 337 (2003) (municipality may impose nuisance conditions on regional wastewater facility as long as does not interfere with its legislatively mandated purpose).
- 📖 *Green v. Board of Appeal of Norwood*, 358 Mass. 253, 263 N.E.2d 423 (1970) (zoning interpretation should not cause absurd or unreasonable result).

 *Gricus v. Superintendent & Inspect. of Builds. of Cambridge*, 345 Mass. 687, 189 N.E.2d 209 (1963).  
 *Harbor Schools, Inc. v. Board of Appeals of Haverhill*, 5 Mass. App. Ct. 600, 366 N.E.2d 764 (1977) (group care facility for emotionally disturbed children is educational use exempt from zoning).  
 *Harvard v. Maxant*, 360 Mass. 432, 275 N.E.2d 347 (1971) (accessory use is incidental to a principal use, that is it is not the primary use and is subordinate and minor to the primary use).  
 *Haynes v. Grasso*, 353 Mass. 731, 234 N.E.2d 877 (1968) (in interpreting zoning must look at both intent and structure of zoning).  
 *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 641 N.E.2d 1334 (1994) (growing of evergreens for saw cut or Christmas trees constitutes agriculture or horticulture, but commercial removal of gravel on property is not).  
 *Howland v. Acting Super. of Builds. of Cambridge*, 328 Mass. 155, 102 N.E.2d 423 (1951).  
 *Inspector of Bldgs. of Salem v. Salem State College*, 28 Mass. App. Ct. 92, 546 N.E.2d 388 (1989) (state owned college not subject to reasonable regulations applicable to other educational uses, as state uses are exempt from all zoning regulations).  
 *Jenckes v. Building Comm'r of Brookline*, 341 Mass. 162, 167 N.E.2d 757 (1960) (zoning must protect public safety, health, and welfare).  
 *Kane v. Board of Appeals of Medford*, 273 Mass. 97, 173 N.E. 1 (1930) (zoning is one of police powers).  
 *Kirker v. Board of Appeals of Raynham*, 33 Mass. App. Ct. 111, 596 N.E.2d 398 (1992) (barn for housing dairy cattle is permissible agricultural structure exempt from zoning).  
 *Kurz v. Board of Appeals of No. Reading*, 341 Mass. 110, 167 N.E.2d 627 (1960) (dancing school not educational use exempt from zoning).  
 *LaMontagne v. Kenney*, 288 Mass. 363, 193 N.E. 9 (1935) (zoning should be interpreted in line with enabling statute).  
 *Lanner v. Board of Appeals of Tewksbury*, 348 Mass. 220, 202 N.E.2d 777 (1964) (municipality may determine proper zoning districts).  
 *Lapenas v. Zoning Bd. of Appeals of Brockton*, 352 Mass. 530, 226 N.E.2d 361 (1967) (zoning may not regulate land in adjacent municipality).  
 *Leahy v. Inspector of Bldgs. of New Bedford*, 308 Mass. 128, 31 N.E.2d 436 (1941) (legislative branch may determine zoning powers and district boundaries).  
 *Lindsay v. Board of Appeals of Milton*, 362 Mass. 126, 284 N.E.2d 595 (1972) (must construe zoning reasonably).  
 *Livoli v. Zoning Bd. of Appeals of Southborough*, 42 Mass. App. Ct. 921, 676 N.E.2d 68 (1997) (where no numeric height limit imposed on accessory structure, barn could be constructed as one story building at a height of 32.3 feet).

- 📖 *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 393 N.E.2d 858 (1979) (based on home rule amendment municipality may regulate wetlands under a separate wetlands bylaw or ordinance or under zoning).
- 📖 *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 636, 255 N.E.2d 347 (1970) (zoning may require special permit to fill a wetland; zoning may not attempt to preserve land in natural state by prohibiting use for any practical purpose).
- 📖 *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972, 482 N.E.2d 336, review denied, 396 Mass. 1102, 484 N.E.2d 102 (1985).
- 📖 *Martin v. Church of Latter-Day Saints*, 434 Mass. 141, 747 N.E.2d 131 (2001) (church steeple in excess of height requirements was on highest hill in town and court ruled that because no benefit would come to the community by enforcing the height requirement when compared to the architectural character of the temple the religious exemption applied to allow height violation; plaintiff was aggrieved party with standing to appeal as steeple cast large shadow over plaintiff's property).
- 📖 *Martorano v. Department of Pub. Utilities*, 401 Mass. 257, 516 N.E.2d 131 (1987) (proposed site for utility exempt from zoning does not need to be least expensive site).
- 📖 *Massachusetts Feather Co. v. Alderman of Chelsea*, 331 Mass. 527, 120 N.E.2d 766 (1954) (zoning may not supersede building code).
- 📖 *Medford v. Marinucci Bros. & Co.*, 344 Mass. 50, 181 N.E.2d 584 (1962) (uses on state owned or leased real estate are not subject to zoning).
- 📖 *Mitchell v. Board of Appeals of Revere*, 27 Mass. App. Ct. 1119, 537 N.E.2d 595, review denied, 405 Mass. 1203, 542 N.E.2d 601 (1989).
- 📖 *Modern Continental Const. Co. v. Building Inspect. of Natick*, 42 Mass. App. Ct. 901, 674 N.E.2d 247 (1997) (facility for slaughtering animals raised on premises and preparing them for market is agricultural use).
- 📖 *Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham*, 29 Mass. App. Ct. 31, 557 N.E.2d 43 (1990) (use of space in church for psychological counseling center with religious component did not qualify for exemption from zoning for religious purposes, as it resembled a mental health clinic).
- 📖 *New York Cent. R.R. v. Department of Pub. Utilities*, 347 Mass. 586, 199 N.E.2d 319 (1964) (in considering whether public utility use is reasonably necessary, DPU must weigh not only suitability of property for use, but also effect of facility on regional territory and effect of facility on profitability of utility).
- 📖 *Newbury Jr. College v. Brookline*, 19 Mass. App. Ct. 197, 472 N.E.2d 1373 (1985) (license for a lodging house is a separate issue from exemption from zoning as educational).
- 📖 *Noonan v. Moulton*, 348 Mass. 633, 204 N.E.2d 897 (1965) (comprehensive plan is not a condition to adopting zoning).

- 📖 *Old Colony Council – Boy Scouts of America v. Zoning Board of Appeals of Plymouth*, 31 Mass. App. Ct. 46, 574 N.E.2d 1014 (1991) (incidental means minor or of lesser importance).
- 📖 *Opinion of Justices to Senate*, 234 Mass. 597, 127 N.E.2d 525 (1920) (zoning may limit buildings by use and construction).
- 📖 *Ouellet v. Board of Appeals of Dover*, 355 Mass. 77, 242 N.E.2d 759 (1968) (municipal uses are not exempt from zoning, unless zoning expressly exempts such uses).
- 📖 *Petrucchi v. Zoning Bd. of Appeals of Westwood*, 45 Mass. App. Ct. 818, 702 N.E.2d 47 (1998) (use of nonconforming barn for primary use of child care facility for 47 children on lot with single family house exempt from zoning and subject only to reasonable dimensional regulations that do not prohibit use and cause excessive expense to comply).
- 📖 *Pierce v. Town of Wellesley*, 336 Mass. 517, 146 N.E.2d 666 (1957) (municipal uses are not exempt from zoning, unless zoning expressly exempts such uses).
- 📖 *Pratt v. Building Inspect. of Gloucester*, 330 Mass. 344, 113 N.E.2d 816 (1953) (even if zoning does not permit accessory uses, they may be permitted if carry out purpose of zoning; based on reading of ordinance, stabling of horses was not a permissible accessory use to a residential use).
- 📖 *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass. App. Ct. 796, 680 N.E.2d 115, *rev. denied*, 425 Mass. 1108, 691 N.E.2d 580 (1997) (zoning may regulate to protect aquifer).
- 📖 *Radcliffe College v. Cambridge*, 350 Mass. 613, 215 N.E.2d 892 (1966) (city may impose off-street parking requirements for college without impeding education use).
- 📖 *Rayco Inv. Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385, 331 N.E.2d 910 (1975) (zoning is one of the police powers, the purpose of which is to regulate land use).
- 📖 *Roberts v. Southwestern Bell Mobile Systems*, 429 Mass. 478, 709 N.E.2d 798 (1999) (municipality cannot prohibit, but may reasonably regulate structures and facilities to provide for personal wireless services).
- 📖 *Robichaud v. Board of Appeals of Methuen*, 6 Mass. App. Ct. 835, 372 N.E.2d 280 (1978) (board of appeals correctly refused to reverse building inspector's grant of a permit for greenhouses in an agricultural district, as greenhouses were included within such district as permitted uses).
- 📖 *Rogers v. Norfolk*, 422 Mass. 374, 734 N.E.2d 1143 (2000) (a child care facility exceeded size of building regulation and court ruled facility was exempt, as a regulation may not unreasonably impede an exempted use unless it substantially advances a valid zoning goal).
- 📖 *Rose v. Comm'r of Pub. Health*, 361 Mass. 625, 282 N.E.2d 81 (1972) (zoning should be interpreted within context).

- 📖 *Rowley v. Kovalchuk*, 434 Mass. 1006, 747 N.E.2d 97 (2001) (a sawmill is not incidental to a permitted agricultural use).
- 📖 *Save the Bay, Inc. v. Department of Pub. Utilities*, 366 Mass. 667, 322 N.E.2d 742 (1975) (DPU should find hazardous and detrimental effects not court; discussing what constitutes public service corporation).
- 📖 *Shuman v. Board of Aldermen of Newton*, 361 Mass. 758, 282 N.E.2d 653 (1972) (association of persons living together in common dwelling includes high school age students alienated from living with their parents).
- 📖 *Simeone Stone Corp. v. Oliva*, 350 Mass. 31, 213 N.E.2d 230 (1965) (purpose of zoning to protect public health, safety, and welfare).
- 📖 *Simmons v. Zoning Bd. of Appeals of Newburyport*, 60 Mass. App. Ct. 3, 798 N.E.2d 1025 (2003) (recreational use of horses in residential district on less than five acres is not agricultural, but it is a permissible accessory use; discussing two components of an accessory use – must be incidental and customary).
- 📖 *Simon v. Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942) (municipality has right to determine zoning to be exercised).
- 📖 *Sinn v. Board of Selectmen of Action*, 357 Mass. 606, 259 N.E.2d 557 (1970) (municipality may permit all municipal uses as a matter of right).
- 📖 *Sisters of the Holy Cross v. Brookline*, 347 Mass. 486, 198 N.E.2d 624 (1964) (town may impose dimensional regulations that specifically apply to religious use, but may not impose single family regulations on religious use).
- 📖 *Smith v. Board of Appeals of Fall River*, 319 Mass. 341, 65 N.E.2d 547 (1946) (municipality may not pass zoning that exceeds its statutory authority).
- 📖 *Southern New England Conf. Assoc. of Seventh-Day Adventists v. Burlington*, 21 Mass. App. Ct. 701, 490 N.E.2d 451, *rev. denied*, 397 Mass. 1103, 492 N.E.2d 98 (1986) (religious use is not exempt from compliance with Wetlands Protection Act).
- 📖 *Steege v. Board of Appeals of Stow*, 26 Mass. App. Ct. 970, 527 N.E.2d 1176 (1988) (operation of horse stable and riding academy constitutes agricultural use exempt from zoning).
- 📖 *Sturbridge v. McDowell*, 35 Mass. App. Ct. 924 (1993) (raising and breeding dogs owned by property owner is agricultural use, while boarding dogs owned by others is not).
- 📖 *Sturges v. Chilmark*, 380 Mass. 246, 402 N.E.2d 1346 (1980) (zoning may limit development temporarily while municipality prepares comprehensive plan).
- 📖 *Tanner v. Board of Appeals of Boxford*, 61 Mass. App. Ct. 647, 813 N.E.2d 578 (2004) (a veterinary clinic is not an agricultural use, as agriculture use is the raising and breeding of animals by the owner of the property and not the care of animals owned by others).
- 📖 *Teasdale v. Newell & Spaulding Const. Co.*, 192 Mass. 440 (1960) (uses of land by Metropolitan District Commission are exempt from zoning).
- 📖 *Town of Bourne v. Plante*, 429 Mass. 329, 708 N.E.2d 103 (1999) (Nantucket Steamship Authority may use leased parking lot for weekend parking, as it is an

entity created by state legislature to carry out governmental function and is exempt from zoning unless statute states otherwise).

📖 *Town of Brookline v. Co-ray Realty Co.*, 326 Mass. 206, 93 N.E.2d 581 (1950) (zoning regulates land and buildings).

📖 *Town of Concord v. Attorney-General*, 336 Mass. 17, 142 N.E.2d 360 (1957) (zoning is a local matter).

📖 *Town of Foxborough v. Bay State Harness Horse Racing and Breeding Assoc., Inc.*, 5 Mass. App. Ct. 613, 366 N.E.2d 733 (1977) (zoning by-law or ordinance should be interpreted as a harmonious whole).

📖 *Town of Framingham v. Department of Pub. Utilities*, 355 Mass. 138, 244 N.E.2d 281 (1969) (discussing denial by DPU of exemption from zoning for electric company lines; electrical transmission line company is a public service corporation).

📖 *Town of Framingham v. Department of Pub. Utilities*, 351 Mass. 127, 218 N.E.2d 89 (1966) (railroad is a public service corporation and parking lot for automobiles brought to lot by rail prior to distribution is exempt use).

📖 *Town of Freetown v. Zoning Bd. of Appeals of Dartmouth*, 33 Mass. App. Ct. 415, 600 N.E.2d 1001 (1992) (regional refuse disposal district established under M.G.L. ch. 40, § 44F is not subject to zoning).

📖 *Town of Lexington v. Bean*, 272 Mass. 547, 172 N.E. 867 (1930) (should not give broader meaning to local zoning than that given to state statute).

📖 *Town of Tisbury v. Martha's Vineyard Comm'n*, 27 Mass. App. Ct. 1204, 544 N.E.2d 230 (1989) (agricultural use includes greenhouse and accessory fuel tanks used to operate greenhouse).

📖 *Town of Truro v. Department of Pub. Utilities*, 365 Mass. 407, 312 N.E.2d 566 (1974) (tour company transporting sightseers in three eight-passenger vehicles is a public service corporation).

📖 *Town of Wenham v. Department of Pub. Utilities*, 333 Mass. 15, 127 N.E.2d 791 (1955) (discussing exemption from zoning by DPU for gas company; site selected does not have to be best site).

📖 *Town of Westborough v. Department of Pub. Utilities*, 358 Mass. 716, 267 N.E.2d 110 (1971) (DPU's findings were not adequate to support exemption of railroad land from zoning).

📖 *Trustees of Boston College v. Board of Aldermen of Newton*, 58 Mass. App. Ct. 794, 793 N.E.2d 387 (2003) (case involving detailed and complex facts concerning reasonable regulations applied to educational uses; court suggesting that a section 6 finding for an educational nonconformity might be permissible; reaffirming that section 9 special permit not permitted for educational uses; holding that reasonable dimensional regulations concerning parking may apply if they do not prohibit the educational uses outright).

📖 *Trustees of Boston Univ. v. Licensing Bd. of Boston*, 24 Mass. App. Ct. 475, 510 N.E.2d 283 (1987) (religious and educational uses are permitted in the city of Boston pursuant to 1956 Mass. Act 665).

☞ *Trustees of Tufts College v. Medford*, 415 Mass. 753, 616 N.E.2d 433 (1993) (municipality may impose reasonable dimensional and parking regulations that do not result in excessive cost to institution when compared with carrying out of legitimate governmental purpose, but may not impose regulations that could result in prevention of educational use; municipality does not need to adopt regulations that are specific to educational uses).

☞ *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972) (zoning may regulate uses in floodplain).

☞ *Village on the Hill, Inc. v. Massachusetts Turnpike Auth.*, 348 Mass. 107, 202 N.E.2d 602 (1964), *cert. denied*, 380 U.S. 955 (1965) (discussing governmental immunity for essential governmental functions and that land no longer used by turnpike authority for turnpike may be subject to local zoning).

☞ *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *rev. denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (must exhaust administrative remedies before seeking zoning exemption).

☞ *Vorenberg v. Bunnell*, 257 Mass. 399, 153 N.E. 884 (1926) (zoning cannot relieve land of deed restrictions).

☞ *Watros v. Greater Lynn Mental Health and Retardation Assoc.*, 421 Mass. 106, 653 N.E.2d 589 (1995) (use of barn as residence for three mentally handicapped persons was exempt as educational use).

☞ *Whitinsville Retirement Society, Inc. v. Northbridge*, 394 Mass. 757, 477 N.E.2d 407 (1985) (nursing home facility that offered crafts is not the same as a formal program of education by trained professionals and thus is not exempt from zoning).

☞ *Worcester County Christian Comm'rs. v. Board of Appeals of Spencer*, 22 Mass. App. Ct. 83, 491 N.E.2d 634 (1986) (radio station exempt as accessory to educational use).

☞ *Worcester v. New England Inst. & New England School of Accounting, Inc.*, 335 Mass. 486, 140 N.E.2d 470 (1957) (nonprofit educational institution for accountants is exempt from zoning).

## **CAUTIONARY NOTES**





✎ The municipality should stay abreast of exemptions to zoning as this section of the law has been amended numerous times and court decisions continue to interpret the meaning of the exemptions under this section.

## **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

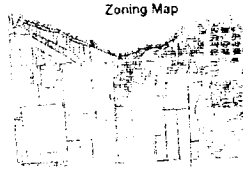
🔗 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

-  The Land Use Manager, Vols. I – II
-  The Land Use Manager, Vols. VI -- VII
-  The Land Use Manager, Selected Articles from July 1991 through March 1999.
-  Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 6, 7, 9, 9B, 9C, 10, & 15 (2004).

## **SECTION 4.**

### **UNIFORM DISTRICTS**



#### **THE LAW**

Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.

Districts shall be shown on a zoning map in a manner sufficient for identification. Such maps shall be part of zoning ordinances or by-laws. Assessors' or property plans may be used as the basis for zoning maps. If more than four sheets or plates are used for a zoning map, an index map showing districts in outline shall be part of the zoning map and of the zoning ordinance or by-law.

#### **ANNOTATIONS**

*Uniform provisions required for each class or kind of structures or uses within a district*

*Zoning map required and shall be sufficient for identification*

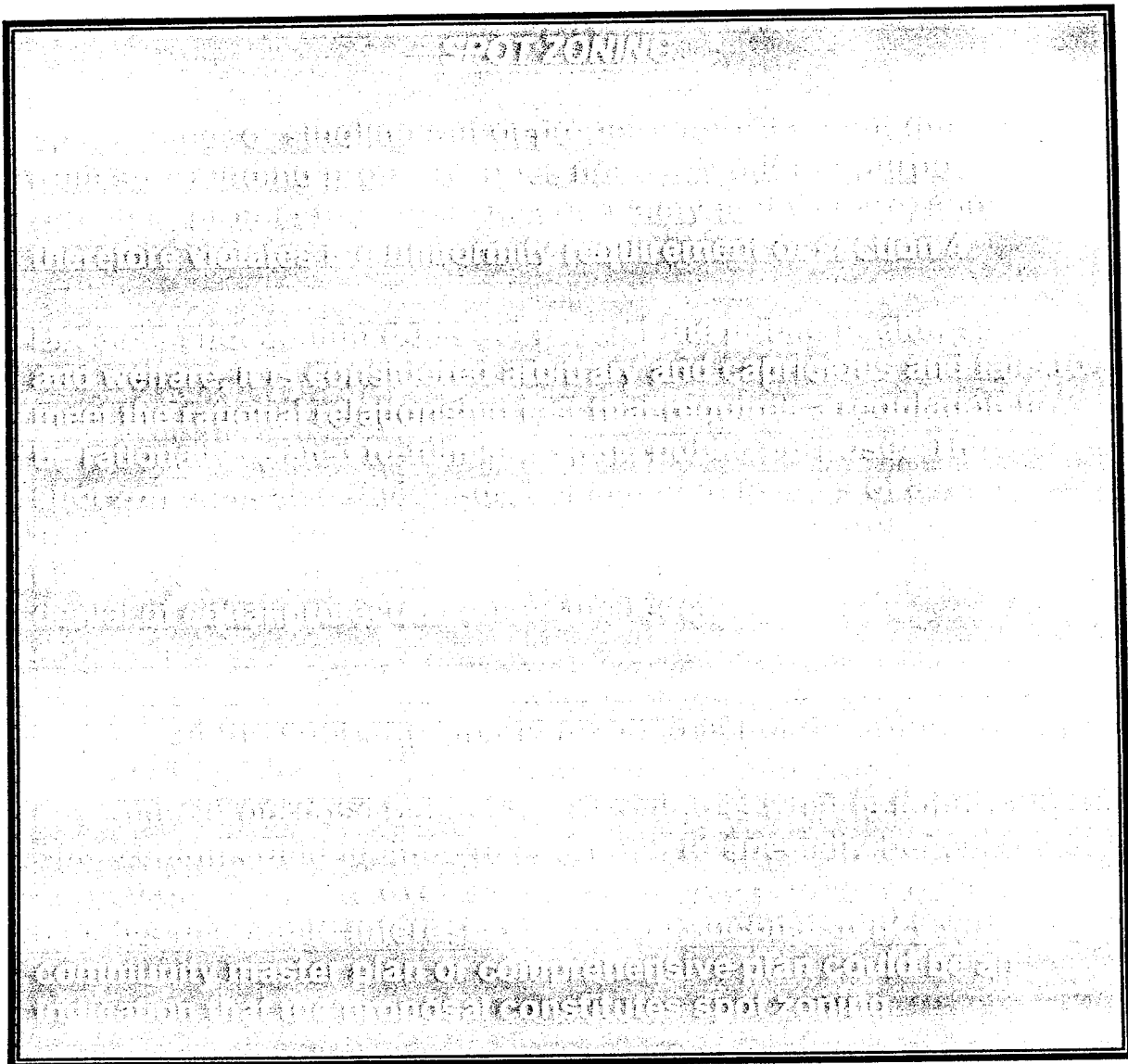
*Assessors' maps may be basis for zoning map*

#### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3.

#### **PERMISSIBLE/REQUIRED ACTIONS**

- ☛ A city or town may divide its community into zoning districts.
- ☛ All regulations within each zoning district must apply uniformly to each class or kind of structure or use that is permitted in the district.
- ☛ Some uses within a zoning district must be permitted by right, while others may be permitted by special permit.
- ☛ No zoning district should be established that requires a special permit for all uses within the district.
- ☛ All zoning districts must be shown on a zoning map, which is sufficient for identifying zoning district boundaries.
- ☛ The zoning map is considered part of the zoning bylaw or ordinance and must be available to the public.
- ☛ Assessors or property maps may be used as the basis for the zoning map.
- ☛ Any changes to zoning district boundaries should include amendments to the zoning map so that it remains sufficient for identifying zoning district boundaries.




### **RELATED CASE LAW**


☞ *Board of Appeals of Hanover v. Housing Appeals Comm'n*, 363 Mass. 339, 294 N.E.2d 393 (1973) (spot zoning may constitute violation of constitutional equal protection clause).


☞ *Cameron v. Zoning Agent of Bellingham*, 357 Mass. 757, 260 N.E.2d 143 (1970) (municipality has wide latitude in making classifications).


☞ *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 346 N.E.2d 732 (1976) (discussing special treatment of one parcel differently from similarly situated property as constituting spot zoning).


☞ *Coleman v. Board of Selectmen of Andover*, 351 Mass. 546, 222 N.E.2d 857 (1966) (lack of adequate zoning map for determination of district boundaries precluded court's issuance of writ of mandamus).


 *Coleman v. Board of Selectmen of Andover*, 351 Mass. 546, 222 N.E.2d 857 (1967) (discussing validity of rezoning one lot of land in light of indefiniteness in zoning map; spot zoning is less likely to occur at the borders of zoning districts).


 *Connolloy v. Building Inspector of Norwood*, 351 Mass. 731, 223 N.E.2d 803 (1967) (changing 189 acre parcel from residential to light manufacturing did not constitute spot zoning as physical condition of land was different from surrounding land).


 *Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 324 Mass. 433, 86 N.E.2d 906 (1949) (zoning is to apply uniformly to all property that is similarly situated for the common benefit of all).


 *Gage v. Town of Egremont*, 409 Mass. 345, 566 N.E.2d 597 (1991) (town does not need to have more than one zoning district and is not required to permit business uses as of right in any section of town).


 *Guidi v. Town of Agawam*, 358 Mass. 812, 265 N.E.2d 914 (1970) (zoning found valid as not sufficient proof of spot zoning and imperfections in warrant to zoning district were minor).


 *Hanna v. Town of Framingham*, 60 Mass. App. Ct. 420, 802 N.E.2d 1061 (2004) (upholding map amendment as satisfying uniformity requirement when parcel is in same zoning district as surrounding land).


 *Hines v. Attleboro*, 355 Mass. 336, 244 N.E.2d 316 (1969) (changing 11 acre parcel of land from residential to industrial constituted spot zoning, as surrounding land was residential use).


 *Kennedy v. Building Inspect. of Randolph*, 351 Mass. 550, 222 N.E.2d 860 (1967) (changing a parcel of land from residential to industrial did not constitute spot zoning where parcel abutted industrial zoning district).


 *Lanner v. Board of Appeal of Tewksbury*, 348 Mass. 220, 202 N.E.2d 777 (1964) (enhancement of land value through rezoning does not make rezoning invalid; spot zoning, which includes conferring of an economic benefit or detriment on owner of small area of land within zoning district, is unlawful; must show zoning conflicts with The Zoning Act beyond a reasonable doubt to invalidate zoning; municipality may determine how to create and modify zoning districts).


 *Leahy v. Inspector of Buildings of New Bedford*, 308 Mass. 128, 31 N.E.2d 436 (1941) (rezoning of one parcel from residential to business violated uniformity requirements of regulations and restrictions for property of a similar character).


 *Marblehead v. Rosenthal*, 316 Mass. 124, 55 N.E.2d 13 (1944) (upholding rezoning of land for small business area within large residential district as serving public purpose).


 *Marshall v. Topsfield*, 13 Mass. App. Ct. 425, 433 N.E.2d 1244 (1982) (spot zoning violates uniformity requirement because it singles out one parcel of land for treatment unlike other parcels with which it is compatible and shares physical characteristics).


 *Mastriani v. Building Inspector of Monson*, 19 Mass. App. Ct. 989, 475 N.E.2d 408 (1985) (change of land in residential district to general commercial constituted spot zoning as no public purpose was served by change; rezoning of twenty-acre parcel indistinguishable from surrounding land found unlawful).


 *McCausland v. Board of Appeals of Salisbury*, 6 Mass. App. Ct. 287, 375 N.E.2d 335 (1978) (discussing preclusion of apartments in single family district).


 *McHugh v. Board of Zoning Adjustment of Boston*, 336 Mass. 682, 147 N.E.2d 761 (1958) (discussing uniformity of regulations to avoid arbitrary and discriminatory zoning).


 *McLean Hosp. Corp. v. Town of Belmont*, 56 Mass. App. Ct. 540, 778 N.E.2d 1016 (2002) (determining that zoning was not invalid contract zoning and setting forth two tests to determine if zoning constitutes contract zoning; party attacking zoning validity has heavy burden of proof; determining that not spot zoning, as was rezoning of geographically discrete parcel for valid public purpose).


 *Muto v. Springfield*, 349 Mass. 479, 209 N.E.2d 319 (1965) (changing one parcel of land from residential A to residential C did not constitute spot zoning, as parcel was surrounded by residence C and commercial uses).


 *National Amusements, Inc. v. City of Boston*, 29 Mass. App. Ct. 305, 560 N.E.2d 138 (1990) (interpreting Boston zoning ordinance and determining that zoning amendment, which singled out property for different treatment than other similar land, without land use study and other valid reasons, was invalid as spot zoning; singling out of specific parcel for disparate treatment in order to protect residential and local business district from unwanted large scale commercial development found unlawful).


 *Rando v. N. Attleborough*, 44 Mass. App. Ct. 603, 692 N.E.2d 544 (1998) (upholding rezoning of parcel of land for planned commercial development and holding this was not spot zoning or contract zoning).







 *Schertzer v. City of Somerville*, 345 Mass. 747, 189 N.E.2d 555 (1963) (discussing setting off of corner lot for special treatment as arbitrary and violative of uniformity requirements).

 *SCIT, Inc. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 472 N.E.2d 269 (1984) (an all special permit zoning district is not permitted).

 *Shapiro v. City of Cambridge*, 340 Mass. 652, 166 N.E.2d 208 (1960) (area rezoned from heavy to light industry was not sufficiently different from surrounding area and thus was not uniform classification and constituted spot zoning).

 *Shea v. Town of Danvers*, 21 Mass. App. Ct. 996, 490 N.E.2d 806 (1986) (discussing use of residential land for access to industrial land as not violating zoning uniformity requirements).



 *Smith v. Board of Appeals of Salem*, 313 Mass. 622, 48 N.E.2d 620 (1943) (all buildings and uses within a district of similar character are to receive uniform and similar treatment and buildings or lots are not to be singled out for advantageous treatment or subjected to peculiar burdens not applied to all property within the district).

 *Sullivan v. Town of Acton*, 38 Mass. App. Ct. 113 (1995) (zoning adopted for benefit of landowner constitutes spot zoning).  
 *Town of Marblehead v. Rosenthal*, 316 Mass. 124, 55 N.E.2d 13 (1944) (town does not need to impose restrictions on all uses in all districts, as long as requirements for certain classes of uses are uniform).  
 *Van Renselaar v. City of Springfield*, 58 Mass. App. Ct. 104, 787 N.E.2d 1148 (2003) (finding that rezoning was not spot zoning as parcel of land rezoned was located in area where there were non-residential uses and non-residential zoning districts, and rezoning resulted in a coherent and consistent zoning district).  
 *Whittemore v. Building Inspector of Falmouth*, 313 Mass. 248, 46 N.E.2d 1016 (1943) (discussing spot zoning as singling out of one lot for treatment different than surrounding property simply to benefit owner of lot).  
 *Woodland Estates v. Building Inspect. of Methuen*, 4 Mass. App. Ct. 757, 358 N.E.2d 468 (1976) (changing one parcel of land to hospital district did not constitute spot zoning as it served the purpose of providing health care to the public).  
 *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 56 Mass. App. Ct. 559, 779 N.E.2d 141 (2002) (upholding adoption of time-limited interim zoning moratorium while study is conducted; determining no reverse spot zoning because legitimate purpose being carried out; determining no temporary taking because economic expectations still met through existing uses of property and uses permitted after expiration of moratorium).


## **CAUTIONARY NOTES**

✎ All municipalities must have a zoning map. Be sure your zoning map is kept up-to-date to avoid a challenge to this requirement.  
 ✎ If the zoning map consists of more than four sheets, there must be an index.

## **LINKS**

 <http://www.massapa.org/> (Mass. American Planning Association resources with links to other sites)  
 <http://www.state.ma.us/> (links to Mass. Law and other state agencies such as (DHCD))

## **REFERENCES**

 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 3 & 5 (discussion of spot and contract zoning cases) (2004).

## SECTION 5.

### ADOPTION OR CHANGE OF ZONING ORDINANCES OR BY-LAWS



#### THE LAW

Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided. Adoption or change of zoning ordinances or by-laws may be initiated by the submission to the city council or board of selectmen of a proposed zoning ordinance or by-law by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter. The board of selectmen or city council shall within fourteen days of receipt of such zoning ordinance or by-law submit it to the planning board for review.

No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town, and the city council or a committee designated or appointed for the purpose by said council has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. Said public hearing shall be held within sixty-five days after the proposed zoning ordinance or by-law is submitted to the planning board by the city council or selectmen or if there is none, within sixty-five days after the proposed zoning ordinance or by-law is submitted to the city council or selectmen. Notice of the time and place of such public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be

#### ANNOTATIONS

*Zoning may be adopted, amended, and repealed from time to time*

*Initiation of zoning change; who may submit to city council or board of selectmen*

*Board of selectmen or city council to submit zoning proposal to planning board within 14 days of receipt*

*Planning board to hold public hearing on zoning proposal in town and planning board and city council to hold public hearing in city*

*Public hearing to be held within 65 days after zoning change submitted to planning board*

*Requirements for notice of public hearing*

inspected shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting cities and towns. The department of housing and community development, the regional planning agency, the planning boards of all abutting cities and towns and nonresident property owners who may not have received notice by mail as specified in this section may grant a waiver of notice or submit an affidavit of actual notice to the city or town clerk prior to town meeting or city council action on a proposed zoning ordinance, by-law or change thereto. Zoning ordinances or by-laws may provide that a separate, conspicuous statement shall be included with property tax bills sent to nonresident property owners, stating that notice of such hearings under this chapter shall be sent by mail, postage prepaid, to any such owner who files an annual request for such notice with the city or town clerk no later than January first, and pays a reasonable fee established by such ordinance or by-law. In cases involving boundary, density or use changes within a district, notice shall be sent to any such nonresident property owner who has filed such a request with the city or town clerk and whose property lies in the district where the change is sought. No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading.

Prior to the adoption of any zoning ordinance or by-law or amendment thereto which seeks to further regulate matters established by section forty of chapter one hundred and thirty-one or regulations authorized thereunder relative to agricultural and aquacultural practices, the city or town clerk shall, no later than seven days prior to the city council's or town meeting's public hearing relative to the adoption

*First publication of notice in a newspaper to be not less than 14 days before the day of the hearing*

*Posting of public hearing required*

*Notice of public hearing to be mailed to DHCD, RPA, planning board of abutting city or town*

*Waiver of notice permitted*

*Zoning may provide for public hearing notice to nonresident property owners*

*Procedure to request notice if nonresident property owner*

*Defects in notice not to invalidate zoning unless defect is misleading*

*If zoning proposal affects agriculture or aquaculture, notice of public hearing must be given to farmland advisory board*

of said new or amended zoning ordinances or by-laws, give notice of the said proposed zoning ordinances or by-laws to the farmland advisory board established pursuant to section forty of chapter one hundred and thirty-one.

No vote to adopt any such proposed ordinance or by-law or amendment thereto shall be taken until a report with recommendations by a planning board has been submitted to the town meeting or city council, or twenty-one days after said hearing has elapsed without submission of such report. After such notice, hearing and report, or after twenty-one days shall have elapsed after such hearing without submission of such report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law. If a city council fails to vote to adopt any proposed ordinance within ninety days after the city council hearing or if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided.

No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting; provided, however, that if in a city or town with a council of fewer than twenty-five members there is filed with the clerk prior to final action by the council a written protest against such change, stating the reasons duly signed by owners of twenty per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending three hundred feet therefrom, no such change of any such ordinance shall be adopted except by a three-fourths vote of all members.

No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council

*No legislative vote to be taken until planning board reports or 21 days have elapsed since close of planning board hearing without submission of such report*

*City council must act within 90 days of its hearing*

*Town meeting must act within 6 months of the planning board hearing*

*New hearing, notice, and report required if city council or town meeting fail to take timely action*

*Favorable vote by 2/3rds of all members of town council or city council or a 2/3rds vote of a town meeting is required to adopt or change zoning*

*Requirements for filing a written protest to zoning proposal in a city.*

*When a written protest is filed, city council must have a 3/4ths favorable vote of all members*

*When unfavorable action zoning proposal may not be reconsidered unless*

or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

When zoning by-laws or amendments thereto are submitted to the attorney general for approval as required by section thirty-two of chapter forty, he shall also be furnished with a statement which may be prepared by the planning board explaining the by-laws or amendments proposed, which statement may be accompanied by explanatory maps or plans.

The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty. If, in a town, said by-law is subsequently disapproved, in whole or in part, by the attorney general, the previous zoning by-law, to the extent that such previous zoning by-law was changed by the disapproved by-law or portion thereof, shall be deemed to have been in effect from the date of such vote. In a municipality which is not required to submit zoning ordinances to the attorney general for approval pursuant to section thirty-two of chapter forty, the effective date of such ordinance or amendment shall be the date passed by the city council and signed by the mayor or, as otherwise provided by ordinance or charter; provided, however, that such ordinance or amendment shall subsequently be forwarded by the city clerk to the office of the attorney general.

A true copy of the zoning ordinance or by-law with any amendments thereto shall be kept on file available for inspection in the office of the clerk of such city or town.

No claim of invalidity of any zoning ordinance or by-law arising out of any possible defect in the procedure of adoption or amendment shall be made in any legal proceedings and no state, regional,

*favorable recommendation  
of planning board*

*Requirements in a town for  
submission of zoning or  
changes thereto to the  
attorney general for  
approval*

*Effective date of zoning  
ordinance or by-law or  
change thereto*

*Town requirements for  
posting and publishing  
zoning before becomes  
effective*

*Previous zoning applies if  
disapproved by attorney  
general*

*City or town clerk to  
maintain on file true copy of  
zoning*

*Commencement of action  
for procedural defects in  
adoption*

|   |  |
|---|--|
| <p>county or municipal officer shall refuse, deny or revoke any permit, approval or certificate because of any such claim of invalidity unless legal action is commenced within the time period specified in sections thirty-two and thirty-two A of chapter forty and notice specifying the court, parties, invalidity claimed, and date of filing is filed together with a copy of the petition with the town or city clerk within seven days after commencement of the action.</p> |  |
|---|--|

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by St. 1977, c. 829, §§ 3B, 3C; St. 1984, c. 189, § 47; St. 1987, c. 685, § 3; St. 1991, c. 515, §§ 1, 2; St. 1996, c. 258, § 16; St. 1998, c. 616, § 255.

## **PERMISSIBLE/REQUIRED ACTIONS**

➤ A municipality has the police power to adopt, amend, or repeal a zoning ordinance (cities) or a zoning by-law (towns).

➤ The following may initiate a zoning proposal by filing a proposal with the city council or board of selectmen:

- City council
- Board of selectmen
- Zoning board of appeals
- Planning board
- Regional planning agency
- Individuals owning land to be affected by the zoning, including those that want to make a zoning proposal concerning their land
- Registered voters in a town, subject to the process set forth in M.G.L. ch. 39, § 10
  - Section 10 of Chapter 39 concerns the warrant for a town meeting and the selectmen should insert zoning items into the warrant as follows:
    - Upon written request by 10 or more registered voters, including their residence addresses, for an annual town meeting
    - Upon written request of at least 100 registered voters or 10% of the total number of registered voters in a town, including their residence addresses, whichever is less, for a special town meeting
      - The selectmen must call a special town meeting upon written request of at least 200 registered voters or 20% of the total number of registered voters in a town, whichever is less
      - The special town meeting must be held no later than 45 days after the selectmen receive the written request

- 10 registered voters in a city
- Any other method provided by municipal charter

NOTE: Municipal charters may have boards of aldermen and town councils that take the place of a city council or board of selectmen. Thus, any reference throughout this section to a city council or board of selectmen refers also to boards of aldermen and town councils.

☛ Within 14 days of receipt of a zoning proposal, the city council or board of selectmen shall submit the proposal to the planning board for review and hearing.

☛ Before any action can be taken on a zoning proposal, the planning board must hold a public hearing concerning the proposal. In a city, the city council or a committee it has appointed must also hold a public hearing, and its public hearing may be held jointly with the planning board.

- The public hearing is to be held within 65 days after the proposal is submitted to the planning board, or if there is no planning board within 65 days after the proposal is submitted to the city council or the board of selectmen.

☛ Notice of the public hearing must be:

- published in a newspaper of general circulation in the community once in each of two successive weeks
  - the notice must be published in a newspaper, not an advertising flier
  - the newspaper in which the notice appears does not have to be published in the city or town, but it must be generally circulated in the city or town
  - the first notice must be at least 14 days before the day of the hearing
    - Once in each of two successive weeks means calendar weeks and not at least one full week apart. *Crall v. Leominster*, 362 Mass. 95, 284 N.E.2d 610 (1972).
    - The day of the public hearing should not be counted in determining the 14-day period. *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 275 N.E.2d 525 (1971).
- posted in the city or town hall 14 days before the day of the hearing
  - the notice is to be posted in a conspicuous place
- mailed, postage prepaid and within a reasonable time (14 days is sufficient, but the notice must be sent so that it is received before the hearing), to the following:
  - the department of housing and community development;
  - the applicable regional planning agency, if any;
  - the planning board of every abutting city or town, even if the city or town is in another state;
  - the farmland advisory board, if the zoning proposal seeks to regulate certain agricultural and aquacultural matters;

- the matters include those established by M.G.L. ch. 131, § 40 ("The Wetlands Protection Act") and any regulations adopted under this section, particularly those concerning maintenance and improvement of agricultural (such as cranberry bogs) and aquacultural uses.
- the city or town clerk is designated as the one to give notice of the hearing.
- The clerk is to give notice no later than seven days before the hearing.
- nonresident property owners making an annual request for a notice and paying for such notice, but only if such notice is required in the zoning ordinance or by-law and the zoning proposal involves a boundary, density, or use change in the zoning district in which the nonresident owner's property is located.
  - In municipalities providing for nonresident notice, a conspicuous statement shall be included with the property tax bill of all nonresident owners stating that they can receive notice of zoning proposals if they file an annual written request for such notice with the city or town clerk no later than January 1 and pay the notice fee established in the zoning ordinance or by-law. Parties may waive their right to receive notice.
  - A nonresident owner who does not receive notice may grant a written waiver of notice or submit an affidavit of actual notice to the city or town clerk prior to the meeting at which the zoning proposal will be acted upon.
- The board or committee conducting the public hearing is responsible for giving the required notice, except in the case of required notice to the farmland advisory board as set forth above, in which case the city or town clerk gives the notice.
- Any defect in the form of a notice of hearing will not invalidate any zoning adopted unless the defect is found to be misleading.
- The contents of a public hearing notice must include the following:
  - date, time, and place of the hearing;
  - subject matter of the hearing, sufficient for identification;
    - A notice is sufficient for identification if it provides the public with enough information so they can make a determination of whether to attend the hearing.
  - the location where the proposed text and any related maps may be inspected.

**NOTE:** The notice must be sufficient to warn "parties in interest" of how the proposed action may affect them. *Carson v. Bd. of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947).

## **SAMPLE NOTICE OF PUBLIC HEARING**

The [Planning Board/City Council] of the City/Town of [name of City/Town] will hold a public hearing on [date], at [place], scheduled for [time].

The public hearing concerns a zoning proposal to add/amend/repeal section [specify section or article] of the zoning ordinance/by-law.

The zoning proposal affects property located in [zoning district affected] as follows: [explain what the proposal is, e.g., by changing the frontage requirements from 100 to 150 feet for all uses within the district; by adding new provisions for a planned unit development use within the district subject to the following requirements; by repealing section 2.3 that allows use variances, thus prohibiting use variance in the city/town].

All interested persons should attend the public hearing. A copy of the text of the zoning proposal and any map related to the proposal is available for review at [office where can be reviewed] between the hours of [hours available].

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_  
Board Name \_\_\_\_\_

## **HOLDING THE PUBLIC HEARING**

### **Suggested Format for Holding a Public Hearing on a Zoning Proposal**

- Open hearing, read public hearing notice, and give rules for participation
- Person filing proposal speaks and explains proposal
- Board members ask questions
- Those in favor speak
- Those opposed speak
- Person filing proposal presents rebuttal
- Hearing is closed

### **Some Additional Pointers in Holding a Public Hearing**

- The chair is usually the one responsible for conducting and controlling the hearing, maintaining decorum, requesting the removal of unruly persons, and granting permission to speak. Those speaking should be requested to identify who they are and provide their address for the record.
- Because a public hearing must comply with due process, the chair should allow any person to speak. The chair may, however, establish rules to exclude testimony that is irrelevant, immaterial, or repetitive.
- The board should keep a complete record of information obtained at the hearing, as this information may be used in the planning board's report.
- The public hearing is subject to the open meeting law, and under the open meeting law, the public has a right to make audio and video recordings as long as they do not actively interfere with the hearing or meeting.

➤ A vote on the zoning proposal may not be taken until the planning board submits a report with recommendations to the town meeting or city council, unless 21 days has elapsed since close of the planning board hearing on the proposal and no report is submitted.

➤ The town meeting, city council, or legislative body of the city or town may vote to adopt, reject, or amend and adopt any zoning proposal.

- Town meeting must vote within six months of the planning board's hearing.
- City or town council must vote within 90 days of its hearing.
- If the vote is to amend and adopt a zoning proposal, new public hearings may be necessary if the amendment(s) made to the proposal make a substantial change in the proposal, e.g., the original proposal was to add a planned unit development use and the amendment to the proposal is to allow light industrial uses. A new notice and public hearing are required if the amendment to the zoning proposal:
  - changes its identity
  - changes its substantial character
  - fundamentally departs from the original proposal
  - radically differs from the original proposal

➤ The vote on a zoning proposal requires an extra-majority vote for passage as follows:

- In a city, 2/3rds of all members of the city council or legislative body must vote in favor of the zoning proposal;
  - Each branch of a two branch body must meet the 2/3rds voting requirement for passage.
- In a town with a town council form of government, 2/3rds of all members of the town council must vote in favor of the zoning proposal;
- In a town, 2/3rds of a town meeting must vote in favor of the zoning proposal;
  - Town meeting may be subject to a quorum requirement. Thus, a favorable vote by 2/3rds of those persons that constitute a quorum is necessary for passage.
- A protest may be filed that will increase the extra-majority vote as follows:
  - In a city or town with fewer than 25 members on a city or town council, a protest may be filed with the city or town clerk prior to final action on the proposal.
    - A proper protest requires the following:
      - A written protest stating the reasons for the protest against the zoning proposal and
        - Signatures of owners of 20% or more of the area of land included in the zoning proposal or
        - Signatures of owners of 20% or more of the area of land immediately adjacent to the

proposal extending 300 feet from the boundary of the land included in the zoning proposal.

- If a proper protest is filed, then 3/4ths of the city or town council must vote in favor of the zoning proposal.

➤ If the legislative body acts unfavorably on a zoning proposal, the same proposal may not be reconsidered for two years after the date of the unfavorable action, unless the planning board recommends adoption of the proposal in its final report.

- The meaning of "final report" of the planning board has never been clear. Some municipalities allow a planning board that did not initially recommend in favor of the zoning proposal to hold a subsequent hearing on the same proposal following the unfavorable action, and if the planning board changes its report to a recommendation for adoption, the legislative body may reconsider without waiting the two years. Other municipalities require a two year waiting period if the initial planning board report is not in favor of adoption. Be consistent in the process used in your municipality and check with your municipal legal counsel as to which process to follow.

➤ If town meeting fails to vote on the zoning proposal within six months after the planning board hearing, no action can be taken on such proposal until there is a subsequent notice, hearing, and report by the planning board to town meeting.

➤ If the city or town council fails to vote on the zoning proposal within 90 days after the city or town council hearing, no action can be taken on such proposal until there are subsequent notices and hearings by the council and the planning board and there is another report by the planning board to the council.

➤ Zoning becomes effective in a city on the date when it was passed by the city council and signed by the mayor, or as provided by the charter or an ordinance.

- The city clerk is required to forward a copy of the adopted zoning to the attorney general, even though the attorney general has no authority to approve or disapprove the adopted zoning.

➤ Some cities have adopted the provisions of M.G.L., ch. 40, § 32A and are required to make a newspaper publication of an adopted zoning proposal before it is effective.

- The zoning must be published at least twice in a newspaper of general circulation in the municipality.
  - If the zoning is longer than eight octavo pages of ordinary book print, then a summary of the zoning may be published in the newspaper.
- The publication must include the following:

- A statement that claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within 90 days after the posting or second publication in a newspaper.
  - A statement indicating where copies of the zoning that was adopted may be examined and obtained.
- Zoning becomes effective in a town on the date of adoption, but only if the following actions are taken:
- The zoning must be submitted to and approved by the attorney general as set forth under M.G.L., ch. 40, § 32, as follows:
    - The town clerk has the responsibility of submitting the following to the attorney general within 30 days after final adjournment of the town meeting at which the proposal was adopted:
      - a certified copy of the zoning proposal that was adopted, including any maps and plans that are part of the zoning adopted;
      - a request for approval of the zoning;
      - a statement that clearly explains the zoning:
        - The planning board may prepare the explanatory statement for such submittal.
        - The planning board may accompany the statement with explanatory maps or plans.
      - adequate proof that all the procedural requirements for adoption were complied with.
    - If the town clerk fails to make the submission within 30 days, then the selectmen have an additional 15 days to make the submission required of the town clerk.
  - The public must be notified of the newly adopted zoning in one of the following ways:
    - The zoning is published in a town bulletin or pamphlet and posted in five public places in the town, or if the town is divided into precincts, posted in one or more public places in each precinct;
    - The zoning is published twice at least one week apart in a newspaper of general circulation in the town; or
    - A copy of the zoning adopted is delivered to every occupied dwelling or apartment in the town and affidavits of the persons making the deliveries are filed with the town clerk.
  - The publication must include the following:
    - A statement that claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within 90 days of such posting or second publication in a newspaper.
    - A statement indicating where copies of the zoning adopted may be examined and obtained.
- The attorney general may take the following actions or may not act on zoning submitted by a town:

- Require additional proof of compliance from the town clerk within 90 days after receipt of the zoning;
- Disapprove the zoning because of one or more of the following procedural defects:
  - Procedure used for adoption or amendment
  - Form of content of the notice of the planning board hearing
  - Manner or dates on which the planning board hearing notice is mailed, posted, or published
- Despite a procedural defect, the attorney general's 90 day time period for acting on an adopted zoning proposal may be suspended and the attorney general shall send a written notice to the town clerk that sets forth with specificity the procedural defect and provides a form of notice to be used by the town clerk to give notice of the defect.
  - The notice shall provide:
    - That any resident, owner of real property in the town, or any other party entitled to notice of the planning board hearing on the zoning proposal may file a claim that the defect was misleading or otherwise prejudicial with the town clerk
  - The town clerk shall:
    - Post the attorney general notice in a conspicuous place in the town hall for not less than 14 days
    - Publish the attorney general notice once in a newspaper of general circulation in the town
      - Any claim made that the defect was misleading or prejudicial must be filed with the town clerk within 21 days after the newspaper publication.
        - The claim must set forth reasons that support the claim.
  - Immediately after expiration of 21 days after the newspaper publication, the town clerk shall submit one of the following to the attorney general:
    - A certificate that no claim was filed within 21 days or
    - A statement that one or more claims were filed accompanied by copies of the claims
  - Once the attorney general receives notice from the town clerk, the 90 day review period resumes and the attorney general may:
    - Waive any defect if no claim was filed;
    - Or take appropriate action, not including waiver, if a claim was made.
  - Any person failing to claim a defect under the above procedures has not waived the right to make a claim of invalidity otherwise provided under this section of The Zoning Act.
- Approve the zoning, in which case the zoning is in effect on the date of the legislative body's vote;

- Approve the zoning with amendments, in which case the zoning is in effect on the date of the legislative body's vote, as long as the amendments are incorporated and subsequently approved by the attorney general;
  - Disapprove the zoning and give reasons for such disapproval, in which case the zoning in effect prior to the zoning proposal remains in effect; or
  - Fail to act on the submitted zoning within 90 days after receipt, in which case the zoning is in effect on the date of the legislative body's vote.
    - The town clerk must enter into his or her records that the zoning has become effective by reason of failure of the attorney general to take timely action.
  - The attorney general and the town's legal counsel may agree in writing to extend the 90 day review period not more than an additional 90 days and file a copy of the agreement with reasons therefor with the town clerk before expiration of the initial 90 day period.
  - In the case of approval or disapproval, the attorney general notifies the town clerk of such action.
- A true copy of the zoning ordinance or by-law, as amended, and including amendments to the zoning map, shall be kept on file and be available for inspection in the office of the city or town clerk.
- A claim of invalidity in the procedures of adopting a zoning proposal may be commenced in a court with competent jurisdiction.
- There is no express requirement under this section that the party commencing the claim be aggrieved, but case law seems to require prejudice and that the party making a claim be aggrieved. *Sunderland v. Building Inspect. of N. Andover*, 328 Mass. 638, 105 N.E.2d 471 (1952).
  - The claim must be filed with the court within 90 days after the newly adopted zoning is posted or after its second publication in a newspaper.
  - The person commencing the claim must file a notice of the claim with the city or town clerk within seven days after commencement of the action.
    - The notice must:
      - Specify the court in which the claim is filed;
      - The parties named in the claim;
      - The invalidity claimed;
      - The date the claim was filed; and
      - Include a copy of the claim filed with the court.
  - No state, regional, county, or municipal official may refuse, deny, or revoke any permit, approval, or certificate because of such claim of invalidity, unless it is timely and properly filed.

## **POWER TO REGULATE REAL PROPERTY**

In Massachusetts the power to regulate real property (land, buildings, and structures) is derived from the following sources:


- Massachusetts constitutional provisions concerning police powers – Mass. Const., pt. 2, ch. 1, § 1, art. IV
- Massachusetts constitutional provisions concerning the right to limit building districts -- Mass. Const., § 190, amend. art. LX
- Massachusetts constitutional provisions concerning home rule – Mass. Const., § 235, amend. art. LXXXIX, amending §§ 104-104H, amend. art. II.
- Acts of the legislature, such as The Zoning Act, M.G.L. ch. 40A, and special acts, which are authorized by the constitution for the purpose of protecting the public health, safety, morals, and welfare (acts that carry out the police power)


Although most land use regulations are adopted pursuant to The Zoning Act, section 6 of art. II (the home rule amendment) includes zoning as one of a municipality's independent powers and also permits a municipality to adopt other ordinances and by-laws that protect the public health, safety, morals, and welfare, as long as such ordinances and by-laws are not inconsistent with the constitution, state law, or a municipal charter. Thus, municipalities may adopt innovative and creative land use regulations outside of zoning. For example, some communities have adopted sign ordinances or by-laws under the home rule amendment, as opposed to under zoning. Gravel and earth removal, historic district, and wetlands ordinances and by-laws are other examples of home rule ordinances and by-laws. In all cases there is a state law that covers the subject matter, but there may not be any express legislative grant of authority for such ordinances or by-laws. The home rule amendment, therefore, provides that authority. These home rule ordinances and by-laws are not subject to the procedural requirements of The Zoning Act, may be adopted by majority vote of the municipal legislative body, and all uses that occur after adoption and are subject to the home rule ordinance or by-law do not have the protection afforded nonconformities under zoning, unless such protection is provided for in the ordinance or by-law or is required by state law.


Municipalities should take advantage of the home rule amendment and adopt by-laws and ordinances outside of zoning. In addition, The Zoning Act does not prevent innovative and creative zoning provisions that are adopted under the broad authority granted by the home rule amendment. In adopting any ordinance or by-law provision remember that the provision must promote specific purposes related to protection of the public health, safety, morals, and welfare, and the means used must bear a reasonable relationship to carrying out such legitimate governmental purpose or interest and may not be arbitrary or capricious.


## **RELATED CASE LAW**


- 📖 *Advanced Dev. Concepts, Inc. v. Town of Blackstone*, 33 Mass. App. Ct. 228, 597 N.E.2d 1372 (1992) (authorizing phased development by-law with limit on number of building permits issued each year and provisions for adding permits authorized but not used to next year's quota).
- 📖 *American Sign and Indicator v. Town of Framingham*, 399 N.E.2d 41 (Mass. App. Ct. 1980) (signs may be regulated by home rule by-law or ordinance, rather than by zoning).
- 📖 *Aronson v. Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964) (invalidating zoning applicable to one parcel of land only; 100,000 square foot zoning found confiscatory).
- 📖 *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 294 N.E.2d 393 (1973) (rezoning not invalid as spot zoning if serves public purpose).
- 📖 *Boston Gas Co. v. Somerville*, 420 Mass. 702 (1995) (municipality may not adopt zoning that is inconsistent with state law).
- 📖 *Burlington v. Dunn*, 318 Mass. 216, 61 N.E.2d 243, *cert. denied*, 326 U.S.739 (1945) (zoning was not invalid even though two small parcels were added to zoning proposal after notice and public hearing by planning board).
- 📖 *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114 (1955) (purpose of zoning to protect property owners in more restricted district from activities in less restrictive district).
- 📖 *Caires v. Building Comm'r of Hingham*, 323 Mass. 589, 83 N.E.2d 550 (1949) (planning board report is advisory only and is not binding on legislative body; where reasonableness of zoning is debatable, judgment of legislative body should be upheld; zoning will be sustained if there is a substantial relation between it and furtherance of legitimate governmental purposes; legitimacy of zoning does not turn on motives of supporters).
- 📖 *Caputo v. Board of Appeals of Somerville*, 330 Mass. 107, 111 N.E.2d 674 (1953) (planning board's statement sent to board of aldermen that a zoning change was not advisable was considered a negative report with recommendations).
- 📖 *Carstensen v. Cambridge Zoning Bd. of Appeals*, 11 Mass. App. Ct. 348, 416 N.E.2d 522 (1981) (where moratorium proposal under zoning was not voted on within 90 days after close of hearing and party obtained building permit before first notice of hearing on identical moratorium proposal, such permit was valid under previous zoning, despite subsequent passage of moratorium).
- 📖 *Cherkes v. Town of Westport*, 393 Mass. 9, 468 N.E.2d 269 (1984) (procedural requirements for passage of town by-law that regulated trailer permits were not the same as those required for adoption of zoning).
- 📖 *Chaume v. Board of Zoning Appeals of Fitchburg*, 27 Mass. App. Ct. 1135, 538 N.E.2d 31 (1989) (alleged unconstitutional taking cannot be sustained as there is no evidence of lot value without a building permit, and there is no taking simply because undersized lot cannot be put to most profitable use, that is, construction of a house).


 *Chilson v. Zoning Bd. of Appeals of Attleboro*, 344 Mass. 406, 182 N.E.2d 535 (1962) (zoning may not grant unlimited zoning powers to board of appeals; standards are required before the board may allow new or extended uses).


 *CHR General, Inc. v. Newton*, 387 Mass. 351, 439 N.E.2d 788 (1982) (condominium use deemed multi-family use, as condominium is method of ownership and does not define use).


 *City of Newburyport v. Thurlow*, 324 Mass. 40, 84 N.E.2d 450 (1949) (discussing need for municipality to keep map available together with zoning provisions in office of municipal clerk).


 *Coleman v. Board of Selectmen of Andover*, 351 Mass. 546, 222 N.E.2d 857 (1967) (discussing validity of rezoning one lot of land in light of indefiniteness in zoning map; spot zoning is less likely to occur at the borders of zoning districts).


 *Collura v. Arlington*, 367 Mass. 881, 329 N.E.2d 733 (1975) (interim or time-limited moratorium provisions on apartment construction may be adopted as part of zoning to allow municipality time to cure sewer problems).


 *Coolidge v. Planning Board of N. Andover*, 337 Mass. 648, 151 N.E.2d 51 (1958) (ruling the zoning which permitted motels by right subject to a notice, hearing and site plan review by the planning board was unauthorized delegation of zoning power to the planning board).


 *Crall v. Leominster*, 362 Mass. 95 (1972) ("two successive weeks" required for notice means two successive calendar weeks; discussing sufficiency of public hearing notice; planning board's report is advisory only; if reasonableness of zoning is fairly debatable the court should uphold the zoning; party attacking zoning validity has heavy burden of proof).


 *Crowell v. Attorney General*, 3 Mass. App. Ct. 700, 322 N.E.2d 87 (1975) (selectmen may on its own include zoning proposal in warrant for special town meeting).

 *Daddario v. Cape Cod Comm'n.*, 425 Mass. 411, 681 N.E.2d 833, *cert. denied*, 522 U.S. 1036 (1997) (there is no taking because zoning may prevent owner from exploiting investment potential of property to its fullest; in taking case court to look at character of action and nature and extent of interference of regulation with rights in parcel as a whole).

 *Daly Dry Wall, Inc. v. Board of Appeals of Easton*, 3 Mass. App. Ct. 706, 322 N.E.2d 780 (1975) (a second hearing is unnecessary if substantial character of original zoning proposal is not changed).

 *Doliner v. Town Clerk of Millis*, 343 Mass. 10, 175 N.E.2d 925 (1961) (a second hearing is unnecessary if substantial character of original zoning proposal is not changed, despite there being 13 amendments to such proposal; planning board's written approval of zoning proposal and explanation by chair at town meeting was considered final report of planning board).

 *Dunn v. Burlington*, 318 Mass. 217 (1945) (notice and new hearing unnecessary despite five map changes to a comprehensive zoning proposal).

 *Durand v. Superintendent of Pub. Bldgs. of Fall River*, 354 Mass. 74, 235 N.E.2d 550 (1968) (city council may waive its rules when considering zoning

proposals and zoning amendment not invalid for failure to follow rules in every detail).

☐ *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 793 N.E.2d 359 (2003) (determining that zoning under home rule amendment was valid despite offer to pay town 8 million dollars for any municipal use, because motive of town meeting in adopting zoning was not an issue as long as zoning is otherwise valid)

☐ *Enos v. Brockton*, 354 Mass. 278 (1968) (purpose of zoning to stabilize property values).

☐ *Fabiano v. Boston*, 49 Mass. App. Ct. 281, 730 N.E.2d 311 (2000) (purposes of rezoning must be consonant with objection of zoning act).

☐ *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681 (1996) (to determine taking and loss of all economic benefit must look at larger parcel of land from which single parcel came to determine if benefit derived from larger parcel).

☐ *Fish v. Town of Canton*, 322 Mass. 219, 77 N.E.2d 231 (1948) (zoning adopted was invalid, as original article was to repeal zoning and what was adopted was reduction of zoning district area based on warrant that did not give adequate notice of nature of business to be acted upon).

☐ *Gamsey v. Building Inspect. of Chatham*, 553 N.E.2d 1311 (Mass. App. Ct. 1990) (town regulation of conversion of resort motel to condominiums is a permissible regulation due to qualitative differences between sporadic or seasonal use and condominium use, especially where town had concerns about adequate sewage disposal and water).

☐ *Goldman v. Dennis*, 375 Mass. 197, 375 N.E.2d 1212 (1978) (zoning may regulate conversion of seasonal use to year-round use, but may not regulate method of ownership such as condominium ownership).

☐ *Gricus v. Superintendent & Inspect. of Bldgs. of Cambridge*, 345 Mass. 687, 189 N.E.2d 209 (1963) (purpose of hearing before adoption of zoning is to provide residents a forum to offer personal views and delay in adoption after hearing will result in zoning invalidity).

☐ *Guidi v. Town of Agawam*, 358 Mass. 812, 265 N.E.2d 914 (1970) (zoning found valid as not sufficient proof of spot zoning and imperfections in warrant to zoning district were minor).

☐ *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 275 N.E.2d 525 (1971) (upholding zoning that gave planning board right to require applicant for a permit to file site plan and for planning board to hold hearing on site plan; person claiming procedural defect must show prejudice caused by insufficient notice that was one day short; discussing sufficiency of planning board's report).

☐ *Hanna v. Town of Framingham*, 60 Mass. App. Ct. 420, 802 N.E.2d 1061 (2004) (upholding map amendment as allowing for orderly development of uses compatible with surrounding uses).

☐ *Harrison v. Braintree*, 355 Mass. 651, 247 N.E.2d 356 (1969) (municipality may prohibit access for use in abutting zoning district, when such use is not permitted in underlying district over which access crosses).

- 📖 *Inhabitants of W. Springfield v. Mayo*, 265 Mass. 41, 163 N.E. 653 (1928) (discussing consideration of zoning by attorney general).
- 📖 *In re Opinion of the Justice*, 234 Mass. 597, 127 N.E. 525 (1920) (it is constitutional for municipalities to limit buildings based on their use and construction).
- 📖 *Jenkins v. Pepperell*, 18 Mass. App. Ct. 265 (1984) (zoning is entitled to presumption of validity).
- 📖 *Johnson v. Edgartown*, 425 Mass. 117 (1997) (general welfare transcends town's "parochial interests" in adopting specific zoning provisions; party attacking zoning validity has heavy burden of proof).
- 📖 *Johnson v. Town of Framingham*, 354 Mass. 750, 242 N.E.2d 420 (1968) (changes in zoning proposal to allow uses by special permit rather than by right were not so great that a second public hearing was required).
- 📖 *Kitty v. Springfield*, 343 Mass. 321, 178 N.E.2d 580 (1962) (once zoning proposal failed and there was negative vote concerning reconsideration, legislative body was precluded from considering zoning proposal at next meeting and had to wait two years unless planning board recommended favorable action in its final report).
- 📖 *Knowles v. Codex Corp.*, 12 Mass. App. Ct. 493 (1981) (court may not inquire into municipal legislative body's motive in adopting zoning).
- 📖 *Kubik v. City of Chicopee*, 353 Mass. 514, 233 N.E.2d 219 (1968) (procedural requirements for adoption of zoning are uniform throughout the state and may not be varied by municipalities through their charters; 3/4ths vote required when protest filed means 3/4ths of full membership of city council as constituted, even if one member is unable to vote).
- 📖 *LaBranche v. A.J. Lane & Co.*, 404 Mass. 725, 537 N.E.2d 119 (1989) (zoning amendment may be repealed by voters through referendum in accordance with M.G.L. ch. 43, § 42).
- 📖 *Lamarre v. Commissioner of Pub. Works of Fall River*, 324 Mass. 542, 87 N.E.2d 211 (1949) (legality of zoning depends not on parcel singled out for rezoning, but whether the change furthers a legitimate purpose of zoning; illegal to single out parcel for economic benefit when surrounding land not similarly benefited).
- 📖 *Lanner v. Board of Appeal of Tewksbury*, 348 Mass. 220, 202 N.E.2d 777 (1964) (enhancement of land value through rezoning does not make rezoning invalid; spot zoning, which includes conferring of an economic benefit or detriment on owner of small area of land within zoning district, is unlawful; must show zoning conflicts with The Zoning Act beyond a reasonable doubt to invalidate zoning).
- 📖 *Leahy v. Inspector of Bldgs. of City of New Bedford*, 308 Mass. 128, 31 N.E.2d 436 (1941) (municipality may not vary statutory procedural requirements for changing zoning; single lot in residential area zoned for business purposes solely to benefit owner is unlawful).

☞ *Leonard v. Brimfield*, 423 Mass. 152, 666 N.E.2d 1300, *cert. denied*, 519 U.S. 1028 (1996) (may not complain about validity of regulations in effect when purchased land).

☞ *Lexington v. Bean*, 272 Mass. 547, 172 N.E. 867 (1930) (upholding zoning by-law even though notice and hearing on proposal took place after legislative body's vote).

☞ *Longo v. City of Malden*, 350 Mass. 761, 213 N.E.2d 387 (1965) (zoning was not invalid even though planning board report made reference to inaccurate information).

☞ *Lopes v. Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (1994) (case involving possible taking of all economical benefit of land, but wetlands conservatory district amended so as to permit an economically beneficial use of property).

☞ *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 393 N.E.2d 858 (1979) (wetlands may be regulated under zoning or under separate home rule by-law or ordinance).

☞ *Marblehead v. Rosenthal*, 316 Mass. 124, 55 N.E.2d 13 (1944) (may not single out parcel from surrounding land for specific economic benefit).

☞ *Mastriani v. Building Inspector of Monson*, 19 Mass. App. Ct. 989, 475 N.E.2d 408 (1985) (discussing illegal spot zoning; rezoning of twenty-acre parcel indistinguishable from surrounding land found unlawful).

☞ *Mayo v. Inhabitants of W. Springfield*, 260 Mass. 594, 157 N.E. 700 (1927) (discussing town clerk requirements for embodying zoning proposals in town meeting records).

☞ *MacNeil v. Avon*, 386 Mass. 339, 435 N.E.2d 1043 (1982) (zoning may diminish value of land and may prevent most profitable use of land).


☞ *McLean Hosp. Corp. v. Town of Belmont*, 56 Mass. App. Ct. 540, 778 N.E.2d 1016 (2002) (determining that zoning was not invalid contract zoning and setting forth two tests to determine if zoning constitutes contract zoning; party attacking zoning validity has heavy burden of proof; determining that not spot zoning, as was rezoning of geographically discrete parcel for valid public purpose; municipality may not bargain away zoning power).


☞ *Milton Commons Assocs. V. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 436 N.E.2d 1236, *rev. denied*, 387 Mass. 1101, 440 N.E.2d 21 (1982) (both pro and con views should be heard at public hearing on zoning proposal).


☞ *Morgan v. Banas*, 331 Mass. 694, 122 N.E.2d 369 (1954) (zoning adopted by newly elected city council, which was not same council that held hearing on zoning proposal, was valid; amendment to zoning proposal to reduce size of area rezoned did not require new notice and hearing and was not invalid).


☞ *Moskow v. Commissioner of Env'tl. Mgmt.*, 384 Mass. 530, 427 N.E.2d 750 (1981) (in taking case court to look at character of action and nature and extent of interference of regulation with rights in parcel as a whole).


☞ *MP Corp. v. Planning Bd. of Leominster*, 27 Mass. App. Ct. 812, 545 N.E.2d 44 (1989) (proposal made before final passage of zoning change was subject to prior zoning).


 *National Amusements, Inc. v. City of Boston*, 29 Mass. App. Ct. 305, 560 N.E.2d 138 (1990) (interpreting Boston zoning ordinance and determining that zoning amendment, which singled out property for different treatment than other similar land, without land use study and other valid reasons, was invalid as spot zoning; singling out of specific parcel for disparate treatment in order to protect residential and local business district from unwanted large scale commercial development found unlawful).


 *Nelson v. Belmont*, 274 Mass. 35, 174 N.E. 320 (1931) (new notice and hearing are required before legislative body may change zoning district boundaries of zoning proposal).


 *Noonan v. Moulton*, 348 Mass. 633, 204 N.E.2d 897 (1965) (planning board's report is advisory only and is not binding on legislative body).


 *Parisi v. Gloucester*, 3 Mass. App. Ct. 680, 338 N.E.2d 847 (1975) (protest petition invalid for failure to state reasons for protest).


 *Pierce v. Town of Wellesley*, 336 Mass. 517, 146 N.E.2d 666 (1958) (town meeting members exercise their judgment based on personal knowledge of municipality).


 *Pitman v. City of Medford*, 312 Mass. 618, 45 N.E.2d 973 (1943) (property owner who did not receive notice of hearing, but was able to attend hearing and file objections waived claim of insufficiency of notice).


 *Poremba v. City of Springfield*, 354 Mass. 432, 238 N.E.2d 43 (1968) (adoption of official map or master plan is not prerequisite to adoption of zoning).


 *Rando v. N. Attleborough*, 44 Mass. App. Ct. 603, 692 N.E.2d 544 (1998) (upholding rezoning of parcel of land for planned commercial development and holding this was not spot zoning or contract zoning).


 *Rayco Inv. Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385, 331 N.E.2d 910 (1975) (by-law regulating maximum number of trailer park licenses had to be adopted as zoning).


 *Richardson v. Zoning Bd. of Appeals of Framingham*, 351 Mass. 375, 221 N.E.2d 396 (1966) (where single family district not zoned for access to multi-family district, such access not permitted).


 *Roman Catholic Archbishop of Boston v. Board of Appeals of Boston*, 268 Mass. 416, 167 N.E. 672 (1929) (advertisement concerning zoning change found insufficient due to lack of time between notice and hearing).


 *Rousseau v. Building Inspect. of Framingham*, 349 Mass. 31, 206 N.E.2d 399 (1965) (planning board's request that zoning proposal be referred back to planning board for further study was considered negative final report to legislative body).


 *Russell v. Zoning Bd. of Appeals of Brookline*, 349 Mass. 532, 209 N.E.2d 337 (1965) (town meeting is appropriate body to adopt and change zoning).


 *Schertzer v. Somerville*, 345 Mass. 747, 189 N.E.2d 555 (1963) (setting off parcel for different treatment from similar adjacent land in order to prevent proposed use is unlawful and violates uniformity requirement of zoning).


 *Selectmen of Sudbury v. Garden City Gravel Corp.*, 300 Mass. 41, 14 N.E.2d 112 (1938) (zoning requires a 2/3rds vote of the legislative body, not a majority vote, for passage).


 *Shannon v. Building Inspect. of Woburn*, 328 Mass. 633, 105 N.E.2d 192 (1952) (planning board complied with requirement for giving final report to legislative body by recommending passage of zoning in one report and giving reasons therefor in another report).


 *Shapiro v. Cambridge*, 340 Mass. 652, 166 N.E.2d 208 (1960) (rezoning that does not sufficiently differentiate one parcel from surrounding land is unlawful spot zoning).


 *Simon v. Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942) (upholding one acre zoning; zoning is still valid even if reasons given by planning board in favor of zoning were unsound; zoning may not be used as a barrier to an influx of population).


 *Sinn v. Board of Selectmen of Acton*, 357 Mass. 606, 259 N.E.2d 557 (1970) (discussing exemption of municipal uses from zoning; constitutional test of zoning validity is whether it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").


 *Sturges v. Chilmark*, 380 Mass. 246, 402 N.E.2d 1346 (1980) (town may rely on outside reports and studies and admit them as part of the evidence used in making decision on zoning proposal; reasonable time-related controls on development are valid zoning provisions; municipality may adopt any zoning that is constitutionally permissible).


 *Sullivan v. Board of Selectmen of Canton*, 346 Mass. 784, 196 N.E.2d 185 (1964) (amendment to zoning before adoption to change type of residential district and more than double length on street was not considered fundamental change requiring new notice and hearing).


 *Sunderland v. Building Inspect. of N. Andover*, 328 Mass. 638, 105 N.E.2d 471 (1952) (person aggrieved by procedural defects is entitled to bring claim of invalidity).


 *Sylvania Elect. Products v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962) (discussing when new hearing is required on zoning proposal; contract-type zoning upheld).


 *Toda v. Board of Appeals of Manchester*, 18 Mass. App. Ct. 317 (1984) (by-law that regulated earth removal and use of property for processing and commercial sale was considered zoning by-law and required compliance with procedures for adoption of zoning).


 *Town of Canton v. Bruno*, 361 Mass. 598, 282 N.E.2d 87 (1972) (town meeting or legislative body had no authority to appoint special board to prepare zoning, only selectmen could do this; use of land in violation of zoning provision found invalid due to procedural defects, but subsequently passed in accordance with required procedures, is not a nonconforming use).


 *Town of Concord v. Attorney General*, 336 Mass. 17, 142 N.E.2d 360 (1957) (attorney general must give reasons based on legal grounds for disapproving zoning by-law).


 *Trumper v. City of Quincy*, 358 Mass. 311, 264 N.E.2d 689 (1970) (protest petitions are not unconstitutional).


 *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972) (may adopt flood plain regulations under zoning; fact that property not usable for most beneficial use neither constitutes taking nor requires just compensation; legitimacy of zoning does not turn on motives of supporters).


 *Vagts v. Superintendent & Inspect. of Bldgs. of Cambridge*, 355 Mass. 711, 247 N.E.2d 366 (1969) (planning board's negative report was advisory only and not binding on the legislative body; every presumption is in favor of zoning amendment validity; must show beyond a reasonable doubt that zoning amendment conflicts with The Zoning Act).


 *Van Renselaar v. City of Springfield*, 58 Mass. App. Ct. 104, 787 N.E.2d 1148 (2003) (finding that rezoning was not spot zoning as parcel of land rezoned was located in area where there were non-residential uses and non-residential zoning districts, and rezoning resulted in a coherent and consistent zoning district).


 *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *rev. denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (discussing time periods under The Zoning Act and whether they are directory or mandatory).


 *Wallace v. Building Inspector of Woburn*, 5 Mass. App. Ct. 786, 360 N.E.2d 664 (1977) (planning board's negative report was advisory only and not binding on the legislative body).


 *Ward & Johnson, Inc. v. Planning Bd. of Whitman*, 343 Mass. 466, 179 N.E.2d 331 (1962) (zoning amendment is not effective until town meeting passage).

 *Whittemore v. Town Clerk of Falmouth*, 299 Mass. 64, 12 N.E.2d 187 (1938) (discussing requirement for planning board hearing and report on zoning proposal before legislative action; planning board report without recommendations is not considered negative report).

 *Wilbur v. Newton*, 302 Mass. 38 (1938) (constitutional test of zoning validity is whether it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

 *Wilson v. Sherborn*, 3 Mass. App. Ct. 237 (1975) (upholding two acre zoning).

 *Wolk v. Planning Bd. of Stoughton*, 4 Mass. App. Ct. 812, 347 N.E.2d 700 (1976) (discussing effective date of zoning when applied to plans submitted under the subdivision control law).

 *Wood v. Milton*, 197 Mass. 531 (1908) (town meeting vote to "indefinitely postpone" an article is equivalent to disapproval).

📖 *Woodland Estates v. Building Inspect. of Methuen*, 4 Mass. App. Ct. 757, 358 N.E.2d 468 (1976) (discussing legislative body's discretion in rezoning particular tracts of land).

📖 *Woods v. City of Newton*, 351 Mass. 98, 217 N.E.2d 728 (1966) (purpose of planning board hearing is to garner views of residents and make recommendations on the proposal to the legislative body, who should act after considering such recommendations; planning board and legislative body in a city may hold joint hearing, but should keep own minutes and deliberate separately; legislative body may act if planning board fails to file report).

📖 *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 56 Mass. App. Ct. 559, 779 N.E.2d 141 (2002) (upholding adoption of time-limited interim zoning moratorium while study is conducted; determining no reverse spot zoning because legitimate purpose being carried out; determining no temporary taking because economic expectations still met through existing uses of property and uses permitted after expiration of moratorium).

📖 *Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. 82, 807 N.E.2d 221 (2004) (finding that there was neither a taking of all economical use of the property nor a taking of something less, as plaintiff had benefited from sale of other lots in subdivision and could combine lot in question with surrounding lots for purposes of a cluster development; must look at larger parcel of land from which single parcel came to determine if benefit derived from larger parcel).

📖 *Zuckerman v. Town of Hadley*, 492 Mass. App. Ct. 511, 813 N.E.2d 843 (2004) (absent exceptional circumstances restrictions of unlimited duration on a municipality's rate of development are unconstitutional and in derogation of public welfare).

## **CAUTIONARY NOTES**

✓ A new notice and public hearing may be required before proceeding to a vote, if there is an amendment to a zoning proposal during the legislative process that does one of the following:

- changes the identity or substantial character of the original zoning proposal;
- fundamentally departs from the original proposal; or
- radically differs from the original proposal.

✓ To avoid rejection of a zoning by-law by the attorney general or a possible claim of invalidity due to procedural defects carefully follow all of the requirements for notice, hearing, planning board report, extra-majority vote, and times within which certain actions must take place.

## **LINKS**

🔗 <http://www.umass.edu/masscptc/> (Citizen Planner Training web site – this site has links to other planning sites and sample by-law and ordinance language)

🔑 <http://www.massapa.org/> (Mass. American Planning Association resources with links to other sites)

🔑 <http://www.state.ma.us/> (links to Mass. Law and other state agencies such as DHCD)

🔑 <http://www.epa.gov/owow/nps/ordinance/> (environmental protection agency that has some sample ordinances)

🔑 Links to Regional Planning Agencies with Web Sites (some of these agencies have sample language for ordinances and by-laws):

- Berkshire Regional Planning Commission  
<http://www.berkshireplanning.org/>
- Cape Cod Commission  
<http://www.cape.com/mcccom/>
- Central Massachusetts Regional Planning Commission  
<http://www.cmrpc.org>
- Franklin Regional Council of Governments  
<http://www.frcog.org>
- Massachusetts Area Planning Council  
<http://www.mapc.org/>
- Merrimack Valley Planning Commission  
<http://www.mvpc.org>
- Montachusett Regional Planning Commission  
<http://www.mrpc.org/>
- Old Colony Planning Council  
<http://www.ocpcrpa.org/>
- Pioneer Valley Planning Commission  
<http://www.pvpc.org>
- Southeastern Regional Planning & Economic Development District  
<http://www.srpedd.org/>

🔑 [www.firstamendmentcenter.org](http://www.firstamendmentcenter.org) (sample e-codes)

🔑 <http://www.landlaw.com> (lower court cases available from landlaw)

🔑 <http://www.socialaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

🔑 <http://www.ago.state.ma.us/sp.cfm?pageid=1592> (sample stormwater by-law)

🔑 <http://www.ago.state.ma.us/sp.cfm?pageid=116> (attorney general web page that includes information on attorney general action on town zoning submitted for approval).

## **REFERENCES**

📁 The Land Use Manager, Vols. I – II

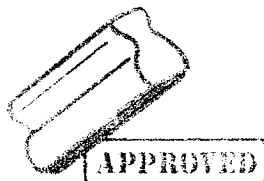
📁 The Land Use Manager, Vols. VI -- VII

📁 The Land Use Manager, Selected Articles from July 1991 through March 1999.

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 4, 11, & 17 (2004).

## SECTION 6.

### EXISTING STRUCTURES, USES, OR PERMITS; CERTAIN SUBDIVISION PLANS; APPLICATION OF CHAPTER.



#### THE LAW

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. This section shall not apply to establishments which display live nudity for their patrons, as defined in section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A.

#### ANNOTATIONS

*Zoning does not apply to legal, pre-existing uses and structures*

*Application of zoning after first notice of public hearing*

*Application of zoning for any reconstruction, extension, structural change, or alteration of a use or structure*

*Applicable of zoning to single and two family dwelling*

*Treatment of pre-existing nonconforming uses and structures*

*Required finding to allow change, extension, or alteration of pre-existing nonconforming structures and uses*

A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than six months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.

A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building,

*If construction or use not commenced within 6 months after issuance of a permit, zoning changes will apply*

*Regulation of abandoned nonconforming uses and structures*

*Application of zoning to pre-existing, separately owned vacant lots of at least 5,000 s.f. of area*

*Application of zoning to pre-existing, non-separately owned vacant lots of up to three with at least 7,500 s.f. of area*

*Zoning may permit building on an undersized lot*

building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval, except in the case where such plan was submitted or submitted and approved before January first, nineteen hundred and seventy-six, for seven years from the date of the endorsement of such approval. Whether such period is eight years or seven years, it shall be extended by a period equal to the time which a city or town imposes or has imposed upon it by a state, a federal agency or a court, a moratorium on construction, the issuance of permits or utility connections.

When a plan referred to in section eighty-one P of chapter forty-one has been submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal referred to in said section, and for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required, or words of similar import.

Disapproval of a plan shall not serve to terminate any rights which shall have accrued under the provisions of this section, provided an appeal from the decision disapproving said plan is made under

*Zoning that applies to preliminary and definitive subdivision plans*

*Zoning that applies to plans that do not require subdivision approval*

*Plan disapproval does not terminate rights to zoning freeze if an appeal is filed and is successful*

applicable provisions of law. Such appeal shall stay, pending either (1) the conclusion of voluntary mediation proceedings and the filing of a written agreement for judgment or stipulation of dismissal, or (2) the entry of an order or decree of a court of final jurisdiction, the applicability to land shown on said plan of the provisions of any zoning ordinance or by-law which became effective after the date of submission of the plan first submitted, together with time required to comply with any such agreement or with the terms of any order or decree of the court.

In the event that any lot shown on a plan endorsed by the planning board is the subject matter of any appeal or any litigation, the exemptive provisions of this section shall be extended for a period equal to that from the date of filing of said appeal or the commencement of litigation, whichever is earlier, to the date of final disposition thereof, provided final adjudication is in favor of the owner of said lot.

The record owner of the land shall have the right, at any time, by an instrument duly recorded in the registry of deeds for the district in which the land lies, to waive the provisions of this section, in which case the ordinance or by-law then or thereafter in effect shall apply. The submission of an amended plan or of a further subdivision of all or part of the land shall not constitute such a waiver, nor shall it have the effect of further extending the applicability of the ordinance or by-law that was extended by the original submission, but, if accompanied by the waiver described above, shall have the effect of extending, but only to extent aforesaid, the ordinance or by-law made then applicable by such waiver.

*Zoning adopted subsequent to an appeal shall not apply to a plan*

*Extension of zoning exemption during appeal*

*Record owner of land may waive the rights given under this section*

### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3; Amended by St. 1977, c. 829, § 3D; St. 1979, c. 106; St. 1982, c. 185; St. 1985, c. 494; St. 1986, c. 557, § 54; St. 2000, c. 29; St. 2000, c. 232.

### **PERMISSIBLE/REQUIRED ACTIONS**

☛ Zoning changes shall not apply to:

1. Pre-existing nonconforming uses, buildings, or structures, as long as they continue to exist and are not abandoned or not used.
  - "Pre-existing" means the following:

- The use, building, or structure was in existence before the zoning change which it no longer complies with.
- The use, building, or structure is not illegal, as it was used or built in accordance with any permit issued and any zoning in effect at the time the use or construction commenced.
- If the municipality had not yet adopted zoning at the time the use or construction commenced, the use, building, or structure is considered "pre-existing."
- "Nonconforming" means that the use, building, or structure no longer complies with existing zoning, e.g., the use is no longer permitted or a building was constructed on a lot that no longer meets dimensional requirements.
  - A use permitted by a variance is not a nonconforming use and a new variance is required to make any change in such use.
- 2. Uses, buildings, or structures that are lawfully begun before the first publication of the notice concerning the zoning change.
- 3. A building or special permit issued **before** the first publication of the notice of the public hearing concerning the zoning change.

NOTE: The term "structure" includes buildings.

➤ Except for single and two family residential structures, zoning shall apply to:

1. a building or special permit issued **after** the first notice of the public hearing concerning the zoning change.
2. any change of a nonconforming use
3. substantial extension of a nonconforming use
4. extension of a nonconforming structure
5. structural change of a nonconforming structure
6. reconstruction of a nonconforming structure
7. alteration of a nonconforming structure begun after the first notice of the public hearing concerning the zoning change
  - a. Alterations do not include repairs as defined by the building code
  - b. The alteration must be for one of the following purposes:
    - i. A use with a substantially different purpose
    - ii. The same use, but in a substantially different manner
    - iii. The same use, but to a substantially greater extent

➤ In considering whether there has been a change or extension that will require municipal action, the following three-part test, known as the "Powers" test should be applied, and if the answer is yes to any of the questions, then the zoning will apply and the municipality will need to take further action:

1. Will the proposed use fail to reflect the nature and purpose of the nonconforming use in existence when the zoning took effect or changed? ("nature and purpose" test)

2. Is the proposed use different in the quality or character or different in quality or degree from the existing nonconforming use? ("quality or character" test)
3. Will the proposed use be different in kind than the existing use with respect to its effect on the neighborhood. ("different in kind" test)

*Powers v. Building Inspect. of Barnstable*, 363 Mass. 648 (1973).

➤ A change to a single or two family residential structure that does not increase the nonconforming nature of the structure is not subject to a zoning change in the following cases:

1. alteration of the nonconforming structure
2. reconstruction of the nonconforming structure
3. extension of the nonconforming structure
4. structural change to the nonconforming structure

NOTE: The terminology "increase the nonconforming nature" means further noncompliance with the zoning with which the structure no longer complies, e.g., any increase to the size of a house that is on a lot that no longer meets the minimal lot area requirements.

➤ The process to be used when the issue concerns a nonconforming single or two-family residential structure is as follows:

- An application is filed with the board of appeals, who determines if there will be an increase in the nonconforming nature of the structure by what is proposed.

NOTE: The board must first determine in what respect(s) the single or two-family residential structure does not comply with zoning, e.g., lot too small, noncompliance with yards, structure too high, etc., before it can decide whether the proposal will increase the nonconforming nature of the structure.

- If there will not be an increase then the building official may issue a building permit.
- If there will be an increase then the applicant must seek the section 6 finding from the permit or special permit granting authority (see the discussion regarding the finding under the next major bullet below).

➤ In certain cases the permit granting authority (the board of appeals) or special permit granting authority, as designated in the zoning by-law or ordinance, may permit the following with respect to pre-existing nonconforming uses and structures after making the findings set forth below:

1. extension of the use
2. extension of the structure
3. alteration of the structure under one of the circumstances set forth above.

NOTE: The statute does not expressly permit change of a nonconforming use to another nonconforming use or reconstruction of a nonconforming structure

that is not a single or two-family dwelling. This language does not prohibit a municipality from authorizing such change or reconstruction in its zoning by-law or ordinance.

☛ The permit or special permit granting authority must make two findings to permit a change, extension, or alternation of a nonconformity. *Rockwood v. Snow Inn Corp.*, 409 Mass. 361 (1991). The findings are:

- The change, extension, or alteration to the nonconforming use or structure will not be substantially more detrimental to the neighborhood than the existing use or structure.
- The change, extension, or alteration to the nonconforming use or structure complies with existing zoning.
  - If it does not comply a variance is necessary.

NOTE: If this finding is treated as a special permit the procedures and voting requirements set forth under sections 9 and 15 of this Guidebook apply.

☛ If any proposed change, extension, alteration, or reconstruction, in the case of a single and two family residential structure, results in a new zoning violation, then a variance is required to permit such noncompliance with zoning.

NOTE: This section of the law does not apply to adult uses as specified under section 9A of The Zoning Act.

☛ A use, building, or structure authorized by a building permit or special permit is not subject to a zoning change as long as the use or construction authorized by such permit is commenced within 6 months.

- In the case of construction it must be continued through to completion as continuously and expeditiously as is reasonable.

☛ A municipal zoning ordinance or by-law may regulate and define nonconforming uses, buildings, and structures that are abandoned or not used for a period of two years or more.

- Abandonment requires an intent to abandon.
- Zoning should clearly define the meaning of "not used," e.g., the business has not been operational, the dwelling has not been occupied for residential purposes.

☛ If certain conditions are complied with, a vacant lot that is to be used for a single or two family residential use, but not any other use, will not be subject to increases in the following zoning requirements and may be built upon based on the so-called grandfather nonconforming exemption if other conditions are met:

1. area
2. frontage
3. width
4. yard

5. depth

NOTE: This exemption applies only to single and two-family residential uses unless the municipal zoning by-law or ordinance provides otherwise. Other uses may only be permitted if a dimensional variance or variances are obtained that permit such use of the undersized vacant lot.

☛ The conditions for permitting construction of single and two-family residential uses on an undersized vacant lot include the following:

1. at the time of the increase in zoning requirements, the vacant lot
  - a. had at least 5,000 square feet of area
  - b. had at least 50 feet of frontage
  - c. was not held in common ownership with any adjoining land based on record of title (a plan, deed, will)
    - i. A lot is buildable if the most recent instrument of record placed the lot into separate ownership prior to the zoning change with which it does not comply.
    - ii. Vacant lots that are in common ownership at the time of the zoning increase must be merged or combined to meet the increased zoning before they may be built upon. This is called the "merger doctrine."
    - iii. A vacant lot created by dividing land from an existing lot that has a single or two-family residential structure on it in such a manner as to leave the lot with the house located on it in violation of zoning cannot be built upon, even if the newly created lot complies with existing zoning.
    - iv. A lot shown on an approved definitive subdivision plan has an additional eight-year zoning freeze, which permits construction on any lot commonly owned with any adjoining lots (see discussion of eight year zoning freeze below). However, any lots subject to the eight-year zoning freeze that are in common ownership at the time of the zoning increase are subject to the merger doctrine, unless a building permit is obtained before the zoning freeze expires. The old technique of checkerboarding (conveying every other lot to a different entity before the subdivision freeze expired) is no longer available.
    - v. If a vacant lot was separately owned at the time of the increase in zoning, but subsequently becomes commonly owned with adjoining land, the lots must be merged or combined to comply with zoning as much as is possible.
  - d. conformed to the zoning requirements in existence before the increase in dimensional requirements.
2. The municipal zoning by-law or ordinance may permit construction on an undersized lot that is subject to lesser requirements than those set forth under this provision.

☛ Another exemption is available under this section for certain commonly-owned vacant lots to be used for single and two-family residential purposes that meet the following requirements:

1. at the time of the increase in zoning requirements, the vacant lot
  - a. had at least 7,500 square feet of area
  - b. had at least 75 feet of frontage
  - c. was held in common ownership with adjoining land at the time of recording or endorsement of the plan showing the lot
  - d. conformed to the zoning requirements in effect as of January 1, 1976
2. This exemption does not apply to more than three adjoining lots held in common ownership, although a plan may show more than three commonly owned lot.
3. This exemption for commonly owned lots is available for five years after the effective date of the increase in zoning requirements or five years after January 1, 1976, whichever is later.
4. The municipal zoning by-law or ordinance may permit construction on an undersized lot that is subject to lesser requirements than those set forth under this provision.

☛ A dimensional or use zoning change will not apply to vacant lots shown on a definitive subdivision plan for

- seven years after the planning board endorses its approval on the plan with respect to plans filed **before** January 1, 1976
- eight years after the planning board endorses its approval on the plan with respect to plans filed **after** January 1, 1976

☛ The definitive subdivision plan zoning freeze applies as long as

- the plan showing the lot or lots is filed with the planning board for approval and notice of submission is given to the city or town clerk before the effective date of the zoning change
- any preliminary subdivision plan submitted to the planning board is followed within seven months by a definitive subdivision plan

NOTE: The land shown on the plan is governed by the zoning in effect at the time of the first submission of the preliminary plan, or if there is no preliminary plan, the first submission of the definitive plan, despite any prior notice of a public hearing on a zoning change.

☛ If the federal, state, or municipal government, through an agency or a court decision, imposes a moratorium on construction, the issuance of permits, or utility connections, then the period of the zoning freeze shall be extended or tolled during the time of the moratorium.

☛ A use zoning change with respect to uses by right or by special permit (including a change from a use by right to one requiring a special permit) will not apply to vacant lots shown on a plan endorsed by the planning board as

an approval not required under section 81P of The Subdivision Control Law for three years after such endorsement as long as

- the plan showing the lot or lots is filed with the planning board for endorsement and
- notice of submission is given to the city or town clerk before the effective date of the zoning change

NOTE: The land shown on the plan is governed by the zoning in effect at the time of the first submission of the approval not required plan.

☛ If a plan is disapproved, the zoning freeze is not terminated and no other rights are lost, as long as an appeal is timely and properly filed and the appeal is successful.

- If a plan is simply amended or modified and no appeal is filed, then any zoning changes will apply and the lots shown on such amended plan must comply with any changes in effect on the date it is resubmitted for approval.
- Any zoning changes adopted while an appeal is pending do not apply.
- The time period of the zoning freeze is stayed while the appeal is pending, as long as the appeal is successful.
- The stay on the tolling of the time period for the zoning freeze is lifted after
  - the conclusion of any voluntary mediation proceeding and the filing of a written agreement for judgment or stipulation of dismissal, including the time required to comply with such agreement or stipulation or
  - the entry of an order or decree of a court of final jurisdiction, including the time required to comply with such order or decree
    - a court of final jurisdiction means that if there is an appeal of a lower court decision, the zoning freeze is stayed until all appeals are exhausted and a final order or decree is issued by the appellate court.

☛ If an appeal is filed concerning a lot shown on a plan endorsed by the planning board, then any zoning exemption or freeze is extended or tolled during the time period of the appeal.

- The time period of the appeal shall commence on the date the litigation is commenced or an appeal is filed, whichever is earlier, and shall end on the date of final disposition of the litigation or appeal, as long as the decision is in favor of the owner of the lot that is the subject matter of the litigation or appeal.

☛ Any record owner may waive the protections afforded by this section. For example, an owner may want to waive the rights to a zoning exemption if a zoning change is more beneficial or less restrictive than the zoning in effect when the use, building, structure, or plan was approved or endorsed.

- The zoning in effect at the time of the waiver or as adopted after the waiver, will apply to the land, use, building, or structure.

- The waiver must be in writing.
- The waiver must be recorded at the applicable registry of deeds where the land, building, or structure is located.
- Unless a written waiver is filed, the following actions do not constitute a waiver and shall not have the effect of extending any existing zoning exemption or freeze:
  - the submission of an amended plan
  - the further subdivision of all or part of the land shown on a previous plan

## **RELATED CASE LAW**

📖 *Adamowicz v. Town of Ipswich*, 395 Mass. 757, 481 N.E.2d 1368 (1985) (if the most recent instrument of record prior to a zoning change places a legal lot into separate ownership, such lot is buildable notwithstanding the zoning change to which it does not apply).

📖 *Adams v. Peterson*, 35 Mass. App. Ct. 782 (1994) (do not need to merge nonconforming, adjoining, and commonly owned lots that are not vacant at the time of the zoning change).

📖 *Alexander v. Building Inspector of Provincetown*, 350 Mass. 370, 214 N.E.2d 876 (1966) (demolition and removal of old buildings and site preparation is not commencement of construction in order to afford continuation of 6 month freeze from zoning changes).

📖 *Angus v. Miller*, 5 Mass. App. Ct. 470, 463 N.E.2d 1349 (1977) (by-law prohibited by specific terms the reconstruction of a nonconforming building, if it is razed).


📖 *Arenstam v. Planning Bd. of Tyngsborough*, 29 Mass. App. Ct. 314, 560 N.E.2d 142 (1990) (where preliminary subdivision plan was filed prior to zoning change, and definitive plan was filed 7 months later, but plan was denied and then amended and resubmitted, lots shown on such amended plan were subject to all zoning changes, as developer did not preserve grandfather protection by filing appeal and obtaining favorable decision).


📖 *Asack v. Board of Appeals of Westwood*, 47 Mass. App. Ct. 733, 716 N.E.2d 135 (1999) (adjoining lots that were purchased by one owner as separate lots must be merged into one lot for zoning purposes. if both lots do not comply with all dimensional requirements under the zoning by-law or ordinance).


📖 *Baldiga v. Board of Appeals of Uxbridge*, 395 Mass. 829, 481 N.E.2d 809 (1985) (five year exemption for three commonly owned lots applies to lots which complied with zoning requirements as of January 1, 1976).


📖 *Barron Chevrolet, Inc. v. Danvers*, 419 Mass. 404, 646 N.E.2d 89 (1995) (use commenced through grant of a variance can never become a nonconforming use; alteration of a nonconforming sign requires section 6 finding).


📖 *Bartlett v. Board of Appeals of Lakeville*, 23 Mass. App. Ct. 664 (1987) (abandonment and not used are independent, as abandonment requires an intent, while not used simply means no use for two years regardless of intent).


 *Becket v. Building Inspect. of Marblehead*, 6 Mass. App. Ct. 96 (1978) (undersized adjoining parcels of land in one ownership are generally considered one lot for zoning purposes).


 *Bellows Farms, Inc. v. Building Inspector of Acton*, 364 Mass. 253, 303 N.E.2d 728 (1973) (three year zoning freeze is for use changes and does not protect against site plan and intensity requirements; substantial reduction in scope of use by changes in dimensional requirements is not a de facto use regulation and protected use is subject to such new dimensional regulations).


 *Berliner v. Feldman*, 363 Mass. 767 (1973) (ordinary improvements and modernization to an existing structure do not constitute a change in the original nature and purpose of the use, as long as no reconstruction or structural change; reconstruction may be permitted by local zoning as long as nonconforming structure has not been abandoned by voluntary demolition).


 *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32, 574 N.E.2d 424, rev. denied, 411 Mass. 1101, 579 N.E.2d 1360 (1991) (reviewing language concerning change and extension to nonconforming uses and structures; municipality may choose special permit application filed with special permit granting authority as procedure for extension or alteration of nonconforming use, but may also have permit granting authority simply make the section 6 finding, but must specify procedure in by-law or ordinance).


 *Boston and Albany Railroad Co. v. Department of Pub. Utilities*, 314 Mass. 634 (1943) (discussing distinction between repair and alteration).


 *Boulter Bros. Const. Co. v. Zoning Bd. of Appeals of Norfolk*, 45 Mass. App. Ct. 283, 697 N.E.2d 997 (1998) (even though undersized lot adjoined a lot in another municipality it was grandfathered as a separate lot).


 *Bridgewater v. Chuckran*, 351 Mass. 20, 217 N.E.2d 726 (1966) (setting forth three-prong test for looking at significance of change in pre-existing nonconformity in determining whether such change should be allowed).

 *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 794 N.E.2d 1198 (2003) (upholding denial of section 6 finding on basis of aesthetics detriment to neighborhood, but deciding that potential of future problems if set precedent was legally untenable).

 *Building Inspect. of Groton v. Vlahos*, 10 Mass. App. Ct. 890 (1980) (applying three-prong "Powers" test to change in nonconformity).

 *Burke v. Zoning Bd. of Appeals of Harwich*, 38 Mass. App. Ct. 937, 650 N.E.2d 355 (1995) (landowner will not be permitted to create a dimensional nonconformity if can merge adjoining lots to avoid or diminish a nonconformity).

 *Burlington Sand & Gravel, Inc. v. Town of Harvard*, 26 Mass. App. Ct. 436, 528 N.E.2d 889 (1988) (where there was abandonment of access road used in one town that served sand and gravel use in another town, access road could not be reestablished without compliance with current zoning).

 *Byrne v. Town of Middleborough*, 364 Mass. 331, 304 N.E.2d 194 (1973) (town may regulate earth removal under separate by-law that does not afford nonconforming protection).

- 📖 *Cape Ann Land Dev. Corp. v. City of Gloucester*, 371 Mass. 9 (1976) (use freeze for lot shown on approval not required plan may still require person to obtain special permit, but city may not refuse to grant such permit due to zoning freeze).
- 📖 *Cape Resort Hotels v. Alcoholic Licensing Bd. of Falmouth*, 385 Mass. 205, 431 N.E.2d 213, *appeal after remand*, 388 Mass. 1013, 446 N.E.2d 1070 (1982) (discusses in detail extension and alteration of nonconforming uses and structures; applicant has burden of showing use was lawfully in existence; applying nature and purpose and different in kind prongs of "Powers" test to prohibit substantial expansion in structure and substantial increase in use intensity).
- 📖 *Carciofi v. Board of Appeals of Billerica*, 492 N.E.2d 747 (Mass. 1986) (because ownership of adjoining land remained separate, even though one lot owned by husband and wife with ½ interests and abutting lots owned by husband and husband and wife with ¼ interests, undersized lots were buildable).
- 📖 *Carstensen v. Cambridge Zoning Bd. of Appeals*, 11 Mass. App. Ct. 348, 416 N.E.2d 522 (1981) (building permit not subject to zoning amendment if permit was issued prior to first notice of public hearing on zoning amendment).
- 📖 *Chira v. Planning Bd. of Tisbury*, 3 Mass. App. Ct. 433, 333 N.E.2d 204 (1975) (amendment not applicable to land shown on preliminary subdivision plan if plan is filed prior to the vote and effective date of the zoning amendment).
- 📖 *Cicatelli v. Board of Appeals of Wakefield*, 57 Mass. App. Ct. 799, 789 N.E.2d 1216 (2003) (three-year use freeze applies to land shown on plan and not plan; application of dimensional change so only half of lot could be used for residential use was not de facto use regulation).
- 📖 *Cohasset Heights v. Zoning Bd. of Appeals of Cohasset*, 53 Mass. App. Ct. 116, 757 N.E.2d 274 (2001) (person who never recorded special permit, but commenced use was protected from zoning change, even though special permit not effective until recorded).
- 📖 *Connors v. Town of Burlington*, 325 Mass. 494 (1950) (holding that any use or structure which existed before the municipality had zoning is protected from the new zoning as a nonconforming use or structure).
- 📖 *Cox v. Board of Appeals of Carver*, 42 Mass. App. Ct. 422, 677 N.E.2d 697 (1997) (board of appeals could not allow extension of nonconforming use as such extension did not comply with current zoning requirements, unless a variance was obtained).
- 📖 *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124, 807 N.E.2d 245 (2004) (upholding a denial to expand three unlawful gasoline storage tanks under a section 6 finding and similar provisions of a local zoning by-law; ruling that there was a substantial extension and thus the proposal failed the "Powers" test).
- 📖 *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 754 N.E.2d 101 (2001) (upholding denial of section 6 finding to permit nonconforming boathouse

to be substantially expanded to include berthing and slip area and describing detailed process for making section 6 finding).

📖 *Derby Refining Co. v. City of Chelsea*, 407 Mass. 703, 555 N.E.2d 524 (1990) (right to continue nonconforming use runs with the land and change from fuel storage tanks to asphalt storage met the three-prong *Bridgewater* test, as use was permitted as a pre-existing, non-conforming use; use is not unlawful if additional licenses and permits can be easily obtained; abandonment requires intent to abandon a nonconformity).

📖 *Dial Away Co., Inc. v. Zoning Bd. of Appeals of Auburn*, 41 Mass. App. Ct. 165, 669 N.E.2d 446 (1996) (zoning applicable to abandonment and nonuse applies to all nonconforming uses and structures, not just non-residential ones).

📖 *DiStefano v. Stoughton*, 36 Mass. App. Ct. 642 (1994) (for purposes of zoning, adjoining, commonly owned, nonconforming lots must be merged in order to minimize nonconformities; conveyance of lots to spouse, trust, and corporation in order to obtain separate ownership was a scam and because original owner could still exercise control over lots in future, the lots were still held in common ownership despite whose name was listed as the record owner).

📖 *Dobbs v. Board of Appeals of Northampton*, 339 Mass. 684, 162 N.E.2d 32 (1959) (the evidence of what is or is not done to a nonconforming structure is evidence of the intentions of the property owner to abandon the structure).

📖 *Doliner v. Planning Bd. of Millis*, 349 Mass. 691 (1965) (planning board must make decision on plan based on zoning in effect at time plan was filed not at time of decision).

📖 *Donnelly v. Outdoor Advertising Bd.*, 369 Mass. 206 (1975) (discussing regulation of billboards under zoning for aesthetic reasons).

📖 *Dowling v. Board of Health of Chilmark*, 28 Mass. App. Ct. 547, 522 N.E.2d 866 (1990) (undersized, remainder lot did not have grandfather protection where lot was never proved to exist on a recorded instrument prior to the first notice of the zoning change to which the lot did not conform, even if such lot's existence could be shown after examination of several unrelated instruments).

📖 *Falcone v. Board of Appeals of Brockton*, 7 Mass. App. Ct. 710, 389 N.E.2d 1032 (1979) (where three-year freeze period for approval not required plan expired before issuance of a building permit, the new zoning applied).

📖 *Ferzoco v. Board of Appeals of Falmouth*, 29 Mass. App. Ct. 986, 562 N.E.2d 105 (1990) (five year exemption for three commonly owned lots applied only if lots complied with zoning on January 1, 1976; exemption runs from the first amendment of zoning that takes place after January 1, 1976, such that exemption expires at the end of five years; single lot exemption applies forever).

📖 *First Crestwood Corp. v. Building Inspector of Middleton*, 3 Mass. App. Ct. 363, 326 N.E.2d 363 (1975) (applying tests for nonconforming uses or structures).

📖 *Fitch v. Board of Appeals of Concord*, 55 Mass. App. Ct. 748, 774 N.E.2d 1107 (2002) (interesting facts concerning lots adjoining in the rear with undersized

frontage on two different streets, in which the court declined to decide a grandfather rights issue because of failure of the parties to brief the issue).

📖 *Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass. App. Ct. 53, 484 N.E.2d 113 (1985) (if alteration of two family residential structure increases nonconforming nature of structure, finding for alteration must be obtained; structure is nonconforming if located on a lot which does not meet the minimum lot area requirement of zoning by-law).

📖 *Gamache v. Town of Achusnet*, 14 Mass. App. Ct. 215, 438 N.E.2d 82 (1982) (may not deny zoning relief based on lack of license, as licensing is a different statutory consideration).

📖 *Gaudet v. Building Inspector of Dracut*, 358 Mass. 807, 265 N.E.2d 375 (1970) (six adjoining lots owned by same person must be merged and treated as one lot for zoning purposes).

📖 *Giovannucci v. Board of Appeals of Plainville*, 4 Mass. App. Ct. 239 (1976) (zoning is to minimize nonconformities wherever possible; to obtain zoning exemption for substandard lots, lots must be separately owned at the time of the zoning change which makes the lots undersized).

📖 *Girard v. Board of Appeals of Easton*, 14 Mass. App. Ct. 334 (1982) (when lots are adjoining and in common ownership they must be merged until the merged lot meets or comes close to complying with existing zoning).


📖 *Goldhirsh v. McNear*, 32 Mass. App. Ct. 455, 590 N.E.2d 709 (1992) (nonconforming carriage house converted to residence may be altered as long as nonconforming nature is not increased; additional violations of zoning require a variance; board of appeals is to determine whether there is an increase in the intensity of a nonconformity or whether there is a new nonconformity before requiring the section 6 finding; vertical expansion of nonconforming carriage house could cause increase in nonconforming nature of structure, even if there is no change in the footprint).


📖 *Green v. Board of Appeals of Norwood*, 358 Mass. 253 (1970) (if the definitive plan is filed more than 7 months after preliminary plan then zoning in effect at time of filing definitive plan is the zoning that applies).


📖 *Green v. Board of Appeals of Provincetown*, 26 Mass. App. Ct. 469 (1988) (applying three-part "Powers" test and finding that change from existing restaurant to Burger King, which would double number of customers and include takeout service, failed the test).


📖 *Hall v. Zoning Bd. of Appeals of Edgartown*, 28 Mass. App. Ct. 249, 549 N.E.2d 433 (1990) (although tenants were not necessarily lodgers and could be treated as family, nonconforming use protection for transient residential facilities was not established, as there was no showing that the use before the zoning amendment was lawful).


📖 *Heald v. Zoning Bd. of Appeals of Greenfield*, 7 Mass. App. Ct. 286, 387 N.E.2d 170 (1979) (separate assessment of three abutting properties in common ownership did not determine zoning status of lots).


 *Heavey v. Board of Appeals of Chatham*, 58 Mass. App. Ct. 401, 792 N.E.2d 651 (2003) (two lots of land separated by water are not adjoining and thus both may enjoy the grandfather protection afforded vacant lots that are not adjoining, but have at least 5,000 square feet of area and 50 feet of frontage).


 *Heritage Park Dev. Corp. v. Southbridge*, 424 Mass. 71, 674 N.E.2d 233 (1997) (automatic rescission of subdivision approval does not terminate zoning freeze applicable to lots shown on subdivision plan; filing of amended plan or further subdivision does not constitute waiver of zoning freeze, but does not extend the freeze either).


 *Hinves v. Commissioner of Public Works of Fall River*, 342 Mass. 54, 172 N.E.2d 232 (1961) (change in zoning does not apply to lawfully existing buildings).


 *Inspector of Bldgs. of Burlington v. Murphy*, 320 Mass. 207 (1946) (alterations to nonconforming structures require only a "minimum of tolerance").


 *Island Props., Inc. v. Martha's Vineyard Comm'n*, 377 Mass. 555, 361 N.E.2d 385 (1977) (despite zoning freeze, Martha's Vineyard Commission may impose more stringent requirements on land shown on definitive subdivision plan).


 *Ka-Hur Enterprises, Inc. v. Zoning Bd. of Appeals of Provincetown*, 424 Mass. 404, 676 N.E.2d 838 (1997) (the terms abandonment and discontinued are not synonymous, as an abandonment requires a voluntary and intentional relinquishment of a use, while a discontinuance simply means it is not used regardless of the intent).


 *Kosla v. Board of Appeals of Holden*, 55 Mass. App. Ct. 62, 768 N.E.2d 1115 (2002) (upholding section 6 special permit finding as within board's authority).


 *Langevin v. Superintendent of Public Bldgs. of Worcester*, 5 Mass. App. Ct. 892, 369 N.E.2d 739 (1977) (slaughterhouse operation was protected nonconforming use).

 *Lapidus v. Board of Appeal of Boston* (Mass. App. Ct. 2001) (discussing time for bringing enforcement action)

 *Lavoie Const. Co. v. Building Inspect. of Ludlow*, 346 Mass. 274, 191 N.E.2d 697 (1963) (zoning that applies to a subdivision plan is zoning in effect on date plan filed not zoning advertised in notice of hearing).

 *LeBlanc v. Board of Appeals of Danvers*, 32 Mass. App. Ct. 760, 594 N.E.2d 906 (1992) (an undersized vacant lot in separate ownership may be buildable for zoning purposes despite the lack of a way physically existing on the ground).

 *Lee v. Board of Appeals of Harwich*, 11 Mass. App. Ct. 148 (1981) (checkerboarding, or conveying land to relatives to avoid zoning changes, may not provide protection from such changes if the lots are not built upon before the zoning freeze for a subdivision expires; municipality may be able to grant greater exemption than that afforded by statute).

 *Lindsay v. Board of Appeals of Milton*, 362 Mass. 126 (1972) (despite person's ownership of separately described record lots that are adjoining, a grandfather nonconforming exemption does not exist unless both lots comply with existing zoning).

☞ *Livoli, Inc. v. Planning Bd. of Marlborough*, 347 Mass. 330 (1963) (applicant does not lose zoning freeze rights because preliminary plan may be disapproved as long as plan substantially complies with requirements for preliminary plan; zoning that applies to a subdivision plan is zoning in effect on date plan filed not zoning advertised in notice of hearing).

☞ *Lomelis v. Board of Appeals of Marblehead*, 17 Mass. App. Ct. 962 (1983) (deviations in perimeter and height permitted in reconstruction of nonconforming single family house, as they did not change the original nature of the house).

☞ *Long v. Board of Appeals of Falmouth*, 32 Mass. App. Ct. 232, 588 N.E.2d 692, rev. denied, 412 Mass. 1104, 592 N.E. 2d 751 (1992) (applicant may obtain zoning freeze applicable to approval not required plan in order to freeze special permit use while zoning amendment is pending, but not yet in effect; applicant does not have to record approval not required plan in order to maintain three-year zoning freeze).

☞ *Malden v. Werlin Realty, Inc.*, 349 Mass. 623, 172 N.E.2d 232 (1961) (use of property in violation of zoning is not protected nonconforming use).

*Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962).

☞ *Marblehead v. Deery*, 356 Mass. 532 (1969) (self-inflicted nonconformity makes a conforming structure unprotected from zoning changes).

☞ *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 660 N.E.2d 369 (1996) (discussing three-year use freeze for land shown on approval not required plan).

☞ *Marinelli v. Board of Appeals of Stoughton*, 440 Mass. 255, 797 N.E.2d 893 (2003) (common ownership is determined by who the record owner is at the time of the zoning change; the three-lot common ownership exemption means that only three lots may claim the exemption even if there are more than three lots that are commonly owned and that the lots do not have to remain in common ownership in order to claim the exemption during the five year exemption period).


☞ *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972 (1985) (self-inflicted nonconformity makes a conforming structure unprotected from zoning changes).


☞ *Massachusetts Broken Stone Co. v. Weston*, 430 Mass. 637, 723 N.E.2d 7 (2000) (the zoning freeze applies to the land shown on the plan and not the plan; automatic rescission of approval of a plan does not affect the zoning freeze if a new plan is submitted).


☞ *McAler v. Board of Appeals of Barnstable*, 361 Mass. 317, 280 N.E.2d 166 (1972) (change of use from summer to year round is substantial extension of nonconformity).


☞ *McLaughlin v. City of Brockton*, 32 Mass. App. Ct. 930, 587 N.E.2d 251 (1992) (zoning must provide for section 6 finding to allow extension and alteration of nonconformities and board must look at impact of expansion of nonconformity on the neighborhood).


☞ *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972 (1985) (a self-created nonconformity, or the voluntary destruction of a nonconforming structure, may lose its nonconforming protection).  
 ☞ *Mendes v. Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 552 N.E.2d 604, rev. denied, 407 Mass. 1103, 554 N.E.2d 1214 (1990) (defining "nonconformity" as use lawfully in existence at the time of the zoning change; a use commenced through grant of a variance can never become a nonconforming use; suggesting that before section 6 finding can be initiated use must be shown to be lawful and nonconforming).  
 ☞ *Miller v. Board of Appeals of Canton*, 8 Mass. App. Ct. 923, 396 N.E.2d 180 (1979) (three-year zoning freeze applicable to approval not required plans applies to both uses by right and special permit uses).  
 ☞ *Mioduszewski v. Town of Saugus*, 337 Mass. 140, 148 N.E.2d 644 (1958) (failure to use nonconforming use for four years may be abandonment).  
 ☞ *Morin v. Board of Appeals of Leominster*, 352 Mass. 620, 227 N.E.2d 466 (1967) (installation of heat and electricity in a nonconforming structure is not a change in nature and purpose of use).  
 ☞ *MP Corp. v. Planning Bd. of Leominster*, 27 Mass. App. Ct. 812, 545 N.E.2d 44 (1989) (where preliminary subdivision plan filed prior to proposed zoning amendment, but definitive plan denied, plan still governed by earlier zoning where there was an appeal and denial was annulled).  
 ☞ *Murphy v. Board of Selectmen of Manchester*, 1 Mass. App. Ct. 407, 298 N.E.2d 885 (1973) (zoning freeze for 54 apartments, 24 of which were built prior to zoning change, is not preserved by filing appeal, but is only preserved by good faith continuation of construction).  
 ☞ *Murphy v. Kotlik*, 34 Mass. App. Ct. 410 (1976) (purpose of zoning is to foster creation of conforming lots).  
 ☞ *Murphy v. Town of Duxbury*, 40 Mass. App. Ct. 513 (1996) (discussing that permission to build a new house outside original footprint is complex and confusing issue for municipality).  
 ☞ *Murray v. Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473 (1986) (requirements for special permit generally not applicable to expansion of nonconforming use or structure under section 6 finding).  
 ☞ *National Amusement, Inc. v. Commission of Inspect. Services Dept. of Boston*, 26 Mass. App. Ct. 80, 523 N.E.2d 789 (1988) (in interpreting Boston zoning ordinance court held that new zoning applied to use, despite delay in its adoption).  
 ☞ *Nichols v. Board of Zoning Appeal of Cambridge*, 26 Mass. App. Ct. 631, 530 N.E.2d 1257 (1988) (finding is required to alter nonconforming structure to change from one conforming use to another conforming use).  
 ☞ *Oakham Sand & Gravel Corp. v. Oakham*, 54 Mass. App. Ct. 80, 763 N.E.2d 529 (2002) (sand and gravel operation had changed from seasonal to year-round operation and such increase in intensity of use was qualitative change requiring a section 6 finding in order to continue).


 *Papalia v. Inspector of Bldgs. of Watertown*, 351 Mass. 176, 217 N.E.2d 911 (1966) (proceeding in good faith in order to preserve six month zoning exemption means that any delays must be related to construction process and not personal problems, and constructing only footers for project does not preserve exemption).


 *Pasqualino v. Board of Appeals of Wareham*, 14 Mass. App. Ct. 989, 440 N.E.2d 523 (1982) (zoning freeze period for definitive subdivision plan is stayed during litigation or other actions by municipality which prevent continuation of construction).


 *Paul v. Selectmen of Scituate*, 301 Mass. 365 (1945) (interior remodeling and enclosing of porches in a nonconforming structure is not a change in nature and purpose of use).


 *Perry v. Building Inspector of Nantucket*, 4 Mass. App. Ct. 467 (1976) (where no dimensional requirements for use, municipality may impose those applied to similar uses in district or those imposed on same use in different zoning district, even if significantly limits use as long as there is not virtual prohibition of use).


 *Pioneer Insulation & Modernizing Corp. v. City of Lynn*, 331 Mass. 560 (1954) (must have intent to abandon nonconformity no matter how long use or structure has not been in use).


 *Planning Bd. of Norwell v. Serena*, 27 Mass. App. Ct. 689, 542 N.E.2d 314 (1989), *affirmed*, 550 N.E.2d 1390 (Mass. 1990) (landowner will not be permitted to create a dimensional nonconformity if can merge adjoining lots to avoid or diminish a nonconformity; transfer of two lots in anticipation of zoning change which would make lots nonconforming did not protect lots where lots transferred to husband and wife and trust with husband and wife as beneficiaries were still held in common ownership).

 *Planning Bd. of Reading v. Board of Appeals of Reading*, 333 Mass. 657, 132 N.E.2d 386 (1956) (reconstruction of nonconforming building not permitted unless allowed under local zoning).

 *Powers v. Building Inspector of Barnstable*, 363 Mass. 648, 296 N.E.2d 491 (1973) (provides three-part test to determine if change or alteration of nonconforming use protected from municipal approval).

 *Preston v. Board of Appeals of Hull*, 51 Mass. App. Ct. 236, 744 N.E.2d 1126 (2001) (applying common-law merger doctrine to require two adjoining and undersized lots purchased by the same owner at different times to be combined for purposes of constructing a house thereon, despite the fact that at the time of the increased zoning the lots were separately owned).

 *Raia v. Board of Appeals of No. Reading*, 4 Mass. App. Ct. 318, 347 N.E.2d 694 (1976) (may not obtain building permits when create two nonconforming lots out of a conforming lot).

 *Revere v. Rowe Contracting Co.*, 362 Mass. 884 (1972) (right to continue nonconformity is not personal to owner as runs with the land).

☞ *Riley v. Janco Cent., Inc.*, 38 Mass. App. Ct. 984, 652 N.E.2d 631 (1995) (driveway easement was pre-existing use so owner did not have to comply with subsequent greenbelt requirement).  
 ☞ *Rockwood v. Snow Inn Corp.*, 409 Mass. 361 (1991) (any extension or structural change to a nonconforming structure must comply with current zoning or be permitted by a variance in addition to obtaining a finding under section 6).  
 ☞ *Samson v. San-Land Dev. Corp.*, 17 Mass. App. Ct. 977, 458 N.E.2d 1201, rev. denied, 391 Mass. 1104, 461 N.E.2d 1219 (1984) (three-year zoning freeze on approval not required plans suspended during appeal; use permitted by right is protected from change that requires special permit).  
 ☞ *Sangiolo v. Board of Aldermen of Newton*, 57 Mass. App. Ct. 911, 738 N.E.2d 830 (2003) (upholding section 6 finding to allow replacement of nonconforming television tower with a digital, high-definition facility required by the FCC; FCC regulations preempt municipal requirements).  
 ☞ *Seiber v. Zoning Bd. of Appeals of Wellfleet*, 16 Mass. App. Ct. 985, 454 N.E.2d 108 (1983) (an undersized lot is exempt from increases in zoning requirements and is buildable if it was in separate ownership at the time of the zoning change, as evidenced by an instrument placing it into separate ownership, such as a deed; complied with zoning requirements when created, if any; and has 5,000 square feet of area and 50 feet of frontage).  
 ☞ *Selectmen of Blackstone v. Tellestone*, 4 Mass. App. Ct. 311 (1976) (applying three-prong "Powers" test to change in nonconformity).  
 ☞ *Selectmen of Wrentham v. Monson*, 355 Mass. 715 (1969) (applicant has burden of showing use was lawfully in existence).  
 ☞ *Seltzer v. Board of Appeals of Orleans*, 24 Mass. App. Ct. 521 (1987) (for purposes of zoning, adjoining, commonly owned, nonconforming lots must be merged in order to minimize nonconformities; municipality may be able to grant greater exemption than that afforded by statute).  
 ☞ *Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury*, 409 Mass. 317, 565 N.E.2d 1214 (1991) (use which existed before zoning, but now would require a special permit is a pre-existing nonconforming use; municipality may choose a special permit procedure to allow for change, extension, or alteration of nonconforming uses and structures or simply the section 6 finding by the permit granting authority).  
 ☞ *Smith v. Board of Appeals of Needham*, 339 Mass. 399, 159 N.E.2d 324 (1959) (discussing effect of zoning amendment on recorded subdivision plan).  
 ☞ *Smith v. Building Com'r of Brookline*, 367 Mass. 765, 328 N.E.2d 866 (1975) (building constructed under unlawful permit is not lawfully in existence).  
 ☞ *Spector v. Building Inspect. of Milton*, 250 Mass. 63 (1924) (a permit must be issued before the zoning change to obtain nonconforming protection, as the filing of a permit application will not provide such protection).  
 ☞ *Stampfl v. Zoning Bd. of Appeals of Norwood*, 33 Mass. App. Ct. 354, 599 N.E.2d 646 (1992) (owner of lot with nonconforming use subject to buffer

restriction did not need to extend buffer when abutting lot was rezoned residential in its entirety).

📖 *Strazzulla v. Building Inspector of Wellesley*, 357 Mass. 694, 260 N.E.2d 163 (1970), *cert. denied*, 400 U.S. 1004 (1971) (sign is a structure and change of lettering is an alteration of structure for purposes of altering nonconforming structure).

📖 *Sturges v. Chilmark*, 380 Mass. 246, 402 N.E.2d 1346 (1980) (lots that come together at one point only are not adjoining; purpose of grandfather protection is to protect once valid lot from becoming unbuildable).

📖 *Sullivan v. Board of Appeals of Harwich*, 15 Mass. App. Ct. 286 (1983) (change from summer rental to condominium use is not change in nonconforming use, only change in ownership).

📖 *Sylvania Elec. Products v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962) (land use may be regulated by zoning and other regulations).

📖 *Tamerlane Realty Trust v. Board of Appeals of Provincetown*, 23 Mass. App. Ct. 450 (1987) (in determining whether nonconforming use may expand, nature of use at time zoning took effect is material to outcome of case).

📖 *Texstar Const. Corp. v. Board of Appeals of Dedham*, 26 Mass. App. Ct. 977, 528 N.E.2d 1186 (1988) (board of appeal's decision to deny special permit to expand nonconforming use was not abuse of its discretion where board found that increased use would be detrimental to the neighborhood).

📖 *Town of Canton v. Bruno*, 361 Mass. 598, 282 N.E.2d 87 (1972) (use of land in violation of zoning did not create nonconforming use).

📖 *Town of Kingston v. Hamilton*, 2 Mass. App. Ct. 73, 321 N.E.2d 832 (1975) (town may regulate earth removal under separate by-law that does not afford nonconforming protection).

📖 *Trustees of Boston College v. Board of Aldermen of Newton*, 58 Mass. App. Ct. 794, 793 N.E.2d 387 (2003) (case involving detailed and complex facts concerning reasonable regulations applied to educational use in which court suggests that a section 6 finding for a nonconformity might be permissible).

📖 *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 613 N.E.2d 893 (1992) (if lots shown on a plan are subject to zoning freeze and zoning changes during the freeze while lots are still commonly owned, a building permit must be obtained before expiration of the zoning freeze or the merger doctrine will apply).

📖 *Tweed v. Zoning Bd. of Appeals of Tisbury*, 28 Mass. App. Ct. 1106 (1989) (authorizing special permit to increase one nonconformity and decrease another).

📖 *Vassalotti v. Board of Appeals of Sudbury*, 348 Mass. 658, 204 N.E.2d 924 (1965) (multiple adjoining lots must be merged and become one lot for zoning purposes).

📖 *Vazza v. Board of Appeals of Brockton*, 359 Mass. 256, 269 N.E.2d 270 (1971) (owners may rely on zoning for purposes of determining allowed uses).

☞ *Vetter v. Zoning Bd. of Appeal of Attleboro*, 330 Mass. 628, 116 N.E.2d 277 (1953) (must merge undersized adjoining and commonly owned lots in order to minimize nonconformity).  
 ☞ *Vokes v. Avery W. Lowell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *rev. denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (  
 ☞ *Walker v. Board of Appeals of Harwich*, 388 Mass. 42, 445 N.E.2d 141 (1983). (zoning required special permit to change nonconforming use or structure).  
 ☞ *Ward & Johnson, Inc. v. Planning Bd. of Whitman*, 343 Mass. 466 (1962) (preliminary plan followed by timely definitive plan is governed by zoning in effect, that is zoning which has been adopted, at time of plan submission).  
 ☞ *Watros v. Greater Lynn Mental Health and Retardation Ass'n, Inc.*, 421 Mass. 106, 653 N.E.2d 589 (1995) (to make sense, must read section 6 finding as follows: 'shall not be substantially more detrimental than the existing, nonconforming structure or use to the neighborhood').  
 ☞ *Wayland v. Lee*, 325 Mass. 637 (1950) (ordinary improvements and modernization to an existing use do not constitute a change in the original nature and purpose of the use).  
 ☞ *Whelan v. Zoning Bd. of Appeals of Norfolk*, 430 Mass. 1009, 722 N.E.2d 969 (2000) (three-year, not eight-year freeze applies to land shown on approval not required plans).  
 ☞ *Whitten v. Board of Appeals of Woburn*, 38 Mass. App. Ct. 949 (1995) (a use subject to a license may not be a lawful use for zoning purposes).  
 ☞ *Willard v. Board of Appeals of Orleans*, 25 Mass. App. Ct. 15, 514 N.E.2d 369 (1987) (second sentence of the first paragraph should read 'shall not be substantially more detrimental than the existing nonconforming structure or use to the neighborhood'; fourth paragraph exemption applies to vacant land only; board may consider other factors set out in zoning in making determination concerning "substantial more detrimental").  
 ☞ *Wolk v. Planning Bd. of Stoughton*, 4 Mass. App. Ct. 812 (1976) (three-year zoning freeze from use changes applies to land shown on approval not required plan).  
 ☞ *Wright v. Board of Appeals of Falmouth*, 24 Mass. App. Ct. 409 (1987) (if lots shown on a plan are subject to zoning freeze and zoning changes during the freeze while lots are still commonly owned, a building permit must be obtained before expiration of the zoning freeze or the merger doctrine will apply).  
 ☞ *Wrona v. Board of Appeals of Pittsfield*, 338 Mass. 87 (1958) (may not permit extension of nonconformity that violates zoning without a variance).

## **CAUTIONARY NOTES**

✎ The owner of a lot who does not comply with the time constraints of this section may lose the right to construct on a vacant lot that no longer complies with zoning.

✎ The merger doctrine requires all adjoining vacant lots that are commonly owned and which do not qualify for any zoning exemption to be merged for zoning purposes if the lots did not comply with zoning at the time of a zoning change and did not retain their separate identity.

## **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

🔗 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

📁 The Land Use Manager, Vols. I – II

📁 The Land Use Manager, Vols. VI -- VII

📁 The Land Use Manager, Selected Articles from July 1991 through March 1999.

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 1A, 9, 11, 13, & 15 (2004).

## SECTION 7.

### ENFORCEMENT OF ZONING REGULATIONS; VIOLATIONS; PENALTIES; JURISDICTION OF SUPERIOR COURT



#### **THE LAW**

The inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law. If the officer or board charged with enforcement of zoning ordinances or by-laws is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request.

No local zoning law shall provide penalty of more than three hundred dollars per violation; provided, however, that nothing herein shall be construed to prohibit such laws from providing that each day such violation continues shall constitute a separate offense. No action, suit or proceeding shall be maintained in any court, nor any administrative or other action taken to recover a fine or damages or to compel the removal, alteration, or relocation of any structure or part of a structure or alteration of a

#### **ANNOTATIONS**

*Building inspector/  
commissioner/  
local inspector to enforce  
zoning*

*Permit to be withheld if  
there is a violation of zoning*

*Any person may request  
enforcement action in  
writing*

*Zoning enforcement officer  
or board to respond to  
enforcement request within  
14 days*

*Penalty for violation of  
zoning may not exceed \$300  
per violation*

*Each day may be a separate  
violation*

|  |  |
|--|--|
| <p>structure by reason of any violation of any zoning by-law or ordinance except in accordance with the provisions of this section, section eight and section seventeen; provided, further, that if real property has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized to issue such permits, no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation of the provisions of this chapter, or of any ordinance or by-law adopted thereunder, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within six years next after the commencement of the alleged violation of law; and provided, further that no action, criminal or civil, the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation of the provisions of this chapter, or any ordinance or by-law adopted thereunder, or the conditions of any variance or special permit, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within ten years next after the commencement of the alleged violation. Such notice shall include names of one or more of the owners of record, the name of the person initiating the action, and adequate identification of the structure and the alleged violation.</p> <p>The superior court shall have the jurisdiction to enforce the provisions of this chapter, and any ordinances or by-laws adopted thereunder, and may restrain by injunction violations thereof.</p> | <p><i>Action to enforce against use zoning violation to commence within 6 years of violation or use protected</i></p> <p><i>Action to enforce against structural zoning violation to commence within 10 years of violation</i></p> <p><i>Superior Court has jurisdiction in zoning enforcement cases and may issue injunctions</i></p> |
|--|--|

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by St. 1984, c. 291; St. 1986, c. 557, § 55; St. 1987, c. 481, § 1; St. 1989, c. 341, § 21.

## **PERMISSIBLE/REQUIRED ACTIONS**

☛ Every municipality must have a zoning enforcement official, who may be one of the following:

- Inspector of buildings
- Building commissioner
- Local inspector appointed under the building code, or
- If none of the prior officials exists then
  - In a town, the board of selectmen or
  - Other official or board designated by local ordinance or by-law

☛ Permits are required for the following:

- Construction and reconstruction of a building or structure
- Structural change to a building or structure
- Alteration of a building or structure
- Extension of a building, structure, or use
- Moving of a building or structure
- New or changed use of a building, structure, or land

NOTE: A structure might include a sign or fence

☛ The zoning enforcement official is responsible for the following:

- Granting a permit if the use, building, or structure complies with zoning
- Withholding a permit if the use, building, or structure would be in violation of zoning
  - If zoning fails to specifically prohibit a use, such use cannot be deemed to be a permitted use.

☛ A zoning enforcement official may be requested in writing to enforce zoning against an alleged violation, and such official is required to notify the party making the request in writing, within 14 days after receipt of the request, indicating whether the official took an action or declined to act and the reasons for acting or declining to act.

- The 14 days is directory rather than mandatory
- If the enforcement official fails to take any action, the requesting party may seek a *Writ of Mandamus* asking the court to issue an order that compels the enforcement official to take an action.

☛ The zoning enforcement official may enforce zoning through a civil or criminal action by seeking the following:

- A fine as set forth under the zoning by-law or ordinance, which may provide for penalties of not more than \$300 per violation, with each day that the violation continues counting as a separate offense;
- A civil enforcement action filed with the superior court;
- A request for an injunction from the superior court to compel removal, alteration, or relocation of a structure or building or abandonment, limitation, or modification of a use in violation of zoning; or
- A criminal enforcement action.

➤ The zoning enforcement official may also enforce zoning through a non-criminal disposition ordinance/by-law as provided under M.G.L. Ch. 40, § 21D.

➤ When commencing a civil or criminal action, the enforcement official is required to record a notice of such action at the registry of deeds in which the land, building, or structure is located. The notice shall include the following:

- the names of one or more of the owners of record;
- the name of the person initiating the action;
- adequate identification of the building, structure, or land on which the use is located; and
- a description of the alleged violation.

➤ Zoning violations are subject to different statutes of limitations (legally known as statutes of repose) depending on whether they are a use or structural (includes buildings) violation and whether they were commenced or constructed under a valid building permit.

- If the zoning violation pertains to a use, building, or structure improved or used in accordance with a building permit issued by a duly authorized official then an enforcement action must take place within six years after the violation commences or such enforcement action is forever barred.
- If the zoning violation pertains to a use commenced without a building permit issued by a duly authorized official or commenced in derogation of what was permitted by the permit then there is no limit on the time in which the building official may commence an enforcement action.
- If there is a zoning ordinance/by-law violation, violation of a condition of a variance or special permit, or both, that pertains to a structure or building where a building permit was not issued by a duly authorized official then an enforcement action must take place within 10 years after the violation commences or such enforcement action is forever barred.


### **RELATED CASE LAW**


📖 *Alley v. Building Inspector of Danvers*, 354 Mass. 6, 234 N.E.2d 879 (1968) (even though plan endorsed approval not required and newly created lot conformed with zoning, a building inspector may not issue a building permit for the newly created lot if the remaining land or lots became nonconforming due to dividing the land to create the new lot).


📖 *Balcam v. Hingham*, 41 Mass. App. Ct. 260, 669 N.E.2d 461, *rev. denied*, 423 Mass. 1111, 672 N.E.2d 539 (1996) (statutory requirement for written notice by zoning enforcement official pertains to communication with third party seeking enforcement, but does not apply to communication with property owner allegedly in violation of zoning).


📖 *Bancroft v. Building Comm'r of Boston*, 257 Mass. 82, 153 N.E. 319 (1926) (may maintain petition to command building commissioner to deny permit he had verbally agreed to issue).


- ☞ *Banquer Realty Co. v. Acting Bldg. Comm'r of Boston*, 389 Mass. 565, 451 N.E.2d 422 (1983) (those seeking enforcement action must first exhaust administrative remedies at the municipal level before filing for judicial relief).
- ☞ *Beale v. Planning Bd. of Rockland*, 423 Mass. 690, 671 N.E.2d 1233 (1996) (an access road to serve a retail use is prohibited unless the underlying zoning district permits a retail use).
- ☞ *Beane v. H. K. Porter, Inc.*, 280 Mass. 538, 182 N.E. 823 (1932) (business use not permitted though not expressly prohibited by zoning and change to use also prohibited without permit).
- ☞ *Berliner v. Feldman*, 363 Mass. 767, 298 N.E.2d 153 (1973) (vague and ambiguous zoning by-law is void because it violates due process rights).
- ☞ *Board of Selectmen of Blackstone v. Tellestone*, 4 Mass. App. Ct. 810, 348 N.E.2d 110 (1976) (injunction to stop use in violation of zoning is typical relief, but court may order removal of building where no use is permissible).
- ☞ *Board of Selectmen of Tewksbury v. Granfield*, 17 Mass. App. Ct. 1011, 460 N.E.2d 199 (1984) (municipal board must first seek local administrative remedies before filing for judicial relief in the form of an injunction or mandamus).
- ☞ *Board of Selectmen of Truro v. Outdoor Adver. Bd.*, 346 Mass. 754, 196 N.E.2d 218 (1964) (must first exhaust administrative remedies before seeking enforcement action to prohibit billboard licensed by Outdoor Advertising Board).
- ☞ *Bob Ware's Food Shops, Inc. v. Brookline*, 349 Mass. 385, 208 N.E.2d 505 (1965) (judicial relief may not be sought until an enforcement request is made and building official declines to enforce).
- ☞ *Boston v. Pagliaro*, 1 Mass. App. Ct. 117, 294 N.E.2d 531 (1973) (building commissioner had duty to determine if building complied with zoning before issuing building permit and party was not entitled to mandamus unless complied with zoning).
- ☞ *Boulter Bros. Const. Co. v. Zoning Bd. of Appeals of Norfolk*, 45 Mass. App. Ct. 283, 697 N.E.2d 997 (1998) (because by-law was silent on addressing a lot in two different towns, the acreage from both towns could be used to determine compliance with the zoning by-law and a building permit should have been issued).
- ☞ *Bradshaw v. Board of Appeals of Sudbury*, 346 Mass. 558, 194 N.E.2d 716 (1963) (board of appeals had no power to review grant of liquor license by selectmen).
- ☞ *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 204 N.E.2d 513 (1965) (existence of building permit does not preclude enforcement of zoning; landowner may seek mandamus where notice from town could be construed as courteous notice of intent not to act on enforcement request rather than a decision; enforcement officer of town to be named as party in enforcement action).
- ☞ *Brett v. Building Comm'r of Brookline*, 250 Mass. 73, 145 N.E.2d 269 (1924) (zoning may be enforced by injunction).


 *Building Comm'r of Medford v. C. & H. Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946) (even if city had been dumping refuse on owner's land, owner was required to obtain a permit to continue the use; a building permit cannot legalize a structure or use that violates zoning).


 *Building Inspect. of Falmouth v. Haddad*, 369 Mass. 452, 339 N.E.2d 892 (1976) (may enjoin use of building for 20-unit motel when building permit allowed only single family home).


 *Building Inspect. of Lancaster v. Sanderson*, 372 Mass. 157, 360 N.E.2d 1051 (1977) (owner must still pursue other licenses and approvals even if use is permitted by zoning; municipality cannot be estopped from enforcing zoning to prevent use of expanded runway constructed without approval despite acts of its officers charged with enforcement and its selectmen).


 *Building Inspect. of Lowell v. Stoklosa*, 250 Mass. 52, 145 N.E. 262 (1924) (zoning may be enforced by injunction).


 *Burlington Sand & Gravel v. Town of Harvard*, 31 Mass. App. Ct. 261, 576 N.E.2d 707 (1991) (to stop zoning violations municipality may seek injunction in superior court, fines by complaint in district court or by indictment in superior court, or by noncriminal disposition under municipal ordinance or by-law; fines may be assessed while appeal is pending).


 *Cape Resort Hotels v. Alcoholic Licensing Bd. of Falmouth*, 385 Mass. 205, 431 N.E.2d 213, *appeal after remand*, 388 Mass. 1013, 446 N.E.2d 1070 (1982) (changes to nonconforming use without permit did not prevent zoning enforcement, and laches and estoppel for failure of the enforcing officer to act in a timely manner were not adequate defenses to such enforcement).















 *Caputo v. Board of Appeals of Somerville*, 330 Mass. 107, 111 N.E.2d 674 (1953) (there is a statutory duty to issue a building permit for a building that complies with zoning).


 *Castelli v. Board of Selectmen of Seekonk*, 15 Mass. App. Ct. 711, 448 N.E.2d 768 (1983) (building official should not act in unreasonable and arbitrary manner and should not revoke permit without affording owner good faith right to dispute such revocation; selectmen and other town officers may not interfere with enforcement of zoning by building inspector).


 *Church v. Building Inspect. of Natick*, 343 Mass. 266, 178 N.E.2d 272 (1961) (must first appeal to board of appeals before can seek writ of mandamus to compel building inspector to issue permit).


 *City of Haverhill v. Di Burro*, 337 Mass. 230, 148 N.E.2d 642 (1958) (operation of banquet hall for private parties was not accessory to permitted tourist home use in a residential zoning district; private property owners may not seek injunction, as may only ask for mandamus to compel enforcing officer to act).


 *Clark & Clark Hotel Corp. v. Building Inspect. of Falmouth*, 20 Mass. App. Ct. 206, 479 N.E.2d 699 (1985) (must first exhaust administrative remedies before bringing court action against town building inspector for stopping meeting hall use in motel).


 *Cochran v. Roemer*, 287 Mass. 500, 192 N.E. 58 (1934) (despite issuance of permit and erection of building there may still be violation of zoning).  
 *Colabufalo v. Public Bldgs. Comm'r of Newton*, 336 Mass. 205, 143 N.E.2d 477 (1957) (discussing contempt petition for failure of building commissioner to obey order of superior court).  
 *Commonwealth v. A. Graziano*, 35 Mass. App. Ct. 69, 616 N.E.2d 825, *rev. denied*, 416 Mass. 1103, 621 N.E.2d 380 (1993) (there is no automatic stay of zoning enforcement action while proceedings before permit granting authority are pending, and building inspector does not have to exhaust administrative remedies before proceeding with criminal prosecution for zoning violation).  
 *Commonwealth v. Atlas*, 244 Mass. 78, 138 N.E. 243 (1923) (excavation of cellars for proposed building constituted construction).  
 *Commonwealth v. Porrazzo*, 25 Mass. App. Ct. 169, 516 N.E. 1182 (1987) (must give party 30 days to correct zoning violation before commencing criminal action in district court; both district and superior courts have jurisdiction over criminal complaints for zoning violations).  
 *Commonwealth v. Protami*, 354 Mass. 210, 236 N.E.2d 649 (1968) (invalidating ordinance that permitted selectmen to regulate auto maintenance use in residential district).  
 *Commonwealth v. Sostilio*, 351 Mass. 419, 221 N.E.2d 764 (1966) (town may impose criminal penalty for violation of zoning).  
 *Cullen v. Building Inspect. of N. Attleborough*, 353 Mass. 671, 234 N.E.2d 727 (1968) (public has right to have zoning enforced).  
 *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124, 807 N.E.2d 245 (2004) (ruling that because the initial installation did not comply with what was approved, the 10-year statute of limitations did not apply and did not render the prior tanks lawful).  
 *Davidson v. Board of Selectmen of Duxbury*, 358 Mass. 64, 260 N.E.2d 695 (1970) (selectmen may deny license for filling station because of traffic problems despite zoning approval ordered by court).  
 *Dinsky v. Framingham*, 386 Mass. 801 (1982) (building inspector cannot be held personally liable in enforcing land use laws, as under public duty doctrine, duty of inspector is to the public at large and not individuals).  
 *Dion v. Board of Appeals of Waltham*, 344 Mass. 547, 183 N.E.2d 479 (1962) (denial of building permit is not prerequisite to filing petition for variance).  
 *Dressler v. Inspector of Bldgs. of Southbridge*, 348 Mass. 729, 345 Mass. 158 (1962) (estoppel may not prevent municipality from enforcing zoning even if delay in such enforcement).  
 *Dufault v. Millennium Power Partners*, 49 Mass. App. Ct. 137, 727 N.E.2d 89 (2000) (decision of board conducting site plan review cannot be appealed to board of appeals as is not decision of administrative board; must first apply for building permit and be denied and then appeal, including an appeal of any conditions that were imposed as a result of site plan review).


 *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450, 488 N.E.2d 6 (1986) (use is protected from subsequent enforcement action if the use, even if in violation of zoning, was commenced under a building permit and no timely appeal or enforcement action was brought within six years of the alleged violation).


 *E.A.D. Realty Corp. v. Board of Selectmen of Shrewsbury*, 6 Mass. App. Ct. 824, 371 N.E.2d 446 (1977) (board of selectmen may deny license for muffler shop even if board of appeals permitted use).


 *Elio v. Zoning Bd. of Appeals of Barnstable*, 55 Mass. App. Ct. 424, 771 N.E.2d 199 (2002) (discussing response of building official to request for enforcement and 14 day time limit for response as directory, not mandatory).


 *Evans v. Building Inspect. of Peabody*, 5 Mass. App. Ct. 805, 360 N.E.2d 1286 (1977) (six year statute of limitations under this section barred enforcement of zoning to prohibit access road to shopping center through residential zoning district that was constructed under building permit).


 *Fellsway Realty Corp. v. Building Comm'r of Medford*, 332 Mass. 471, 125 N.E.2d 791 (1955) (owner has right to improve premises as long as complies with zoning).


 *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962) (defense of estoppel may not prevent enforcement of zoning, even if delayed).


 *Fitch v. Board of Appeals of Concord*, 55 Mass. App. Ct. 748, 774 N.E.2d 1107 (2002) (section 7 provides an alternative means of enforcing zoning either before or after construction has commenced under a permit).

 *Flynn v. Seekonk*, 352 Mass. 71, 223 N.E.2d 690 (1967) (private persons may not attempt to enforce zoning through proceeding to compel revocation of permit by selectmen and may not seek mandamus unless no other remedy exists).

 *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 415 N.E.2d 840 (1981) (building commissioner could not expand powers based on rejected zoning amendment and could not deny building permit because permitted use did not promote life).

 *Garabedian v. Westland*, 59 Mass. App. Ct. 427, 796 N.E.2d 439 (2003) (hangar is protected used under six year statute of limitations, but airstrip which is not a structure and is not protected under the 10 year statute of limitations, but is protected from an enforcement action based on the defense of laches because the abutters waited 10 years before seeking zoning enforcement).

 *General Elect. Co. v. Maurice Callahan & Sons*, 2 Mass. App. Ct. 124, 309 N.E.2d 209 (1974) (adoption of new zoning did not render case moot where billboard would still violate amended zoning).

 *Goldlust v. Board of Appeals of No. Andover*, 27 Mass. App. Ct. 1183, 541 N.E.2d 1019 (1989) (setback under split lot zoning provision of local zoning by-law to be measured from zoning district line and not property line).

☞ *Green v. Board of Appeals of Provincetown*, 26 Mass. App. Ct. 469, 529 N.E.2d 159 (1988), *rev. on other grounds*, 404 Mass. 571, 536 N.E.2d 584 (1989) (a non-aggrieved person may seek a zoning enforcement action, but may not file an administrative appeal).

☞ *Gricus v. Superintendent & Inspect. of Bldgs. of Cambridge*, 345 Mass. 687, 189 N.E.2d 209 (1963) (mandamus is proper remedy to compel building inspector to enforce zoning).

☞ *Harrison v. Building Inspect. of Braintree*, 350 Mass. 559, 215 N.E.2d 773 (1966) (where building inspector failed to act on request for enforcement a writ of mandamus issued by the court and ordering enforcement was an appropriate remedy).

☞ *Harrison v. Textron*, 367 Mass. 540, 328 N.E.2d 838 (1975) (after six years may not prevent use of access road to industrial property in existence under valid permit).

☞ *Hingham v. B. J. Pentabone, Inc.*, 354 Mass. 537, 238 N.E.2d 534 (1968) (town could seek equitable relief or have assessed costs to require landowner to correct unsightly condition of land where town had permitted removal of substantial soil based on promise of restoration).

☞ *Hull v. Town of Belmont*, 309 Mass. 274, 24 N.E.2d 692 (1941) (superior court has jurisdiction on appeal for permit or variance and land court has jurisdiction to determine validity of zoning).

☞ *Hume v. Building Inspect. of Westford*, 355 Mass. 179, 243 N.E.2d 189 (1969) (existence of remedy for nuisance abatement does not preclude enforcement of zoning).

☞ *Iddings v. Board of Appeals of Mansfield*, 356 Mass. 742, 255 N.E.2d 604 (1970) (may deny building permit for lots without frontage that were created by subdivision).

☞ *Kennedy v. Building Inspect. of Randolph*, 351 Mass. 550, 222 N.E.2d 860 (1967) (owners of abutting land may seek mandamus to obtain enforcement action when no other remedy exists).

☞ *Kenney v. Building Comm'r of Melrose*, 315 Mass. 291, 52 N.E.2d 683 (1944) (building inspector must issue permit for small conservatory accessory to permitted residential use).

☞ *Kirker v. Board of Appeals of Raynham*, 33 Mass. App. Ct. 111, 596 N.E.2d 398 (1992) (cannot deny building permit for farm building even if farm use would derogate from purpose of zoning).

☞ *Knowlton v. Inhabitants of Swampscott*, 280 Mass. 69, 181 N.E. 849 (1932) (equitable relief could not be sought in claim of unconstitutional zoning).

☞ *Lancaster v. Sanderson*, 372 Mass. 157 (1977) (municipality not estopped by acts of its building official from enforcing zoning).

☞ *Langevin v. Superintendent of Public Bldgs. of Worcester*, 5 Mass. App. Ct. 892, 369 N.E.2d 739 (1977) (meaning of words should be determined according to common and approved usage).

- 📖 *Lexington v. Bean*, 272 Mass. 547, 172 N.E. 867 (1930) (town was proper party in action to compel building inspector to enforce zoning).
- 📖 *Leominster Materials Corp. v. Board of Appeals of Leominster*, 42 Mass. App. Ct. 458 (1997) (absence of provision that prohibits a use does not make use lawful).
- 📖 *Lexington v. Govenar*, 295 Mass. 31, 3 N.E.2d 19 (1936) (injunction was appropriate remedy to obtain removal of business sign in residential district).
- 📖 *Lexington v. Menotomy Trust Co.*, 304 Mass. 283, 23 N.E.2d 559 (1939) (stripping of loam from land was not accessory to farm use and town could seek injunction to prevent such zoning violation).
- 📖 *Lincoln v. Giles*, 317 Mass. 185, 57 N.E.2d 554 (1944) (granting of license by selectmen does not authorize use under zoning).
- 📖 *Lord v. Zoning Bd. of Appeals of Somerset*, 30 Mass. App. Ct. 226, 567 N.E.2d 954 (1991) (protection from enforcement under 10 year statute of limitations for structural violations where no permit was issued does not afford similar protection for use violations where no permit was issued, as six year statute of limitations for use violations applies only when permit was issued).
- 📖 *Madaket Realty v. Board of Appeals of Nantucket*, 402 Mass. 137, 521 N.E.2d 723 (1988) (based on Nantucket zoning, town intended to allow time sharing in single family, but not multi-family housing based on use of terms "dwelling" and "dwelling unit").
- 📖 *Malden v. Werlin Realty*, 349 Mass. 623, 211 N.E.2d 338 (1965) (property owner may not violate zoning because it relied on opinion of city solicitor to building inspector).
- 📖 *Marblehead v. Deery*, 356 Mass. 532, 254 N.E.2d 234 (1969) (town is not estopped from enforcing zoning, even though selectmen approved plan for new private way which was subsequently determined to be in violation of zoning).
- 📖 *Mariano v. Building Inspect. of Marlborough*, 353 Mass. 663, 233 N.E.2d 903 (1968) (citizens may seek mandamus where enforcing officers will not act to revoke building permit).
- 📖 *McDonald's Corp. v. Board of Selectmen of Randolph*, 9 Mass. App. Ct. 830, 399 N.E.2d 38 (1980) (zoning is enforced by building inspector, not selectmen through building inspector; planning board has no role in enforcing zoning or approving plans for uses permitted by right).
- 📖 *McDonald's Corp. v. Seekonk*, 12 Mass. App. Ct. 351, 424 N.E.2d 1136 (1981) (before seeking judicial relief for denial of permit to construct parking, owner of property must first appeal building official's decision to the zoning board of appeals).
- 📖 *Meadows v. Town Clerk of Saugus*, 333 Mass. 760, 133 N.E.2d 498 (1956) (granting of dog kennel license by town clerk does not authorize use under zoning).
- 📖 *Moore v. Swampscott*, 26 Mass. App. Ct. 1008, 530 N.E.2d 809 (1988) (in split lot case, portion of land in more restricted zone may be used to satisfy

frontage in less restrictive zone, as long as active use, which is not permitted in more restrictive zone takes place entirely within the less restrictive zone).

☞ *Morganelli v. Building Inspect. of Canton*, 7 Mass. App. Ct. 475, 388 N.E.2d 708 (1979) (zoning to be enforced by building inspector or other municipal official or board charged with such enforcement; no private action for direct enforcement exists).

☞ *Nelson v. Belmont*, 274 Mass. 35, 174 N.E. 320 (1931) (after court orders issuance of permit, building inspector may only determine if plans are proper before issuing permit).

☞ *Neuhaus v. Building Inspector of Marlborough*, 11 Mass. App. Ct. 230, 415 N.E.2d 235 (1981) (to exhaust administrative remedies, a person may be obligated to seek an enforcement action and should give notice to person against whom enforcement is sought).

☞ *New England LNG Co. v. Fall River*, 368 Mass. 259, 331 N.E.2d 536 (1975) (zoning could not prohibit gas facility that had been approved by Department of Public Utilities).

☞ *Norcross v. Board of Appeal of Build., Dept. of Boston*, 255 Mass. 177, 150 N.E. 887 (1926) (cannot grant permit in excess of height requirements in zoning).

☞ *O'Brien v. Turner*, 255 Mass. 84, 150 N.E. 886 (1926) (zoning may be enforced by injunction).

☞ *Ouellette v. Building Inspect. of Quincy*, 362 Mass. App. 272, 285 N.E.2d 423 (1972) (building inspector may not refuse to issue building permit because of proposed zoning amendment; mandamus cannot issue if there is adequate administrative relief).

☞ *Parrish v. Board of Appeal of Sharon*, 351 Mass. 561, 223 N.E.2d 81 (1967) (selling of fruit punch at dairy farm violated zoning's prohibition of commercial uses).

☞ *Paul v. Selectmen of Scituate*, 301 Mass. 365, 17 N.E.2d 193 (1938) (as long as structural changes do not change purpose of nonconforming use, such use may continue).

☞ *Pitman v. Medford*, 312 Mass. 618, 45 N.E.2d 973 (1943) (discussing governmental capacity of municipality to prosecute a lawsuit to enforce local zoning).

☞ *Planning Bd. of Nantucket v. Board of Appeals of Nantucket*, 15 Mass. App. Ct. 733, 448 N.E.2d 778, rev. denied, 389 Mass. 1104, 451 N.E.2d 1167 (1983) (approval not required plan endorsed as both lots met frontage, but one lot left with existing buildings which violated ground coverage ratio requirements and building inspector had to treat two lots as one lot for zoning purposes and could not issue permit for new vacant lot due to zoning violation created on remaining lot with existing buildings).

☞ *Pratt v. Building Inspect. of Gloucester*, 330 Mass. 344, 113 N.E.2d 816 (1953) (no permit to issue where stabling of horses was not listed as a permitted use in residential district).

- 📖 *Public v. Building Inspect. of Quincy*, 336 Mass. 152, 142 N.E.2d 767 (1957) (municipality not required to issue permit on nonconforming lot).
- 📖 *Robichaud v. Board of Appeals of Methuen*, 6 Mass. App. Ct. 835, 372 N.E.2d 280 (1978) (board of appeals correctly refused to reverse building inspector's grant of a permit for greenhouses in an agricultural district, as greenhouses were included within such district as permitted uses).
- 📖 *Rose v. Board of Appeals of Wrentham*, 352 Mass. 301, 225 N.E.2d 63 (1967) (town not required to permit reconstruction of nonconforming accessory porch that was destroyed by fire; issuance of license does not mean use is permitted under zoning).
- 📖 *Saugus v. B. Perini & Sons*, 305 Mass. 403, 26 N.E.2d 1 (1940) (town may seek proper injunction to prevent gravel removal used in reconstruction of highway).
- 📖 *Seekonk v. Anthony*, 339 Mass. 49, 157 N.E.2d 651 (1959) (granting of building permit does not prevent enforcement when there is a zoning violation).
- 📖 *Selectmen of Ayer v. Planning Bd. of Ayer*, 3 Mass. App. Ct. 545, 336 N.E.2d 388 (1975) (planning board could not limit use of lots in subdivision to single family where multi-family was not prohibited).
- 📖 *Selectmen of Lancaster v. DeFelice*, 352 Mass. 205, 224 N.E.2d 218 (1967) (cement platform, concrete retaining wall, and door in wall were all structures, not ordinary repairs, and a building permit was required).
- 📖 *Shemeth v. Selectmen of Holden*, 317 Mass. 278, 58 N.E.2d 6 (1945) (cannot seek mandamus to compel issuance of permit under by-law while claiming by-law is invalid).
- 📖 *Siegemund v. Building Comm'r of Boston*, 259 Mass. 329, 156 N.E. 852 (1927) (landowner proceeds at own risk if continues construction after issuance of stop work order).
- 📖 *Siegemund v. Building Comm'r of Boston*, 263 Mass. 212, 160 N.E. 795 (1928) (zoning is binding on lender, even if lender did not know construction violated zoning).
- 📖 *Simeone Stone Corp. v. Board of Appeals of Bourne*, 345 Mass. 188, 186 N.E.2d 457 (1962) (variance was required to enlarge nonconforming building, even if building would be used for new use).
- 📖 *Smith v. Board of Appeals of Plymouth*, 340 Mass. 230, 163 N.E.2d 654 (1960) (enforcing officer, not private citizens, should seek equitable relief in enforcing zoning, as private property owner may seek mandamus to compel enforcement after exhausting administrative remedies).
- 📖 *Smith v. Building Comm'r of Brookline*, 367 Mass. 765, 328 N.E.2d 866 (1975) (temporary occupancy of building permitted while appeal pending).
- 📖 *Spector v. Building Inspect. of Milton*, 250 Mass. 63, 145 N.E. 265 (1924) (zoning may be enforced by injunction; zoning enacted between application for building permit and its issuance should be applied to permit).
- 📖 *Stefanick v. Planning Bd of Uxbridge*, 39 Mass. App. Ct. 418, 657 N.E.2d 475, *rev. denied*, 422 Mass. 1104, 661 N.E.2d 935 (1995) (must first exhaust local

administrative remedies and make written requesting to zoning enforcement official before seeking judicial enforcement action against such official).

☞ *Stow v. Pugsley*, 349 Mass. 329, 207 N.E.2d 908 (1965) (town is necessary party in enforcement action).

☞ *Tofias v. Butler*, 26 Mass. App. Ct. 89, 523 N.E. 2d 796 (1988) (in calculating lot coverage in split lot case, entire lot should be considered and not just portion of lot within zoning district where use is permitted).

☞ *Town of Canton v. Bruno*, 361 Mass. 598, 282 N.E.2d 87 (1972) (once town's invalid zoning was validated by statute, town could enforce zoning by injunction to prevent illegal earth removal).

☞ *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962) (estoppel may not prevent municipality from enforcing zoning even though it delayed enforcement for three months).

☞ *Town of Maynard v. Tomy*, 347 Mass. 397, 198 N.E.2d 291 (1964) (no one has a right to build under an illegally granted building permit).

*Turnpike Realty Co. v. Dedham*. 362 Mass. 221, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972).

☞ *Town of Natick v. Sostilio*, 358 Mass. 342, 264 N.E.2d 664 (1970) (even if person found not guilty of violating zoning in criminal proceeding, town may still seek injunctive relief to enforce zoning).

☞ *Town of Sterling v. Poulin*, 2 Mass. App. Ct. 562, 316 N.E.2d 737 (1974) (injunction to stop use in violation of zoning is typical relief if building can be used for another permissible use, but court may order removal of building where no other use is possible).

☞ *Turnpike Realty Co. v. Dedham*. 362 Mass. 221, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972) (zoning presumed valid and enforcement usually may not be refused).

☞ *Vagts v. Superintendent & Inspect. of Bldgs. of Cambridge*, 355 Mass. 711, 247 N.E.2d 366 (1969) (validity of zoning amendment presumed and should be enforced).

☞ *Vokes v. Avery W. Lowell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *rev. denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (person may request an enforcement action at any time, as there is no public notice of the issuance of a building permit, while appeal of building inspector's decision must be filed within 30 days of the order or decision being appealed; the 14 day time period in which the zoning enforcement officer is to respond to a written request is directory and not mandatory).

☞ *Wallace v. Building Inspector of Woburn*, 5 Mass. App. Ct. 786, 360 N.E.2d 664 (1977) (zoning to be enforced unless proven beyond reasonable doubt that is unconstitutional or in violation with state Zoning Act).

☞ *Whittemore v. Town Clerk of Falmouth*, 299 Mass. 64, 12 N.E.2d 187 (1937) (where zoning amendment found invalid, mandamus may issue to compel town clerk to expunge amendment from records and building inspector to enforce zoning in existence before invalid amendment).

- 📖 *Wilbur v. Newton*, 302 Mass. 38, 18 N.E.2d 365 (1938) (discussing permit for removal of sand and gravel).
- 📖 *Williams v. Inspector of Bldgs. of Belmont*, 341 Mass. 188, 168 N.E.2d 257 (1960) (defining term "structure").
- 📖 *Woods v. City of Newton*, 349 Mass. 373, 208 N.E.2d 508 (1965) (citizens could have requested zoning enforcement action and sought writ of mandamus if building official declined to enforce).
- 📖 *Wrentham v. Monson*, 355 Mass. 715, 247 N.E.2d 364 (1969) (failure to obtain license did not destroy protection as pre-existing, nonconforming use under zoning).
- 📖 *Wright v. Town of Shirley*, 5 Mass. App. Ct. 769, 359 N.E.2d 64 (1977) (findings that storage of 8,000 rubber tires was in violation of zoning did not warrant finding that use violated Wetlands Protection Act or laws concerning private dumping).
- 📖 *Wyman v. Zoning Bd. of Appeals of Grafton*, 47 Mass. App. Ct. 635, 715 N.E.2d 459, *rev. denied*, 430 Mass. 1112, 722 N.E.2d 977 (1999) (zoning enforcement official is responsible for enforcing conditions of special permits and variances).
- 📖 *Zocchi v. Town of Hinsdale*, 30 Mass. App. Ct. 803, 573 N.E.2d 1017 (1991) (building inspector not obligated to issue a permit where no indication of compliance with Wetlands Protection Act; building inspector did not owe property owner special duty of care).

## **SAMPLE ZONING ENFORCEMENT ORDINANCE/BY-LAW:**

(NOTE: These provisions could also be adopted as part of the zoning ordinance or by-law rather than as a separate ordinance or by-law. Remember in towns to submit the by-law to the attorney general for approval after adoption by town meeting).

**CITY/TOWN OF** \_\_\_\_\_

**Adopted** \_\_\_\_\_

### **ARTICLE I – AUTHORITY AND PURPOSE**

In accordance with Massachusetts General Laws Chapter 40, Section 21D and Chapter 40A, Section 7, the city/town of \_\_\_\_\_ adopts this ordinance/by-law to provide for enforcement of its zoning ordinance/by-law by all available legal means.

### **ARTICLE II – ENFORCEMENT OFFICER**

This ordinance/by-law shall be enforced by the (building inspector/building commissioner/local inspector/superintendent of buildings/\_\_\_\_\_). The enforcement officer may enforce zoning by using the enforcement processes set forth under Article III and Article VIII or by using the non-criminal disposition enforcement process set forth under Article V of this ordinance/by-law.

### **ARTICLE III – ENFORCEMENT PROCESS**

When the enforcement officer determines that there is a violation of the zoning ordinance/by-law, such officer shall proceed as follows:

- Issue a written notice of violation and deliver or mail it to the owner of the property ("the violator")
- If necessary issue a stop work order
- The notice shall contain the following:
  - The name and address of the violator;
  - The address or description of the building, structure or use of land where the violation is occurring;
  - A description of the violation;
  - The remedial action necessary to terminate the violation and bring the building, structure or use of land in compliance with the zoning ordinance/by-law;
  - A timetable for completion of the remedial action;
  - A statement of the penalties that will be applied or sought if there is non-compliance; and
  - A statement that the determination of violation may be appealed to the zoning board of appeals within 30 days of the notice of violation, as set forth under §§ 8 and 15 of M.G.L. Ch. 40A.

- The violation notice and stop work order, if any, shall remain in force until the zoning enforcement officer determines that the building, structure, or use has been brought into compliance with the zoning ordinance/by-law.

#### **ARTICLE IV – RESPONSE OF VIOLATOR TO ENFORCEMENT UNDER ARTICLE III**

Failure to address a notice of violation in a timely manner can result in civil, criminal, or monetary penalties in accordance with the enforcement measures authorized in this ordinance/by-law.

Any violator may be required to restore land to its undisturbed condition. In the event that restoration is not undertaken within a reasonable time after notice, the city/town may take necessary corrective action, the cost of which shall become a lien upon the property until paid.

#### **ARTICLE V – ENFORCEMENT PROCESS FOR NON-CRIMINAL DISPOSITION**

When the enforcement officer determines that there is a violation of the zoning ordinance/by-law, such officer shall proceed as follows:

- Issue a written notice of violation to the owner of the property (“the violator”)
- If necessary issue a stop work order
- The notice shall contain the following:
  - The name and address of the violator;
  - The address or description of the building, structure or use of land where the violation is occurring;
  - A description of the violation;
  - The time and place where the violator shall appear
    - The violator must appear before the clerk of the district court/ Boston municipal court/housing court having jurisdiction over the matter at any time during office hours, not later than twenty-one days after the date of such notice.
- Such notice shall be in triplicate and shall be signed by the enforcement officer, and shall be signed by the violator whenever practicable in acknowledgment that such notice has been received.
- The enforcement officer shall, if possible, deliver to the violator a copy of said notice at the time and place of the violation. If it is not possible to deliver a copy of said notice, then a copy shall be mailed to the violator’s last known address, within fifteen days after said violation. Such notice as so mailed shall be deemed a sufficient notice, and a certificate of the person so mailing such notice that it has been mailed in accordance with this Article and M.G.L. ch. 40, § 21D shall be prima facie evidence thereof.
- The enforcement officer shall give to the department head copies of each notice of violation that have not already been delivered or mailed as set forth under this Article.

- The department head shall retain and safely preserve one copy of the notice of violation and shall, at a time not later than the next court day after such delivery or mailing, deliver the other copy to the clerk of the court before which the violator has been notified to appear.

## **ARTICLE VI – RESPONSE OF VIOLATOR TO ENFORCEMENT UNDER ARTICLE V – NON-CRIMINAL DISPOSITION**

Any person notified to appear before the clerk of a district/Boston municipal/housing court as hereinbefore provided may so appear and confess the offense charged, either personally or through a duly authorized agent or may mail to the city/town clerk three hundred dollars for each day that the violation has continued since receipt of notice. Such payment shall if mailed be made only by postal note, money order or check. Upon receipt of such notice, the city/town clerk shall forthwith notify the court clerk of such payment and the receipt by the court clerk of such notification shall operate as a final disposition of the case.

Any person who desires to contest the violation alleged in the notice to appear may, within twenty-one days after the date of the notice, request a hearing in writing. Such hearing shall be held before a district/Boston municipal/housing court judge, clerk, or assistant clerk, as the court shall direct, and if the judge, clerk, or assistant clerk shall, after hearing, find that the violation occurred and that it was committed by the person so notified to appear, the person so notified shall be permitted to dispose of the case by paying the specific sum of money fixed as a penalty, or such lesser amount as the judge, clerk or assistant clerk shall order, which payment shall operate as a final disposition of the case. If the judge, clerk, or assistant clerk shall, after hearing, find that violation alleged did not occur or was not committed by the person notified to appear, that finding shall be entered in the docket, which shall operate as a final disposition of the case.

If any person notified to appear before the clerk of a district court fails to pay the required fine within the time specified or, having appeared, does not confess the offense before the clerk or pay the sum of money fixed as a penalty after a hearing and finding, the clerk shall notify the enforcement officer who issued the original notice, who shall determine whether to apply for the issuance of a complaint for the violation of the zoning ordinance/by-law.

## **ARTICLE VII – SPECIFIC PENALTY**

A violation of the city/town zoning ordinance/by-law shall subject the violator to a penalty of three hundred dollars per violation. Each day that the violation continues after notice to the violator shall constitute a separate violation. If, after correcting a violation, a violator returns to the same violation, such violation shall be treated as a continuing violation from the date of the first violation.

Any fines that are paid by a violator shall enure to the city/town for such use as said city/town may direct.

### **ARTICLE VIII – ADDITIONAL ENFORCEMENT REMEDIES**

The enforcement officer may also institute appropriate civil proceedings in superior court to enforce the provisions of the zoning ordinance/bylaw, to restrain by injunction any violation thereof, or both. The enforcing officer may also institute appropriate criminal proceedings in a court with statutory jurisdiction.

### **ARTICLE IX – SEVERABILITY**

The invalidity of any section or provision of this ordinance/by-law shall not invalidate any other section or provision thereof.

### **CAUTIONARY NOTES**

✓ The enforcing officer should pay attention to the statute of limitations provided in this section and ensure that use, building, or structural violations, where a permit was issued and followed, are enforced within the six year limit, and structural or building violations where a permit was not issued are enforced within the 10 year limit.

### **LINKS**

🔗 <http://www.ago.state.ma.us/> (attorney general web site; includes information concerning non-criminal zoning enforcement by-laws).

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

🔗 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 3, 6, 8, 9, 10, 13, 15, & 17 (2004).

## **SECTION 8.**

### **ADMINISTRATIVE APPEALS**



#### **THE LAW**

An appeal to the permit granting authority as the zoning ordinance or by-law may provide, may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer under the provisions of this chapter, by the regional planning agency in whose area the city or town is situated, or by any person including an officer or board of the city or town, or of an abutting city or town aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision of this chapter or any ordinance or by-law adopted thereunder.

#### **ANNOTATIONS**

*Appeal to permit granting authority*

*Person aggrieved*

*Who may appeal*

#### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3.

#### **PERMISSIBLE/REQUIRED ACTIONS**

➤ Administrative appeals to the permit granting authority – the zoning board of appeals (see sections 12 & 14) or the zoning administrator (see section 13) may be filed by the following:

- an aggrieved person
  - An aggrieved person is a natural person or entity that is able to demonstrate specific and personal harm or damage or violation of a private right, property interest, or legal interest.
- the regional planning agency in whose area the municipality is located
- an aggrieved officer of the municipality or of an abutting city or town
- an aggrieved board of the municipality or of an abutting city or town

➤ An administrative appeal may concern the following:















- inability to obtain a permit related to zoning

- inability to obtain an enforcement action from a municipal official charged with enforcing zoning
- an order or decision made by the inspector of buildings or other administrative official that may violate The Zoning Act or the municipal zoning ordinance or by-law.

NOTE: The process for filing appeals is covered under Section 15 of this Guidebook.

## **RELATED CASE LAW**

- 📖 *Atherton v. Selectmen of Bourne*, 337 Mass. 250, 149 N.E.2d 232 (1958) (discussing remedy of writ of mandamus to obtain zoning enforcement under law in effect prior to The Zoning Act).
- 📖 *Ayer v. Cram*, 242 Mass. 30, 136 N.E. 338 (1922) (owners of adjacent property whose property values were affected were persons aggrieved entitled to file appeal).
- 📖 *Balcam v. Hingham*, 41 Mass. App. Ct. 260 (1996) (building code board of appeals has no authority to hear a zoning appeal).
- 📖 *Bearce v. Zoning Bd. of Appeals of Brockton*, 351 Mass. 316, 219 N.E.2d 15 (1966) (ZBA may review building superintendent's decision to issue building permit).
- 📖 *Bedford v. Trustees of Boston University*, 25 Mass. App. Ct. 372, 518 N.E.2d 874 (1988) (abutter is presumed to be "person aggrieved," but such presumption can be rebutted so that abutter no longer has standing to appeal).
- 📖 *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 709 N.E.2d 815 (1999) (an abutter was not an aggrieved party where alleged community concern and not private concern).
- 📖 *Board of Selectmen of Tewksbury v. Granfield*, 17 Mass. App. Ct. 1011, 460 N.E.2d 199 (1984) (municipalities and officials must exhaust administrative remedies before filing court appeal).
- 📖 *Bowes v. Inspector of Builds. of Brockton*, 347 Mass. 295, 197 N.E.2d 676 (1964) (writ of mandamus was appropriate remedy where building inspector failed to act on enforcement request).
- 📖 *Boyle v. Building Inspect. of Malden*, 327 Mass. 564, 99 N.E.2d 925 (1951) (before seeking court appeal to enjoin construction, owners of abutting land must first exhaust administrative remedies by filing timely administrative appeal).
- 📖 *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 204 N.E.2d 513 (1965) (discussing procedures for obtaining zoning enforcement).
- 📖 *Butts v. Zoning Board of Appeals of Falmouth*, 18 Mass. App. Ct. 249, 464 N.E.2d 108 (1984) (neighbor was aggrieved person who could file administrative appeal concerning issuance of an amended building permit by the building inspector).
- 📖 *Chongris v. Board of Appeals of Andover*, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (1984) (voluntary civic organization with purpose of preserving and advancing village was not "aggrieved person").

 *Church v. Building Inspect. of Natick*, 343 Mass. 266, 178 N.E.2d 272 (1961) (must exhaust administrative remedies before seeking judicial remedy).  
 *City of Woburn v. McNutt Brothers Equip.*, 16 Mass. App. Ct. 236, 451 N.E.2d 437 (1983) (city council is "aggrieved person," but must exhaust administrative remedies before can file court appeal).  
 *Colabufalo v. Board of Appeal of Newton*, 336 Mass. 213, 143 N.E.2d 536 (1957) (person located within same zoning district as subject property, even though 300 feet away, was presumed to have right to appeal as aggrieved party).  
 *Commonwealth v. A. Graziano*, 35 Mass. App. Ct. 69 (1993) (officer enforcing zoning may file criminal zoning complaint without first exhausting administrative remedies).  
 *Commonwealth v. Dowd*, 37 Mass. App. Ct. 164, 638 N.E.2d 923 (1994) (person aggrieved is one who can claim infringement of private interests rather than general public concern).  
 *Cox v. Board of Appeals of Carver*, 42 Mass. App. Ct. 422, 677 N.E.2d 697 (1997) (abutters qualified as aggrieved persons by showing they would be injured by increased pedestrian traffic).  
 *Cullen v. Building Inspector of N. Attleborough*, 353 Mass. 671, 234 N.E.2d 727 (1968) (discussing when mandamus is appropriate remedy).  
 *Dodge v. Inspector of Builds. of Newburyport*, 340 Mass. 382, 164 N.E.2d 309 (1960) (writ of mandamus was appropriate remedy where building inspector failed to act on enforcement request).  
 *Elio v. Zoning Bd. of Appeals of Barnstable*, 55 Mass. App. Ct. 424, 771 N.E.2d 199 (2002) (administrative appeal must be filed within 30 days after building official's declination to act; ).  
 *Fitch v. Board of Appeals of Concord*, 55 Mass. App. Ct. 748, 774 N.E.2d 1107 (2002) (administrative appeal must be filed within 30 days after building official's response to enforcement request).  
 *Gamer v. Zoning Bd. of Appeals of Newton*, 346 Mass. 648, 195 N.E.2d 772 (1964) (neighbors to property on which building permit is issued are presumed to be aggrieved persons).  
 *Goldman v. Planning Bd. of Burlington*, 347 Mass. 320, 197 N.E.2d 789 (1964) (revocation of a building permit by the building inspector based on zoning is a decision or order subject to administrative appeal, even if reasons for revocation were not put in writing as required).  
 *Green v. Board of Appeals of Norwood*, 358 Mass. 253, 263 N.E.2d 423 (1970) (revocation of permit is not property remedy to enforce order of conditions).  
 *Green v. Board of Appeals of Provincetown*, 26 Mass. App. Ct. 469, 529 N.E.2d 159 (1988), *rev. on other grounds*, 404 Mass. 571, 536 N.E.2d 584 (1989) (municipal officers and boards have right to file administrative appeal, while business owner may not rely on competition as reason for being aggrieved;

citizens may bring enforcement proceeding to compel municipal officials to enforce zoning).

☞ *Hogan v. Hayes*, 19 Mass. App. Ct. 399, 474 N.E.2d 1158 (1985) (building inspector's response to written enforcement request is technically necessary before administrative appeal may be filed).

☞ *Jaffe v. Zoning Board of Appeals of Newton*, 34 Mass. App. Ct. 929, 612 N.E.2d 693 (1993) (person in an abutting zoning district may file appeal as an aggrieved person if can show violation of a private right, property interest, or legal interest).

☞ *Jordan v. Board of Appeals of Brookline*, 14 Mass. App. Ct. 916 (1982) (a decision by a special permit granting authority is not an administrative decision that can be appealed to the board of appeals, as such decision is subject to a judicial appeal).

☞ *Lane v. Board of Selectmen of Great Barrington*, 352 Mass. 523, 226 N.E.2d 238 (1967) (raising issue of invalidity of zoning permit; a decision by a special permit granting authority is not an administrative decision that can be appealed to the board of appeals, as such decision is subject to a judicial appeal).

☞ *Lanner v. Board of Appeals of Tewksbury*, 348 Mass. 220, 202 N.E.2d 777 (1964) (issuance of a building permit by the building inspector is a decision or order subject to timely administrative appeal).

☞ *Marinelli v. Board of Appeals of Boston*, 275 Mass. 169, 175 N.E.2d 479 (1931) (discussing parties that have standing to file administrative appeals).

☞ *Massachusetts Feather Co. v. Alderman of Chelsea*, 331 Mass. 527, 120 N.E.2d 766 (1954) (discussing appeal to board of appeals based on decision of building inspector to issue permit).

☞ *McNeely v. Board of Appeal of Boston*, 358 Mass. 94, 261 N.E.2d 336 (1970) (requirement for bond in Boston zoning ordinance was to limit frivolous appeals).

☞ *Morganelli v. Building Inspect. of Canton*, 7 Mass. App. Ct. 475, 388 N.E.2d 708 (1979) (abutters and citizens only have right to bring appeal after controversy is created by building official's refusal to enforce zoning).

☞ *Murray v. Board of Appeals of Barnstead*, 22 Mass. App. Ct. 473, 494 N.E.2d 1364 (1986) (abutters to abutters are presumed to be "persons aggrieved," but such presumption can be rebutted so that abutters to abutters no longer have standing to appeal).

☞ *Nigro v. Jones*, 332 Mass. 741, 127 N.E.2d 650 (1955) (before seeking court appeal to enjoin construction, owners of abutting land must first exhaust administrative remedies by filing timely administrative appeal).

☞ *Planning Bd. of Marshfield v. Zoning Bd. of Pembroke*, 427 Mass. 699, 695 N.E.2d 650 (1998) (planning board of an abutting town has no standing to appeal a ZBA decision in the other town unless shows harm to legally protected interest).

☞ *Ouellette v. Building Inspector of Quincy*, 362 Mass. App. 272, 285 N.E.2d 423 (1972) (writ of mandamus was proper remedy where building inspector failed to issue building permit for reasons unrelated to zoning).

- ☞ *Quincy v. Planning Bd. of Tewksbury*, 39 Mass. App. Ct. 17, 652 N.E.2d 901 (1995) (decision by a special permit granting authority on a site plan is not an administrative decision that can be appealed to the board of appeals, as such decision is subject to judicial appeal).
- ☞ *Rafferty v. Sancta Maria Hosp.*, 5 Mass. App. Ct. 624, 367 N.E.2d 856 (1977) (discussing issues in deciding whether person is aggrieved when abutter or abutter to abutter).
- ☞ *Richardson v. Zoning Bd. of Appeals of Framingham*, 351 Mass. 375, 221 N.E.2d 396 (1966) (time for filing administrative appeal commences after issuance of building permit and not at time planning board endorses plan).
- ☞ *Rinaldi v. Board of Appeals of Boston*, 50 Mass. App. Ct. 657, 741 N.E.2d 77 (2001) (a person is aggrieved if can show "evidence of a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest").
- ☞ *Saab v. Building Inspect. of Lowell*, 1 Mass. App. Ct. 87, 294 N.E.2d 458 (1973) (owner may not maintain action for writ of mandamus where failed to timely intervene in appeal).
- ☞ *Siegemund v. Building Comm'r of Boston*, 259 Mass. 329, 156 N.E. 852 (1927) (owner of adjacent land presumed aggrieved).
- ☞ *Sunderland v. Building Inspect. of No. Andover*, 329 Mass. 638, 105 N.E.2d 471 (1952) (administrative appeal was not appropriate remedy for invalidating alleged spot zoning).
- ☞ *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972) (appeal concerning flood plain district).
- ☞ *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *rev. denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (neighborhood residents who were unable to obtain enforcement action were "aggrieved persons"; written decision from building official is operative event that triggers 30 days appeal period, even if building official fails to provide written response within 14 days).
- ☞ *Williams v. Inspector of Builds. of Belmont*, 341 Mass. 188, 168 N.E.2d 257 (1960) (writ of mandamus was appropriate remedy where building inspector failed to act on enforcement request).
- ☞ *Worcester County Christian Communications v. Board of Appeals of Spencer*, 22 Mass. App. Ct. 83, 491 N.E.2d 634 (1986) (board of appeals should not act on administrative appeal until decision issued).

## **CAUTIONARY NOTES**

- ✧ An appellant must request specific relief in an administrative appeal so that the permit granting authority has a basis for making a decision. The permit granting authority cannot grant relief that is not requested.
- ✧ An administrative appeal is not the same as a judicial appeal under section 17 of The Zoning Act.

✓ A timely administrative appeal is usually required in order to exhaust administrative remedies before a judicial appeal may be filed. Failure to exhaust administrative remedies may result in the inability to file for judicial relief. In some instances a judicial remedy, such as a writ of mandamus in which the court compels a municipal official or board to act, may be the only available remedy and exhaustion of administrative remedies is unnecessary. An instance where exhaustion of administrative remedies may not be required is when a building official takes no action on a request.

✓ Common law requires that officers and boards must show harm to a legally protected interest in order to have standing and qualify as "aggrieved" for purposes of appealing a decision under section 17 of The Zoning Act. The same standard may apply to appeals filed under this section.

### **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

🔗 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 9, 10, 11, 12, 13, 14, 15, & 17 (2004).

## SECTION 9.

### SPECIAL PERMITS



#### **THE LAW**

Zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.

Zoning ordinances or by-laws may also provide for special permits authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, installation of solar energy systems, protection for solar access, or other amenities. Such zoning ordinances or by-laws shall state the specific improvements or amenities or locations of proposed uses for which the special permits shall be granted, and the maximum increases in density of population or intensity of use which may be authorized by such special permits.

Zoning ordinances or by-laws may provide that special permits may be granted for multi-family residential use in nonresidentially zoned areas where the public good would be served and after a finding by the special permit granting authority, that such

#### **ANNOTATIONS**

*Zoning must provide for special permit uses*

*Special permits may only be issued for uses in harmony with the general purpose and intent of local zoning*

*Conditions and limitations on special permits*

*Special permits to increase permissible densities*

*Exchange required for increased density*

*Special permits for multi-family residential uses in nonresidentially zoned areas and finding therefor*

nonresidentially zoned area would not be adversely affected by such a residential use, and that permitted uses in such a zone are not noxious to a multi-family use.

Zoning ordinances or by-laws may also provide that cluster developments or planned unit developments shall be permitted upon the issuance of a special permit.

Notwithstanding any provision of this section to the contrary, zoning ordinances or by-laws may provide that cluster developments shall be permitted upon review and approval by a planning board pursuant to the applicable provisions of sections 81K to 81GG, inclusive, of chapter 41 and in accordance with its rules and regulations governing subdivision control.

"Cluster development" means a residential development in which the buildings and accessory uses are clustered together into one or more groups separated from adjacent property and other groups within the development by intervening open land. A cluster development shall be permitted only on a plot of land of such minimum size as a zoning ordinance or by-law may specify which is divided into building lots with dimensional control, density and use restrictions of such building lots varying from those otherwise permitted by the ordinance or by-law and open land. Such open land when added to the building lots shall be at least equal in area to the land area required by the ordinance or by-law for the total number of units or buildings contemplated in the development. Such open land may be situated to promote and protect maximum solar access within the development. Such open land shall either be conveyed to the city or town and accepted by it for park or open space use, or be conveyed to a non-profit organization the principal purpose of which is the conservation of open space, or to be conveyed to a corporation or trust owned or to be owned by the owners of lots or residential units within the plot. If such a corporation or trust is utilized, ownership thereof shall pass with conveyances of the lots or residential units. In any case where such land is not conveyed to the city or town, a restriction

*Special permits for cluster and PUDs*

*Requirements for cluster development to be approved under subdivision control law*

*Definition of cluster development*

*Minimum requirements for cluster development under zoning*

*Conveyance of open land in a cluster development*

enforceable by the city or town shall be recorded providing that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway.

"Planned unit development" means a mixed use development on a plot of land containing a minimum of the lesser of sixty thousand square feet or five times the minimum lot size of the zoning district, but of such larger size as an ordinance or by-law may specify, in which a mixture of residential, open space, commercial, industrial or other uses and a variety of building types are determined to be sufficiently advantageous to render it appropriate to grant special permission to depart from the normal requirements of the district to the extent authorized by the ordinance or by-law. Such open space, if any, may be situated to promote and protect maximum solar access within the development.

Zoning ordinances or by-laws may also provide for the use of structures as shared elderly housing upon the issuance of a special permit. Such zoning ordinances or by-laws shall specify the maximum number of elderly occupants allowed, not to exceed a total number of six, any age requirements and any other conditions deemed necessary for the special permits to be granted.

Zoning ordinances or by-laws may provide that certain classes of special permits shall be issued by one special permit granting authority and others by another special permit granting authority as provided in the ordinance or by-law. Such special permit granting authority shall adopt and from time to time amend rules relative to the issuance of such permits, and shall file a copy of said rules in the office of the city or town clerk. Such rules shall prescribe a size, form, contents, style and number of copies of plans and specifications and the procedure for a submission and approval of such permits.

Zoning ordinances or by-laws may provide for associate members of a planning board when a planning board has been designated as a special

*Definition of PUD*

*Requirements for a PUD under zoning*

*Special permit for shared elderly housing*

*Maximum number of occupants to be specified and may not exceed 6*

*Designation of special permit granting authority for various classes of special permits*

*Special permit granting authorities must adopt rules for applications and issuance of special permits*

*Zoning may provide for associate members of planning boards for*

|   |  |
|---|--|
| <p>permit granting authority. One associate member may be authorized when the planning board consists of five members, and two associate members may be authorized when the planning board consists of more than five members. A city or town which establishes the position of associate member shall determine the procedure for filling such position. If provision for filling the position of associate member has been made, the chairman of the planning board may designate an associate member to sit on the board for the purposes of acting on a special permit application, in the case of absence, inability to act, or conflict of interest, on the part of any member of the planning board or in the event of a vacancy on the board.</p>   | <p><i>purposes of acting as a member of a special permit granting authority</i></p>  |
| <p>Each application for a special permit shall be filed by the petitioner with the city or town clerk and a copy of said application, including the date and time of filing certified by the city or town clerk, shall be filed forthwith by the petitioner with the special permit granting authority. The special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven, on any application for a special permit within sixty-five days from the date of filing of such application; provided, however, that a city council having more than five members designated to act upon such application may appoint a committee of such council to hold the public hearing. The decision of the special permit granting authority shall be made within ninety days following the date of such public hearing. The required time limits for a public hearing and said action, may be extended by written agreement between the petitioner and the special permit granting authority. A copy of such agreement shall be filed in the office of the city or town clerk. A special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board.</p> | <p><i>Filing procedures for special permits</i></p> <p><i>Hearing required by the special permit granting authority within 65 days of application, unless time is extended in writing</i></p> <p><i>Decision required by special permit granting authority within 90 days of public hearing, unless time is extended in writing</i></p> <p><i>File copy of extension of time agreement with city or town clerk</i></p> <p><i>Voting requirements for a special permit granting authority</i></p> |
| <p>Failure by the special permit granting authority to take final action within said ninety days or extended time, if applicable, shall be deemed to be a grant of</p>  | <p><i>Failure of special permit granting authority to take timely final action is deemed</i></p>   |

the special permit. The petitioner who seeks such approval by reason of the failure of the special permit granting authority to act within such time prescribed, shall notify the city or town clerk, in writing within fourteen days from the expiration of said ninety days or extended time, if applicable, of such approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest by mail and each such notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the special permit granting authority failed to act within the time prescribed. After the expiration of twenty days without notice of appeal pursuant to section seventeen, or, if appeal has been taken, after receipt of certified records of the court in which such appeal is adjudicated, indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the special permit granting authority failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be deemed a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each such notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse

*a grant of the special permit*

*Process for securing special permit approval due to failure of timely final action*

*Notice of constructive grant due to failure of timely final action*

*City or town clerk to issue certificate of approval after all appeals final*

*Special permit granting authority to make a detailed record of its proceedings*

*Detailed records to be filed within 14 days of decision with city or town clerk and notice of decision mailed to applicant, parties in interest, and others who request notice*

*Notice of decision to specify 20 day time period for filing appeals*

*Zoning shall provide for lapse of special permit*

within a specified period of time, not more than two years, which shall not include such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause.

Zoning ordinances or by-laws shall also provide that uses, whether or not on the same parcel as activities permitted as a matter of right, accessory to activities permitted as a matter of right, which activities are necessary in connection with scientific research or scientific development or related production, may be permitted upon the issuance of a special permit provided the granting authority finds that the proposed accessory use does not substantially derogate from the public good.

A hazardous waste facility as defined in section two of chapter twenty-one D shall be permitted to be constructed as of right on any locus presently zoned for industrial use pursuant to the ordinances and by-laws of any city or town provided that all permits and licenses required by law have been issued to the developer and a siting agreement has been established pursuant to sections twelve and thirteen of chapter twenty-one D, provided however, that following the submission of a notice of intent, pursuant to section seven of chapter twenty-one D, a city or town may not adopt any zoning change which would exclude the facility from the locus specified in said notice of intent. This section shall not prevent any city or town from adopting a zoning change relative to the proposed locus for the facility following the final disapproval and exhaustion of appeals for permits and licenses required by law and by chapter twenty-one D.

A facility, as defined in section one hundred and fifty A of chapter one hundred and eleven, which has received a site assignment pursuant to said section one hundred and fifty A, shall be permitted to be constructed or expanded on any locus zoned for industrial use unless specifically prohibited by the

*within no more than two years from issuance if not utilized*

*Special permit required for uses accessory to scientific research, development, or related production activities*

*Finding for special permit accessory to scientific research*

*Regulation of hazardous waste facility and restriction on adoption of prohibitory zoning after filing of notice of intent with municipality*

*Zoning change following final disapproval and exhaustion of appeals for hazardous waste facility*

*Solid waste disposal facility permitted on any area zoned industrial once receives site assignment unless specifically prohibited under municipal zoning*

ordinances and by-laws of the city or town in which such facility is proposed to be constructed or expanded, in effect as of July first, nineteen hundred and eighty-seven; provided, however, that all permits and licenses required by law have been issued to the proposed operator. A city or town shall not adopt an ordinance or by-law prohibiting the siting of such a facility or the expansion of an existing facility on any locus zoned for industrial use, or require a license or permit granted by said city or town, except a special permit imposing reasonable conditions on the construction or operation of the facility, unless such prohibition, license or permit was in effect on or before July first, nineteen hundred and eighty-seven; provided, however, that a city or town may adopt and enforce a zoning or non-zoning ordinance or by-law of general application that has the effect of prohibiting the siting or expansion of a facility in the following areas: recharge areas of surface drinking water supplies as shall be reasonably defined by rules and regulations of the department of environmental protection, areas subject to section forty of chapter one hundred and thirty-one, and the regulations promulgated thereunder; and areas within the zone of contribution of existing or potential public supply wells as defined by said department. No special permit authorized by this section may be denied for any such facility by any city or town; provided, however, that a special permit granting authority may impose reasonable conditions on the construction or operation of the facility, which shall be enforceable pursuant to the provisions of section seven.

*Municipality may not prohibit solid waste facility on land zoned industrial, but may require a special permit*

*Zoning may prohibit siting of solid waste facility in recharge areas of surface drinking water supplies*

*Special permit for solid waste facility may not be denied, but may be subject to reasonable conditions on construction and operation*

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by 1977, c. 829, §§ 3E, 3F, 4A; St. 1980, c. 508, § 5; St. 1982, c. 344; St. 1985, c. 408; St. 1985, c. 637, §§ 3-5; St. 1986, c. 471; St. 1987, c. 498, § 1; St. 1987, c. 584, § 10; St. 1989, c. 239; St. 1989, c. 341, § 22; St. 1990, c. 177, § 109.

## **PERMISSIBLE/REQUIRED ACTIONS**

➤ Special permits concern uses, although some municipalities have employed special permits to grant relief from parking requirements and specific dimensional requirements and some have used a special permit process for purposes of site plan approval.

## **SITE PLAN REVIEW AND APPROVAL**

There is no express authority for site plan review or approval under The Zoning Act, but the attorney general has upheld site plan review and approval provisions adopted as part of a zoning by-law. Site plan review and approval might also be adopted as a home rule by-law or ordinance, thus allowing the municipality to adopt its own procedural requirements concerning who conducts the review or approval, required vote, etc. Site plan review and approval should be used to protect the public by having the reviewing board suggest reasonable terms and conditions that might be imposed on a proposal to make it more compatible and ensuring that the proposal complies with zoning. Rarely, if ever, should site plan review be used to prohibit a project, and in fact site plan review assumes that a use is permitted by right or special permit and is generally not binding on the board or official issuing the permit. If the municipality wants site plan review to be binding then it should be treated as a site plan approval in the manner of a special permit with notice, hearing, and approval as required by The Zoning Act. If the site plan review is only advisory then no notice and hearing are required, as long as the site plan review takes place at an open meeting and due process rights are not infringed, such as providing for a hearing if one is requested. The courts have held that site plan review requires only a majority vote of the board, as opposed to the extraordinary vote for a special permit site plan approval. If site plan approval is in the form of a special permit, specific findings for grant of site plan approval must be provided in the zoning by-law or ordinance.

- ☛ A zoning by-law or ordinance must provide for specific uses that are permitted by special permit (these uses are usually those which should have discretionary review and may need conditions to protect the public health, safety, and welfare).
- ☛ Section 9 addresses specific uses that may or must be authorized by special permit as follows:

### **Optional:**

1. Increases in permissible density or population or intensity of a particular use in a proposed development
  - a. As a condition for grant of such special permit, the owner must:
    - i. provide open space,
    - ii. provide low and moderate income housing,
    - iii. provide traffic or pedestrian improvements,
    - iv. install solar energy systems,
    - v. protect solar access, or
    - vi. provide other amenities
  - b. The zoning must specify the following:
    - i. The specific improvements or amenities that may be exchanged for increased density or intensity and

- ii. The maximum density or intensity permitted in exchange for the improvements or amenities.
- 2. Multi-family residential uses in nonresidential zoning districts
  - a. In order to permit such use by special permit, the special permit granting authority ("SPGA") must find the following:
    - i. the public good would be served,
    - ii. such nonresidential zoning district will not be adversely affected by such residential use, and
    - iii. permitted uses in such zoning district are not noxious to the multi-family use.
- 3. Cluster developments (clustering buildings and accessory uses into one or more groups separated by intervening open land)
  - a. The zoning by-law or ordinance may require approval of the cluster development by the planning board under the Subdivision Control Law, M.G.L., ch. 41, §§ 81K-81GG.
  - b. The zoning by-law or ordinance must specify the following:
    - i. Minimum size of plot of land on which the development will take place,
    - ii. Dimensional controls for building lots,
    - iii. Density restrictions for building lots,
    - iv. Use restrictions for building lots, and
    - v. Open land requirements
      - 1. When the open land is added to the building lots the total land area shall be equal to the amount of land that would be necessary for a conventional development under existing zoning requirements.
      - 2. The open land may be situated to promote and protect maximum solar access.
      - 3. Title to the open land must be conveyed to one of the following:
        - a. the municipality, which must accept the open land for park or open space use;
          - i. Such conveyance must include a restriction to be recorded at the applicable registry of deeds, enforceable by the municipality, that the land shall be kept in its natural state and shall not be built upon for residential use or developed for accessory uses such as parking or roadways.
        - b. a nonprofit organization, the principal purpose of which is the conservation of open space, or

- c. a corporation or trust owned or to be owned by the owners of lots or residential units within the development.
      - i. Such ownership of the open space shall transfer with each conveyance of a lot or residential unit.
- 4. Planned Unit Developments (PUD, may also include PRD, etc.) (a mixed use and mixed building type development potentially consisting of residential, commercial, industrial, open space, and other uses).
  - a. The zoning by-law or ordinance must specify the following:
    - i. Minimum size of plot of land on which the development will take place, which must be the lesser of 60,000 square feet or five times the minimum lot size required for such development if it was constructed as a conventional development.
    - ii. Although not required by statute, it is recommended that other dimensional and open space requirements be specified in the zoning by-law or ordinance in a manner similar to provisions for a cluster development.
  - b. The zoning by-law or ordinance may promote solar access in the development by regulating the location of the open space.
  - c. In order to permit a PUD, the SPGA must find that the mix of uses and variety of building types are sufficiently advantageous to permit a departure from existing zoning requirements.
- 5. Use of structures as shared elderly housing
  - a. The zoning by-law or ordinance shall specify the:
    - i. maximum number of allowed occupants, not to exceed six,
    - ii. age requirements for the occupants, and
    - iii. any other conditions deemed necessary.

**Mandatory:**

- 1. An accessory use to scientific research and development uses permitted by right.
  - a. The accessory use does not have to be on the same lot as the use permitted by right and
  - b. The SPGA must find that the proposed accessory use does not substantially derogate from the public good.

➤ A special permit granting authority (the board designated in the zoning by-law or ordinance, which could include the zoning board of appeals, planning board, selectmen, city council, or zoning administrator as set forth under M.G.L., ch. 40A, § 13) is the only entity that may grant a special permit.

- 1. A zoning by-law or ordinance may specify more than one SPGA to issue special permits for particular uses.
- 2. A zoning by-law or ordinance may provide for associate members of

a planning board when a planning board is designated as the SPGA in order to ensure that sufficient members will be available to attend the public hearings and vote on the special permit.

- a. One associate member is permitted for a five member planning board.
  - b. Two associate members are permitted for a planning board that is larger than five members.
  - c. The zoning by-law or ordinance should specify the procedure for filling such associate member positions, e.g., appointment by the selectmen in a town or mayor in a city with confirmation by the city council.
  - d. The chairman of the SPGA may designate an associate member to sit on a case when another member is unable to act due to absence, inability, or conflict of interest or in the event there is a vacancy on the SPGA.
3. The SPGA must adopt operational rules.
- a. The rules must specify size, form, contents, style and number of copies of plans, specifications, and procedures for submission and approval of a special permit application.
  - b. The SPGA must file the rules with the city or town clerk.

☛ An applicant (any person with an ownership interest or acting as an agent of an owner) may request a special permit by:

1. filing an application with the city or town clerk, who shall certify the date and time of filing on a copy of the application and
2. filing the certified copy of the application with the SPGA immediately after filing with the city or town clerk.

☛ Before the SPGA may grant (or deny) a requested special permit, the SPGA must:

1. give notice of a public hearing by publication and posting and by mailing to all parties in interest, as set forth under M.G.L., ch. 40A, § 11 and
2. hold the public hearing at an open meeting as set forth in the notice.
  - a. The public hearing shall be held within 65 days after the SPGA receives the special permit application, as set forth under M.G.L., ch. 40A, §§ 9 & 15, unless the applicant and SPGA mutually agree to extend the date for the hearing.
  - b. If the SPGA consists of more than five members, it may appoint a committee to hold the public hearing.
  - c. The chair or acting chair, in the absence of the chair, may
    - i. Administer oaths,
    - ii. summon witnesses, and
    - iii. call for the production of papers.

☛ In order to grant a special permit, the SPGA must make all statutory findings related to the use not limited to the following:

1. The use is in harmony with the general purpose and intent of the zoning ordinance or by-law and
  2. The use complies with general or specific provisions, some of which must be set forth in the zoning ordinance or by-law.
- When making the specific statutory findings and findings required by the zoning ordinance or by-law, the SPGA may not simply repeat the statutory language or language in the ordinance or by-law; it must also include factual reasoning based on evidence presented at the hearing (testimony, reports, etc.) that supports each finding in its decision.
- In granting a special permit, the SPGA may adopt conditions, safeguards, and limitations on the time and use of the special permit. To avoid an arbitrary and unreasonable decision, the SPGA should rely on evidence presented at the hearing and sound reasoning that supports such impositions.
1. An example of a condition is "The special permit is conditioned on the owner removing all snow from the property in order to preserve all parking spaces and maintain the circulation system for the proposed drive-in restaurant use."
  2. An example of a safeguard is "The property shall be surrounded by a fence and shrubs to provide a buffer for uses on surrounding property."
  3. An example of a limitation is "The use of the property for a flea market is limited to weekends from 9:00 AM – 5:00 PM in order to prevent weekday traffic congestion."
- A special permit may be conditioned on continuous ownership.
- Although the SPGA must deny a special permit if all required findings are not met, rarely should a special permit be denied, as the intent of chapter 40A is to permit such uses after discretionary review and after imposition of conditions, safeguards, and limitations that will carry out the purposes of zoning and safeguard the community.
- Unless the time for action on the special permit is extended by mutual agreement of the applicant and the SPGA, the SPGA must take final action (approve or deny and file such decision with the city or town clerk) on the special permit within 90 days after close of the public hearing in order to avoid constructive grant.
1. A three-member board must unanimously vote to grant a special permit.
  2. Four members of a five-member board must vote to grant a special permit.
  3. Two-thirds of all members of a board that is larger than five members must vote to grant a special permit.
  4. SPGA members who did not attend all of the hearings should not vote on the special permit.
- Within 14 days after acting on a special permit application, the SPGA must:
1. File a copy of its detailed record (minutes that specify the decision and reasons for the decision and include a record of the votes by each

member or the absence of a member or failure of a member to vote) with the city or town clerk;

2. Mail a notice of the decision to the applicant, all parties in interest, and all persons who requested notice at the public hearing; and
3. Note on the mailed notice of decision that an appeal pursuant to M.G.L., ch. 40A, § 17 may be filed within 20 days after the SPGA filed the decision with the city or town clerk.

➤ If there is constructive grant, the following process must be followed in order for the constructively granted approval to be in effect:

1. The applicant must notify the city or town clerk in writing of such constructive approval within 14 days from the expiration of the time for final action (90 days after hearing or any extended time),
2. The applicant must send notice of the constructive grant to all parties in interest and specify in the notice to the city or town clerk that such notice has been sent,
3. The applicant must specify in the notice to parties in interest that an appeal pursuant to M.G.L., ch. 40A, § 17 may be filed within 20 days after the date the applicant gave written notice to the city or town clerk,
4. After the 20 day appeal period expires without the filing of an appeal (or after a certified decision on an appeal that is favorable to the applicant), the city or town clerk must issue a certificate stating the date of approval, that the SPGA failed to take final action within the required time period, and that the approval resulting from such approval has become final, and
5. The city or town clerk must mail the certificate to the applicant.

➤ If a special permit is denied, the appellant has a right to request a rehearing as set forth under M.G.L., ch. 40A, § 16.

➤ The applicant or any interested and aggrieved party may appeal the grant or denial of the special permit as set forth under M.G.L., ch. 40A, § 17.

➤ A special permit is not effective until it is recorded at the applicable registry of deeds as set forth under M.G.L., ch. 40A, § 11.

➤ A special permit must be exercised (a substantial use must commence or construction must begin and continue unless there is a good cause for delay) within the time period specified in the zoning by-law or ordinance, which may not exceed two years after grant, or it lapses and must be reestablished with a new application, public hearing, and findings.

1. The time for pursuing an appeal tolls the time for exercise of a special permit, that is, it is not included in the specified time limit.

➤ This section also addresses some specific uses that may be exempted from zoning. These uses include the following:

1. A hazardous waste facility, which must be permitted by right on any land zoned for industrial use at the time an applicant files a notice of intent under M.G.L. ch. 21D, § 7.

- a. The terms "hazardous waste" and "facility" are defined under M.G.L. ch. 21D, § 2. Essentially, a hazardous waste facility would be

"a site or works for the storage, treatment, dewatering, refining, incinerating, reclamation, stabilization, solidification, disposal or other processes where hazardous wastes can be stored, treated or disposed of." Hazardous waste includes waste that because of its quantity, concentration, or physical, chemical or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness or pose a substantial present or potential hazard to human health, safety or welfare or to the environment when improperly treated, stored, transported, used or disposed of, or otherwise managed."

- b. A municipality may not pass zoning to preclude, prohibit, or require a special permit for a hazardous waste facility unless it has no land zoned for industrial use at the time the notice of intent is filed.
    - i. Even if the municipality has no land zoned for industrial use, the existence of industrial uses in a community has been deemed by the courts to constitute permission for industrial uses. *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984).
  - c. The applicant may use the exemption upon satisfying the following:
    - i. Securing permits and licenses required by law
    - ii. Executing a siting agreement under M.G.L. ch. 21D, §§ 12 & 13.
  - d. If the Hazardous Waste Facility Site Safety Council disapproves the proposal and all appeals are exhausted, a municipality may then adopt a zoning change relative to the proposed site.
2. A solid waste facility or expansion of such facility that has received a site assignment, which must be permitted by right on any land zoned for industrial use, unless specifically prohibited by the municipality by July 1, 1987.
- a. A solid waste facility is defined under M.G.L. ch. 111, § 150A as "a sanitary landfill, a refuse transfer station, a refuse incinerator rated by the department at more than one ton of refuse per hour, a resource recovery facility, a refuse composting plant, a dumping ground for refuse or any other works for treating, storing, or disposing of refuse." The term "refuse" is defined as "all solid or liquid waste materials, including garbage and rubbish, and sludge, but not including sewage, and those materials defined as hazardous wastes in section two of chapter twenty-one C and those materials defined as source, special nuclear or by-product material under the provisions of the Atomic Energy Act of 1954."
  - b. A municipality may not pass zoning to preclude or prohibit or require a license or permit for a new or expansion of an existing solid waste facility on land zoned industrial, unless such prohibition

- or requirement for a license or permit was in effect before July 1, 1987.
- c. A municipality may require a special permit for a new or expansion of an existing solid waste facility and impose reasonable conditions on the construction or operation of the facility.
    - i. such special permit may not be denied
    - ii. any reasonable conditions imposed on the construction or operation of the facility are enforceable under § 7 of The Zoning Act.
  - d. A municipality may adopt and enforce a zoning or non-zoning by-law or ordinance that has the effect of prohibiting the siting or expansion of a solid waste facility in the following areas:
    - i. recharge areas of surface drinking water supplies as shall be reasonably defined by rules and regulations of the department of environmental protection
    - ii. wetlands subject to M.G.L. ch. 131, § 40 and any regulations adopted thereunder
    - iii. areas within the zone of contribution of existing or potential public water supply wells as defined by the department of environmental protection

### **RELATED CASE LAW**

- 📖 *ACW Realty Management, Inc. v. Planning Bd. of Westfield*, 40 Mass. App. Ct. 242, 662 N.E.2d 1051 (1996) (special permit decision is discretionary and will not be disturbed unless unreasonable, whimsical, or capricious).
- 📖 *Anderson v. Planning Bd. of Norton*, 56 Mass. App. Ct. 904, 776 N.E.2d 1022 (2002) (on remand board not required to approve special permit, but must support its conclusions for denial with adequate evidence).
- 📖 *Angelus v. Board of Appeals of Canton*, 25 Mass. App. Ct. 994, 521 N.E.2d 1373 (1988) (final action on a special permit does not include mailing notice to parties in interest within 90 day period).
- 📖 *APT Asset Management v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 735 N.E.2d 872 (2000) (board's interpretation of terms under zoning is entitled to measure of deference).
- 📖 *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998, 429 N.E.2d 71, *rev. denied*, 385 Mass. 1102, 440 N.E.2d 1174 (1981) (upholding site plan approval process through a special permit).
- 📖 *Balas v. Board of Appeals of Plymouth*, 13 Mass. App. Ct. 995 (1982) (upholding condition requiring satisfaction of consultant's recommendations and compliance with plans approved by planning board).
- 📖 *Barbaro v. Wroblewski*, 44 Mass. App. Ct. 269, N.E.2d (1998) (when a change in membership occurs between an appeal and a court remand, any action by the SPGA to correct a de minimis error is not invalid, especially when those acting upon the permit on remand attended all of the public hearings; on remand

different members of the board could consider the site plan, as they were considering the plan anew).

📖 *Berkshire Power Dev. v. Zoning Bd. of Appeals of Agawam*, 43 Mass. App. Ct. 828, 686 N.E.2d 1088 (1997) (zoning can provide for dimensional variations, such as building height, by special permit).

📖 *Bernstein v. Chief Build. Inspect.*, 52 Mass. App. Ct. 422, 754 N.E.2d 133 (2001) (phased special permit did not lapse as SPGA continued to modified special permit and did not put time limitation on most recent modification).

📖 *Board of Aldermen of Newton v. Maniace*, 45 Mass. App. Ct. 829, 702 N.E.2d 391, *rev. denied*, 429 Mass. 726, 711 N.E.2d 565 (1999) (when a special permit is denied, detailed reasons for the denial are unnecessary as long as the result of the vote is in writing within the required time period for final action in order to avoid constructive grant).

📖 *Board of Appeals of Westwood v. Lamberg*s, 42 Mass. App. Ct. 411, 677 N.E.2d 270, *rev. denied*, 425 Mass. 1101, 680 N.E.2d 101 (1997) (second decision filed by board that changes results is not an amendment of a decision).

📖 *Board of Selectmen of Stockbridge v. Monument Inn, Inc.*, 14 Mass. App. Ct. 901 (1982) (detailed record is not restricted to minutes of board).

📖 *Boulter Bros. Const. Co. v. Zoning Bd. of Appeals of Norfolk*, 45 Mass. App. Ct. 283, 697 N.E.2d 997 (1998) (board's interpretation of zoning terms is not dispositive).

📖 *Bowen v. Board of Appeals of Franklin*, 36 Mass. App. Ct. 954 (1994) (site plan review does not require detailed findings).

📖 *Bowers v. Board of Appeals of Marshfield*, 16 Mass. App. Ct. 29 (1983) (site plan approval is in nature of special permit).

📖 *Brady v. City Council of Gloucester*, 59 Mass. App. Ct. 691, 797 N.E.2d 479 (2003) (upholding the denial of a special permit based on objections to the proposal by co-owners of the property at issue).

📖 *Building Comm'r of Franklin v. Dispatch Comms. of New England*, 48 Mass. App. Ct. 709, 725 N.E.2d 709, *rev. denied*, 431 Mass. 1106, 733 N.E.2d 125 (2000).

📖 *Building Inspect. of Attleboro v. Attleboro Landfill, Inc.*, 384 Mass. 109, 423 N.E.2d 1009 (1981) (final action on special permit within 90 days after close of the public hearing includes filing written decision with city or town clerk).

📖 *Burwick v. Zoning Bd. of Appeals of Worcester*, 1 Mass. App. Ct. 739, 306 N.E.2d 455 (1974) (where decision did not set forth conditions as voted upon by board, board could amend decision to reflect actual vote; failure of board of appeals to adopt rules did not invalidate special permits for failure to specify how rules would have been a benefit).

📖 *Carson v. Board of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947) (company under conditional purchase and sales agreement could apply for special permit).

☞ *Caruso v. Pastan*, 1 Mass. App. Ct. 28, 294 N.E.2d 501 (1973) (board of appeals should not discuss special permit with planning board after close of hearing).

☞ *Cass v. Board of Appeal of Fall River*, 2 Mass. App. Ct. 555, 317 N.E.2d 77 (1974) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Cefalo v. Board of Appeal of Boston*, 332 Mass. 178, 124 N.E.2d 247 (1955) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Cohasset Heights, Ltd. v. Zoning Bd. of Appeals of Cohasset*, 53 Mass. App. Ct. 116, 757 N.E.2d 274 (2001) (holding that issuance of a special permit protects a use as pre-existing nonconforming even if the special permit is not recorded).

☞ *Colangelo v. Board of Appeals of Lexington*, 407 Mass. 242, 552 N.E.2d 541 (1990) (denial of special permit was abuse of discretion where denial was based on traffic considerations, but projects in same area which generated more traffic were granted special permit approvals before and after plaintiff's application).

☞ *Coolidge v. Planning Bd. of N. Andover*, 337 Mass. 648 (1958) (prior to chapter 808 court invalidated by-law which had planning board designated to issue special permits and approve site plans).

☞ *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124, 807 N.E.2d 245 (2004) (denial of section 6 special permit upheld as reasonable on the basis of protection of watershed from gasoline tank leakage).

☞ *Dion v. Board of Appeals of Waltham*, 344 Mass. 547, 183 N.E.2d 479 (1962) ("straw" person could apply for permit as agent of the owner).

☞ *District Atty. for the Northwestern Dist. v. Board of Selectmen of Sunderland*, 11 Mass. App. Ct. 663 (1981) (one vote does not constitute majority of a quorum of a three-member board when one member votes to go into executive session and the other two members abstain).

☞ *Doliner v. Town Clerk of Millis*, 343 Mass. 10, 175 N.E.2d 925 (1961) (zoning should be construed in a manner which sustains its validity).

☞ *Dufault v. Millennium Power Partners*, 49 Mass. App. Ct. 137, 727 N.E.2d 89 (2000) (discussing site plan review and approval tied to a building permit).

☞ *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 715 N.E.2d 470 (1999) (case concerning special permit for home occupation with change of relief requested by the board and remand by the court for the board to make findings on whether the existing small engine repair shop in a garage had exceeded permissible bounds).

☞ *Elder Care Services v. Zoning Bd. of Appeals of Hingham*, 17 Mass. App. Ct. 480, 459 N.E.2d 832 (1984) (decision of special permit granting authority must be filed with town clerk within 90 days after close of hearing or special permit is constructively granted).

☞ *Emond v. Board of Appeals of Uxbridge*, 27 Mass. App. Ct. 630, 541 N.E.2d 380 (1989) (zoning requirements may permit adjustments to dimensional requirements by special permit where such special permits are subject to clear and uniform standards).

☞ *Fandel v. Board of Zoning Adjustment*, 280 Mass. 195, 182 N.E. 343 (1932) (communications received after hearing that were read at subsequent open meeting did not affect validity of decision).

☞ *Federman v. Board of Appeals of Marblehead*, 35 Mass. App. Ct. 727 (1994) (special permit decision is discretionary and will not be disturbed unless unreasonable, whimsical, or capricious).

☞ *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Framingham Clithic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 415 N.E.2d 840 (1981) (words should be interpreted based on their usual and common meaning; abortion clinic is hybrid use falling somewhere between a hospital and professional medical office).

☞ *Gamache v. Acushnet*, 14 Mass. App. Ct. 215, 438 N.E.2d 82 (1982) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings; vacancy on board does not transform five member board into a four member board).

☞ *Garvey v. Board of Appeals of Amherst*, 400 N.E.2d 880 (Mass. App. Ct. 1980) (granting of special permit upheld if use in harmony with purpose and intent of zoning and decision not arbitrary or resting on illegal grounds).

☞ *Goldman v. Town of Dennis*, 375 Mass. 197, 375 N.E.2d 1212 (1978) (municipality may not regulate method of ownership such as condominium ownership).

☞ *Gulf Oil Corp. v. Board of Appeals of Framingham*, 355 Mass. 275, 244 N.E.2d 311 (1969) (special permit decision is discretionary and will not be disturbed unless unreasonable, whimsical, or capricious).

☞ *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 275 N.E.2d 525 (1971) (upholding site plan approval by planning board for apartment use).

☞ *Hopengarten v. Board of Appeals of Lincoln*, 17 Mass. App. Ct. 901, 459 N.E.2d 1271 (1984) (special permit may be conditioned on continued ownership; condition requiring review of special permit every three years was valid).

☞ *Josephs v. Board of Appeals of Brookline*, 362 Mass. 290, 285 N.E.2d 436 (1972) (discussing site plan by special permit for commercial use).

☞ *Kenrick v. Board of Appeals of Wakefield*, 27 Mass. App. Ct. 774, 543 N.E.2d 437, *rev. denied*, 406 Mass. 1101, 546 N.E.2d 375 (1989) (90 days for taking final action commences at the close of the public hearing process).

☞ *Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 355 N.E.2d 461 (1976) (upholding condition that requires approval of building plans before

construction commences is valid condition, although it is preferable to pass on all matters before issuing decision; failure of zoning board of appeals to file rules with municipal clerk did not render special permits invalid).

☞ *Kosla v. Board of Appeals of Holden*, 55 Mass. App. Ct. 62, 768 N.E.2d 1115 (2002) (discussing "tack back" or tolling of time provisions during an appeal when first application withdrawn without prejudice, and whether non-use for more than two years prevents reconstruction of nonconforming structure).

☞ *Lovaco, Inc. v. Zoning Bd. of Appeals of Attleboro*, 23 Mass. App. Ct. 239 (1986) (requirement of a performance bond is valid).

☞ *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 340 N.E.2d 487 (1976) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Maki v. Yarmouth*, 340 Mass. 207, 163 N.E.2d 633 (1960) (special permit may be conditioned on continued ownership).

☞ *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 447, 796 N.E.2d 455 (2003) (special permit does not lapse for failure to record decision if substantial use is made of the property).

☞ *McDonald's Corp. v. Seekonk*, 12 Mass. App. Ct. 351, 424 N.E.2d 1136 (1981) (plaintiff failed to appeal building inspector's decision on building permit based on planning board's site plan review so court appeal dismissed for failure to exhaust administrative remedies).

☞ *Moran v. School Comm. of Littleton*, 317 Mass. 591 (1945) (discussing rule of necessity where conflicted member may need to vote for board to act).

☞ *Mullin v. Planning Bd. of Brewster*, 17 Mass. App. Ct. 139, 456 N.E.2d 780 (1983) (same members who make decision must be present at each hearing).

☞ *Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham*, 29 Mass. App. Ct. 31, 557 N.E.2d 43 (1990) (board's interpretation of zoning is not dispositive).

☞ *New Seabury Corp. v. Board of Appeals of Mashpee*, 28 Mass. App. Ct. 946, 550 N.E.2d 405 (1990) (cluster special permit allowed development flexibility subject to certain density requirements for 30 years and subdivision of land was not in violation of such conditions).

☞ *Opinion of the Justices to the Senate and the House of Representatives*, 341 Mass. 760, 168 N.E.2d 858 (1960)

☞ *Osberg v. Planning Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 687 N.E.2d 1274 (1997) (site plan review may only require a majority vote of the board and could be used for review of a permitted use, but if site plan requires a special permit then extraordinary vote is required).

☞ *Pasqualino v. Board of Appeals of Wareham*, 14 Mass. App. Ct. 989, 440 N.E.2d 523 (1982) (failure to file petition with municipal clerk provides no starting period for constructive grant).

☞ *Petrucci v. Board of Appeals of Westwood*, 45 Mass. App. Ct. 818, 702 N.E.2d 47 (1998) (board may consider aesthetics in its decision).

☞ *Planning Bd. of Springfield v. Board of Appeals of Springfield*, 355 Mass. 460, 245 N.E.2d 454 (1969) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Potter v. Board of Appeals of Mansfield*, 1 Mass. App. Ct. 89, 294 N.E.2d 587 (1973) (may not amend decision to reverse result from denial to approval).

☞ *Prudential Ins. Co. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 502 N.E.2d 137 (1986) (discussing board's authority pertaining to site plan review which cannot be denied for a use permitted by right and site plan approval which can be denied for a use permitted by special permit process).

☞ *Quincy v. Planning Bd. of Tewksbury*, 39 Mass. App. Ct. 17 (1995) (site plan approval tied to a special permit is appealed directly to court).

☞ *Real Properties v. Board of Appeal of Boston*, 319 Mass. 180, 65 N.E.2d 199 (1946) (quorum when unanimous vote required is all members of the board as it is constituted).

☞ *Racette v. Zoning Bd. of Appeals of Gardner*, 27 Mass. App. Ct. 617 (1989) (notice of filing petition with building inspector does not start clock to measure time period for constructive grant, as must file notice with city or town clerk).

☞ *Roberts v. Southwestern Bell Mobile Systems*, 429 Mass. 478, 709 N.E.2d 798 (1999) (notice of filing with town clerk was three weeks late, but did not affect planning board's jurisdiction, as application was filed before commencement of public hearings).

☞ *S. Kemble Fischer Realty Trust v. Board of Appeals of Concord*, 9 Mass. App. Ct. 477, 402 N.E.2d 100, *cert. denied*, 449 U.S. 1011, *rehearing denied*, 449 U.S. 1134 (1980) (special permit decision is discretionary and will not be disturbed unless unreasonable, whimsical, or capricious).

☞ *Salah v. Board of Appeals of Canton*, 2 Mass. App. Ct. 488 (1974) (need reasons for denial of site plan).

☞ *Schiffone v. Zoning Bd. of Appeals of Walpole*, 28 Mass. App. Ct. 981, 553 N.E.2d 1308 (1990) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Scit, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 472 N.E.2d 269 (1984) (special permit decision is discretionary and will not be disturbed unless unreasonable, whimsical, or capricious).

☞ *Security Mills Lt. Part. V. Board of Appeals of Newton*, 413 Mass. 562, 600 N.E.2d 995 (1992) (four of five members must agree on the result, though not on the reasoning for reaching the result).

☞ *Sesnovich v. Board of Appeal of Boston*, 313 Mass. 393, 47 N.E.2d 943 (1943) (when unanimous vote required quorum of board is all members as the board if constituted).

☞ *Shalbey v. Board of Appeals of Norwood*, 6 Mass. App. Ct. 521, 378 N.E.2d 1001 (1978) (condition that adequate drainage be provided was not imprecise

and did not require further determination of substance; decision not annulled because associate member spoke in favor of application as a private citizen).

☞ *Shea v. Board of Alderman of Chicopee*, 13 Mass. App. Ct. 1047, 434 N.E.2d 214 (1982) (final action includes filing decision with city or town clerk).

☞ *Shoppers' World v. Beacon Terrace Realty*, 353 Mass. 63, 228 N.E.2d 446 (1967) (upholding condition that required compliance with planning board recommendations on ingress and egress).

☞ *Shuman v. Board of Aldermen of Newton*, 361 Mass. 758, 282 N.E.2d 653 (1972) (although special permit may be conditioned on continued ownership, special permit is to be related to land; board may amend decision as long as does not prejudice those entitled to notice).

☞ *Solar v. Zoning Bd. of Appeals of Lincoln*, 33 Mass. App. Ct. 398 (1992) (discussing automatic renewal of special permit and that board could not add new restriction unless there was an objection to the use; ownership restriction is permitted on special permit).

☞ *St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Auth.*, 44 Mass. App. Ct. 56 (1997) (site plan review tied to a building permit requires appeal of denial of building permit to board of appeals before court appeal).

☞ *Tanner v. Board of Appeals of Belmont*, 27 Mass. App. Ct. 1181, N.E.2d (1989) (a vote of two in favor, two opposed, and one member absent is a denial where four favorable votes are required; as long as detailed record specifies the vote of each member, all members do not need to sign detailed record).

☞ *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 495 N.E.2d 892 (1986) (board may not leave site plan authorization for a future determination and may not delegate its responsibilities to another board; a condition that requires further determination after the decision is invalid).

☞ *Tenneco Oil Co. v. City Council of Springfield*, 406 Mass. 658 (1990) (board may correct clerical error in decision, but not result, without giving notice and holding a new public hearing; must give notice and hold hearing prior to consideration of rescission of previously granted special permit).

☞ *Todd v. Board of Appeals of Yarmouth*, 377 Mass. 162 (1958) (special permit may be conditioned on continued ownership).

☞ *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984) (existence of industrial uses in town deemed by Site Safety Council as permitting industrial uses, including hazardous waste facilities).

☞ *Uglietta v. City Clerk of Somerville*, 32 Mass. App. Ct. 742, 594 N.E.2d 887 (1992) (a private individual who fails to file a notice of constructive grant within 14 days after expiration of the time for final action on a special permit loses the constructive grant rights).

☞ *V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth*, 30 Mass. App. Ct. 530, 570 N.E.2d 1044 (1991) (may not require developer to widen state road, as developer has no control over state).

- 📖 *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376, 187 N.E.2d 854 (1963) (a condition that requires further determination after the decision is invalid).
- 📖 *Wolfman v. Board of Appeals of Brookline*, 388 Mass. 1104, 447 N.E.2d 670 (1983) (board may review proposed draft of decision filed by attorney in making its decision).
- 📖 *Wolfson v. Sun Oil Co.*, 357 Mass. 87, 256 N.E.2d 308 (1970) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).
- 📖 *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 255 N.E.2d 732 (1970) (site plan review may only regulate and not prohibit a use).
- 📖 *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980) (public hearing and deliberations must both take place at an open meeting).
- 📖 *Zartarian v. Minkin*, 357 Mass. 14, 255 N.E.2d 362 (1970) (a condition that parking be provided as deemed necessary was a valid condition).
- 📖 *Zuckerman Zoning Bd. of Appeals of Greenfield*, 394 Mass. 663, 477 N.E.2d 132 (1985) (board must only send notice of decision and does not have to ensure that it is received).

## **CAUTIONARY NOTES**

- ✓ In making its findings the SPGA may not simply repeat the findings, it must give reasons therefor based on evidence obtained at the public hearing.
- ✓ Failure to meet time limits will result in constructive grant of a special permit.
- ✓ Many of the special permits require specific findings set forth in this section.
- ✓ Any person who did not attend all public hearings should not vote on the special permit.
- ✓ The special permit vote requires an extraordinary vote of unanimous for a SPGA of three members, 4 of 5 for a SPGA of 5 members, and 2/3rds for a SPGA of more than 5 members.
- ✓ If a special permit lapses for failure to commence the use or construction, the municipality must prohibit the use until another special permit is granted after notice and hearing.

**SAMPLE SPECIAL PERMIT APPLICATION:**

*TIME FOR ACTING ON APPLICATION WILL NOT COMMENCE UNTIL ALL ITEMS ON APPLICATION ARE COMPLETE.*

**APPLICANT--**

Applicant's name: \_\_\_\_\_

Applicant's address: \_\_\_\_\_

Applicant's phone #: \_\_\_\_\_

**OWNER --**

If the applicant and owner are not the same person, the following must be completed:

Owner's name: \_\_\_\_\_

Owner's address: \_\_\_\_\_

Owner's phone #: \_\_\_\_\_

The owner hereby appoints \_\_\_\_\_ (name of person appointed) to act as agent for purposes of submitting and processing this application for a special permit.

Date: \_\_\_\_\_

Owner's signature \_\_\_\_\_

**TITLE TO THE PROPERTY --**

The owner's title to the land that is the subject matter of this application is

derived from deed/will/other of \_\_\_\_\_,

dated \_\_\_\_\_, and recorded in \_\_\_\_\_

Registry of Deeds, Volume \_\_\_\_\_, Page \_\_\_\_\_

Or as Land Court Certificate of Title No. \_\_\_\_\_

registered in \_\_\_\_\_ District, Volume \_\_\_\_\_, Page \_\_\_\_\_

**ASSESSOR'S RECORDS --**

The land shown on the plan is located on Map \_\_\_\_\_, Lot \_\_\_\_\_ of the

Assessor's records and has an address of \_\_\_\_\_.

ZONING REQUIREMENTS --

The land is located in the \_\_\_\_\_  
zoning district.

THE PLAN (If Applicable) --

Title of plan: \_\_\_\_\_

Drawn by: \_\_\_\_\_

P.E.'s or surveyor's registration #: \_\_\_\_\_

Date of plan: \_\_\_\_\_

THE SPECIAL PERMIT REQUEST --

Section(s) of Zoning By-law/Ordinance that permit the special permit use, specify  
specific findings and requirements for such use, or both: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Description and purpose of special permit use requested (describe what you intend to do  
if the special permit is granted): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

THE FINDINGS --

Explain your support for the following findings.

*The use will be in harmony with the general purpose and intent of the zoning ordinance/  
by-law:*

Proposal will comply with the specific provisions of zoning which apply to such use as set forth above:

\_\_\_\_\_  
Signature of applicant

\_\_\_\_\_  
Date

Received by city/town clerk

Date: \_\_\_\_\_

Filing fee paid: \$ \_\_\_\_\_

\_\_\_\_\_  
Signature of city/town clerk

## SAMPLE DECISION

# CERTIFICATE OF DECISION ON SPECIAL PERMIT APPLICATION

Date: \_\_\_\_\_

Applicant  
Applicant's address

**SENT BY CERTIFIED MAIL:**

# \_\_\_\_\_

City/Town Clerk  
City/Town of \_\_\_\_\_  
Address, Massachusetts

RE: Title of special permit proposal

With respect to the above-captioned special permit application submitted to the special permit granting authority of the city/town of \_\_\_\_\_ by \_\_\_\_\_ on \_\_\_\_\_, the special permit granting authority hereby certifies that:

1. after due notice, the board held a public hearing on this proposal duly noticed on \_\_\_\_\_
2. at an open meeting duly noticed and held on \_\_\_\_\_, the board made the following findings:
  - that the use is in harmony with the general purpose and intent of the ordinance/by-law based on the following:

On the basis of these findings, the special permit granting authority voted to

\_\_\_\_\_ grant the special permit(s)

\_\_\_\_\_ deny the special permit(s)

The permit special permit granting authority adopted the following conditions, safeguards, and limitations on the special permit granted:

If a substantial use or construction authorized by this special permit is not commenced within two years (zoning may specify a lesser time which should be inserted in place of the two years) of the date of grant, this special permit shall lapse.

This special permit shall not be in effect until a copy of this decision is recorded at the \_\_\_\_\_ Registry of Deeds at the applicant's expense.

This decision is subject to appeal in accordance with M.G.L. ch. 40A, § 17 within 20 days after this decision is filed with the city/town clerk.

Special Permit Granting Authority

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**SAMPLE CERTIFICATION BY THE CITY OR TOWN CLERK FOR  
FAILURE OF THE SPECIAL PERMIT GRANTING AUTHORITY TO TAKE  
TIMELY ACTION ON A SPECIAL PERMIT APPLICATION:**

**CERTIFICATE OF CONSTRUCTIVE APPROVAL**

The accompanying special permit application was filed by \_\_\_\_\_  
on \_\_\_\_\_.

The special permit application concerns land owned by \_\_\_\_\_.

The special permit granting authority did not take timely action and did not file a decision with the city/town clerk concerning the petition as required under M.G.L. ch. 40A, § 9.

As city/town clerk of the city/town of \_\_\_\_\_,  
(name of city of town)

I hereby certify that due to the failure of the special permit granting authority to take timely action on said application and failure to file a copy of its decision with the city/town clerk as required by M.G.L. ch. 40A, § 9, the special permit application shall be deemed approved.

This constructive approval is subject to appeal in accordance with M.G.L. ch. 40A, § 17 within 20 days after the date of this certification by me.

Date: \_\_\_\_\_

\_\_\_\_\_  
City/Town Clerk

Cc: Special Permit granting authority

## **LINKS**

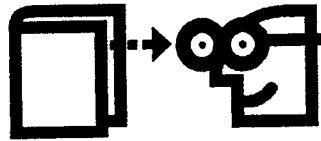
- 🔑 <http://www.landlaw.com> (lower court cases available from landlaw)
- 🔑 <http://www.socialaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

- 📁 The Land Use Manager, Vols. I – II
- 📁 The Land Use Manager, Vols. VI -- VII
- 📁 The Land Use Manager, Selected Articles from July 1991 through March 1999.
- 📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 1A, 3, 11, 13, & 15 (2004).

# SECTION 9A.

## REGULATION OF ADULT USES



### THE LAW

Zoning ordinances or by-laws may provide for special permits authorizing the establishment of adult bookstores, adult motion picture theaters, adult paraphernalia stores, adult video stores or establishments which display live nudity for their patrons as hereinafter defined. Such zoning ordinance or by-law may state the specific improvements, amenities or locations of proposed uses for which such permit may be granted and may provide that the proposed use be a specific distance from any district designated by zoning ordinance or by-law for any residential use or from any other adult bookstore or adult motion picture theatre or from any establishment licensed under the provisions of section twelve of chapter one hundred and thirty-eight. Such zoning ordinance or by-law shall prohibit the issuance of such special permits to any person convicted of violating the provisions of section sixty-three of chapter one hundred and nineteen or section twenty-eight of chapter two hundred and seventy-two.

As used in this section, the following words shall have the following meanings:-

"Adult bookstore", an establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other matter which are distinguished or characterized by their emphasis depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

### ANNOTATIONS

*Special permits may be provided for adult bookstores, motion picture theatres, and other adult entertainment facilities*

*Zoning may provide for specific locations for adult entertainment facilities and may specify the distance of such uses from districts designated as residential*

*Definitions of specific words pertaining to adult entertainment facilities*

*"Adult bookstore"*

|   |  |
|---|--|
| <p>"Adult motion picture theatre", an enclosed building used for presenting material distinguished by an emphasis on matter depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.</p>  | <p><i>"Adult motion picture theatre"</i></p>   |
| <p>"Adult paraphernalia store," an establishment having as a substantial or significant portion of its stock devices, objects, tools, or toys which are distinguished or characterized by their association with sexual activity, including sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.</p>  | <p><i>"Adult paraphernalia store"</i></p>  |
| <p>"Adult video store," an establishment having as a substantial or significant portion of its stock in trade, videos, movies, or other film material which are distinguished or characterized by their emphasis depicting, describing, or relating to sexual conduct or sexual excitement as defined in said section thirty-one of said chapter two hundred and seventy-two.</p>   | <p><i>"Adult video store"</i></p>  |
| <p>"Establishment which displays live nudity for its patrons", any establishment which provides live entertainment for its patrons, which includes the display of nudity, as that term is defined in section thirty-one of chapter two hundred and seventy-two.</p>   | <p><i>"Establishment which displays live nudity for its patrons"</i></p>   |
| <p>Zoning ordinances or by-laws shall provide that special permits shall only be issued following public hearings held within sixty-five days after filing of an application with the special permit granting authority, a copy of which shall forthwith be given to the city or town clerk by the applicant, and may provide that certain classes of special permits shall be issued by one special permit granting authority and others by another special permit granting authority as provided in the ordinance or by-law. Such special permit granting authority shall adopt and from time to time amend rules relative to the issuance of such permits, and shall file a copy of said rules in the office of the city or town clerk. Such rules shall prescribe a size, form, contents, style and number of copies of plans and specifications and the procedure for a submission and approval of such permits.</p> | <p><i>Public hearing required before issuance of special permit</i></p> <p><i>Designation of special permit granting authority</i></p> <p><i>Rules of special permit granting authority to prescribe application and plan requirements</i></p> |

|   |   |
|---|---|
| <p>Special permit granting authorities shall act within ninety days following a public hearing for which notice has been given by publication or posting as provided in section eleven, and by mailing to all parties in interest; provided, however, that a city council having more than five members designated to act upon such a permit may appoint a committee of such council to hold the public hearing. Failure by a special permit granting authority to take final action upon an application for a special permit within said ninety days following the date of public hearing shall be deemed to be a grant of the permit applied for. Special permits issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board and a unanimous vote of a three member board. Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than two years, and including such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause.</p> <p>Any existing adult bookstore, adult motion picture theater, adult paraphernalia store or establishment which displays live nudity for its patrons, or adult video store shall apply for such permit within ninety days following the adoption of said zoning ordinance or by-law by a municipality.</p> <p>Nothing contained herein shall be construed as limiting the power and authority of cities and towns to regulate the use of land, structures or buildings through by-law or zoning ordinance.</p> | <p><i>Special permit granting authority to act within 90 days of public hearing to avoid constructive grant</i></p> <p><i>Failure to take timely final action shall be deemed grant of special permit</i></p> <p><i>Voting requirements for special permit granting authority</i></p> <p><i>Zoning to provide for lapse of unutilized special permit within no less than 2 years of grant</i></p> <p><i>Existing adult facilities must apply for special permit within 90 days of adoption of zoning pertaining to such use or may be terminated</i></p> <p><i>This section shall not be construed to limit the municipal power and authority to adopt zoning</i></p> |
|---|---|

## **LEGISLATIVE HISTORY**

Added by St. 1982, c. 603, § 1; St. 1994, c. 60, §§ 69-71; St. 1996, c. 345, §§ 2-5.

## **PERMISSIBLE/REQUIRED ACTIONS**

- A municipality may regulate adult entertainment uses and facilities defined under this section of chapter 40A – adult bookstores, adult motion picture theatres, adult paraphernalia stores, adult video stores, establishments that display live nudity -- by providing for special permits for such uses. This permits a municipality to distinguish between uses that may appear similar to the adult use, such that zoning could permit a bookstore or movie theatre by right, while requiring a special permit for an adult bookstore or adult motion picture theatre without running afoul of constitutional equal protection rights.
- In requiring a special permit for an adult use or facility, the municipality may include in its zoning regulations the following:
  - The improvements or amenities for such use or facility, e.g., no display of nudity on signs
  - The location of such use or facility
  - The distance the proposed use or facility must be from:
    - A residential zoning district;
    - Other adult uses or facilities; or
    - Any facility licensed under M.G.L., ch. 138, § 12, which is a facility holding a common victualler's license to sell alcohol, wine, or malt beverages to be drunk on the premises.
- If a municipality regulates adult uses and facilities through the special permit process its zoning shall prohibit the issuance of a special permit to any person convicted of violating M.G.L., ch. 119, § 63 or ch. 272, § 28, which includes convictions for inducing or abetting the delinquency of a child or dissemination of matter harmful to a minor, e.g., a conviction for disseminating adult material to a minor.
- In acting on the special permit, the special permit granting authority shall follow the normal procedures and be subject to the same time limits and voting requirements for issuing a special permit, including holding a public hearing on all special permit applications. Constructive grants are also possible under this section.
- A special permit issued under this section is subject to the specific lapse provisions provided in the zoning, which shall not exceed two years if the use is not commenced or construction begun except for good cause.
- A person who wishes to continue a pre-existing adult use must file an application for a permit within 90 days after a city or town adopts a zoning ordinance or by-law which regulates such uses, as adult uses are not protected as nonconforming uses and may be terminated if such permit is not applied for within the 90 day time period.
- This section does not prohibit a municipality from adopting zoning to regulate adult uses, as long as constitutional requirements are complied with and there is a reasonable possibility that such uses could be established in the city or town subject to reasonable distance and other regulations.

## **RELATED CASE LAW**

This portion of the general laws is based largely on federal case law concerning the first amendment right of free speech and equal protection rights under the 14<sup>th</sup> amendment. *See, e.g. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (discussing regulation of adult theatres and rights provided under the first amendment); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1122 (1<sup>st</sup> Cir. 1981) (discussing regulation of adult bookstores and first amendment rights).

📖 *A.F.M., Ltd. V. Medford*, 428 Mass. 1020, 704 N.E.2d 184 (1999) (allowing only .11% of developable land in municipality to be used for adult uses unreasonably forecloses the possibility of such uses and is unconstitutional as it denies the applicant reasonable alternatives of communication as guaranteed by the first amendment).

## **CAUTIONARY NOTES**

✓ A municipality should anticipate potential adult uses and facilities in its community and ensure that they are adequately regulated and are located in areas that will carry out the purposes of zoning, while not infringing on constitutional first amendment and equal protection rights of the property owner.

## **LINKS**

🔗 [www.firstamendmentcenter.org](http://www.firstamendmentcenter.org) (2004) (discussion and cases concerning zoning and free speech)

🔗 Marola, Lydia. "Everything You Ever Wanted to Know About Adult Entertainment Regulations." [http://www.nypf.org/adult\\_entertainment.htm](http://www.nypf.org/adult_entertainment.htm) N.Y. Plan. Fed.: Troy, N.Y. (2004).

## **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 9, 11, 13, 15, 16, & 17 (2004).

## SECTION 9B.

### PROTECTION OF SOLAR ACCESS



#### THE LAW

Zoning ordinances or by-laws adopted or amended pursuant to section five of this chapter may encourage the use of solar energy systems and protect solar access by regulation of the orientation of streets, lots and buildings, maximum building height limits, minimum building set back requirements, limitations on the type, height and placement of vegetation and other provisions. Zoning ordinances or by-laws may also establish buffer zones and additional districts that protect solar access which overlap existing zoning districts. Zoning ordinances or by-laws may further regulate the planting and trimming of vegetation on public property to protect the solar access of private and public solar energy systems and buildings. Solar energy systems may be exempted from set back, building height, and roof and lot coverage restrictions.

Zoning ordinances or by-laws may also provide for special permits to protect access to direct sunlight for solar energy systems. Such ordinances or by-laws may provide that such solar access permits would create an easement to sunlight over neighboring property. Such ordinances or by-laws may also specify what constitutes an impermissible interference with the right to direct sunlight granted by a solar access permit and how to regulate growing vegetation that may interfere with such right. Such ordinances or by-laws may further provide standards for the issuance of solar access permits balancing the need of solar energy systems for direct sunlight with the right of neighboring property owners to the reasonable use of their property within other

#### ANNOTATIONS

*Zoning may encourage the use of solar energy systems and protect solar access*

*Type of solar regulations permissible*

*Buffer zones permissible*

*Regulation of planting and trimming of vegetation on public property*

*Exemptions for solar energy systems*

*Zoning may provide for special permits to protect access to direct sunlight for solar energy systems*

*Specification of impermissible interference with the right to direct sunlight*

*Zoning may provide standards for issuance of solar access permits*

|  |  |
|--|--|
| <p>zoning restrictions. Such ordinances or by-laws may also provide a process for issuance of solar access permits including, but not limited to, notification of affected neighboring property owners, opportunity for a hearing, appeal process and recordation of such permits on burdened and benefited property deeds. Such ordinances or by-laws may further provide for establishment of a solar map identifying all local properties burdened or benefited by solar access permits. Such ordinances or by-laws may also require the examination of such solar maps by the appropriate official prior to the issuance of a building permit.</p> | <p><i>Zoning may provide process for issuance of solar access permits</i></p> <p><i>Zoning may provide for a solar map</i></p> |
|--|--|

## **LEGISLATIVE HISTORY**

Added by St. 1985, c. 637, § 6.

## **PERMISSIBLE/REQUIRED ACTIONS**

☛ A municipality may adopt zoning provisions in order to encourage the use of solar energy systems and to protect solar access.

- Solar energy system is defined under section 1A of The Zoning Act as “a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating.”
- Solar access is defined under section 1A of The Zoning Act as “the access of a solar energy system to direct sunlight.”

☛ The regulations to encourage solar energy systems and to protect solar access may include the following:

- Regulations concerning the:
  - orientation of streets, lots and buildings
  - maximum building height limits
  - minimum building set back requirements
  - planting and trimming of vegetation on public property
- Limitations on the type, height, and placement of vegetation
- Establishment of buffer zones and additional districts that overlay existing zoning districts in order to protect solar access
- Exemptions for solar energy systems from restrictions concerning:
  - set back
  - building height
  - roof and lot coverage restrictions
- Establishment of a solar map that identifies all properties burdened (subject to a solar access easement) or benefited by a permit allowing solar access

- Local zoning may require the appropriate official to examine the solar map before issuing a building permit.
- A municipality may require a solar access special permit for purposes of encouraging the use of solar energy systems and protecting solar access.
- Zoning may specify provisions applicable to solar access special permits, including the following:
  - that the permit creates an easement to sunlight over neighboring property
  - a definition of what constitutes an impermissible interference with the right to direct sunlight granted by a permit
  - a regulation pertaining to management of growing vegetation that may interfere with the rights to sunlight granted by the permit
- Zoning may specify standards and a process for issuance of a solar access special permit, which includes, but is not limited to the following:
  - notification to affected neighboring property owners
  - an opportunity for notice and a hearing
  - the appeal process
  - the recording process, including specifying in easement deeds that particular property is benefited or burdened by a solar access easement

NOTE: If a special permit is used for allowing solar access and solar energy systems, it is recommended that the municipality use the special permit process set forth under chapter 40A, especially under sections 9, 11, & 15.

### **RELATED CASE LAW**

There is no related case law under this section.

### **CAUTIONARY NOTES**

✓ Standards specified in zoning for the issuance of a solar access special permit must balance the needs of solar energy systems to direct sunlight with the rights of neighboring property owners to make a reasonably use of their property under zoning.

### **LINKS**

🔗 U.S. Department of Energy. <http://www.eere.energy.gov/> (2004) (solar access information).

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 1A, 3, 9, 11, 15, 16, & 17 (2004).

**SECTION 9C.**  
**CHILD CARE FACILITIES**



**THE LAW**

As used in this section, 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.

When any zoning ordinance or bylaw in any city or town limits the floor area of any structure, such floor area shall be measured exclusive of any portion of such structure in which a child care facility is to be operated as an accessory or incidental use, and the otherwise allowable floor area of such structure shall be increased by an amount equal to the floor area of such child care facility up to a maximum increase of ten per cent. In any case where the otherwise allowable floor area of a structure has been increased pursuant to the provisions of this section, the portion of such structure in which a child care facility is to be operated as an accessory or incidental use shall not be used for any other purpose unless, following the completion of such structure, the board authorized to grant variances under such zoning ordinance or bylaw shall have determined, with the written concurrence of the office for children, that the public interest and convenience do not require the operation of such facility. The procedures governing the granting of variances, including all rights of appeal, shall apply to any such determination.

The owner of a building as to which the allowable floor area has been increased pursuant to this section shall be allowed to charge the operator of the child care facility for the following: the cost of utilities

**ANNOTATIONS**

*Definition of child care facility*

*Measurement of floor area for child care facility when limited by zoning*

*Facility may not be used for purpose other than child care unless board of appeals grants permission in accordance with procedures for grant of a variance*

*Owner of building in which child care facility is located*



✦ The owner of the floor space used for the child care facility may **not** charge the operator of the facility for alterations to meet the requirements imposed by the Massachusetts Office of Children.

✦ The operator of the exclusive, accessory child care facility shall use best efforts to ensure that 50% of the children using the facility are from families whose income is not in excess of 110% of the Massachusetts median family income.

### **RELATED CASE LAW**

📖 *Petrucci v. Zoning Bd. of Appeals of Westwood*, 45 Mass. App. Ct. 818, 702 N.E.2d 47 (1998) (use of nonconforming barn for primary use of child care facility for 47 children on lot with single family house exempt from zoning and subject only to reasonable dimensional regulations that do not prohibit use and cause excessive expense to comply).

📖 *Rogers v. Norfolk*, 422 Mass. 374, 734 N.E.2d 1143 (2000) (a child care facility exceeded size of building regulation and court ruled facility was exempt, as a regulation may not unreasonably impede an exempted use unless it substantially advances a valid zoning goal).

### **CAUTIONARY NOTES**

✓ The municipality must ensure that the accessory use is exclusively for a child care facility unless the required determination to permit additional uses is made by the board of appeals.

✓ The owner of the property may not charge the operator for the cost of alterations to meet the requirements imposed by the Massachusetts Office of Children.

### **LINKS**

🔗 Massachusetts Office of Child Care Services.  
<http://www.qualitychildcare.org/>

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 3, 10, 11, 15, 16 , & 17 (2004).

## SECTION 10.

### VARIANCES



#### THE LAW

The permit granting authority shall have the power after public hearing for which notice has been given by publication and posting as provided in section eleven and by mailing to all parties in interest to grant upon appeal or upon petition with respect to particular land or structures a variance from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. Except where local ordinances or by-laws shall expressly permit variances for use, no variance may authorize a use or activity not otherwise permitted in the district in which the land or structure is located; provided however, that such variances properly granted prior to January first, nineteen hundred and seventy-six but limited in time, may be extended on the same terms and conditions that were in effect for such variance upon said effective date.

The permit granting authority may impose conditions, safeguards and limitations both of time and of use, including the continued existence of any particular structures but excluding any condition, safeguards or

#### ANNOTATIONS

*Permit granting authority has power to issue variance after notice and public hearing*

*Mandatory findings for issuance of a variance*

*Variance for use not permitted unless specifically authorized under local zoning bylaw or ordinance*

*Permit granting authority may impose conditions, safeguards, and limitations on variance, except for a*

|   |  |
|---|--|
| <p>limitation based upon the continued ownership of the land or structures to which the variance pertains by the applicant, petitioner or any owner.</p> <p>If the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse; provided, however, that the permit granting authority in its discretion and upon written application by the grantee of such rights may extend the time for exercise of such rights for a period not to exceed six months; and provided, further, that the application for such extension is filed with such permit granting authority prior to the expiration of such one year period. If the permit granting authority does not grant such extension within thirty days of the date of application therefor, and upon the expiration of the original one year period, such rights may be reestablished only after notice and a new hearing pursuant to the provisions of this section.</p> | <p><i>requirement of continued ownership</i></p> <p><i>Variance lapses within one year of grant if not exercised</i></p> <p><i>Variance may be extended for 6 months if extension applied for before lapse</i></p> <p><i>If extension is not granted rights may be reestablished with a new notice, hearing, and issuance variance</i></p> |
|---|--|

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by 1977, c. 829; § 4B; St. 1984, c. 195.

## **PERMISSIBLE/REQUIRED ACTIONS**

- A permit granting authority (the zoning board of appeals or a zoning administrator as set forth under M.G.L., ch. 40A, § 13) is the only entity that may grant a variance.
- A petitioner (any person with an ownership interest or acting as an agent of an owner) may request a variance by:
  1. Direct petition to the permit granting authority ("PGA") by filing the petition with the town clerk, who shall certify the date and time of filing, and then immediately transmit the petition to the PGA
  2. Appeal of a building official's decision to require a variance before issuance of a building permit by filing the petition with the town clerk, who shall certify the date and time of filing, and then immediately transmit the petition to the PGA
- Before the PGA may grant (or deny) a requested variance, the PGA must:
  1. give notice of a public hearing by publication and posting, and by mailing to all parties in interest, as set forth under M.G.L., ch. 40A, § 11 and
  2. hold the public hearing at an open meeting as set forth in the notice
    - a. The public hearing must be held within 65 days after the PGA receives the variance petition, as set forth under M.G.L., ch. 40A, § 15, unless the petitioner/appellant and PGA mutually agree to extend the date for the hearing.

- b. The chair or acting chair, in the absence of the chair, may
  - i. Administer oaths,
  - ii. summon witnesses, and
  - iii. call for the production of papers.

➤ A variance pertains to land or structures only, unless the local zoning by-law or ordinance expressly permits the PGA to entertain a request for a use variance.

1. If a municipality no longer permits use variances, such variances properly granted before January 1, 1976, with a limitation on time. may be extended.
2. The same terms and conditions that applied to a use variance granted before January 1, 1976 shall still apply when and if the use variance is extended.

➤ In order to grant a variance, the PGA must make the following specific statutory findings that must be related to the land or structure:

1. The land or structure that is the subject of the variance is uniquely and specifically impacted by one of the following circumstances:
  - a. Soil conditions (wetlands, ledge, etc. prevent compliance with zoning);
  - b. Shape (not self-created, but does include an oddly shaped lot, such as pre-existing pork chop lot, **but not a lot that is simply undersized** *McCabe v. Board of Appeals of Arlington*, 10 Mass. App. Ct. 934, 413 N.E.2d 358 (1980), and also includes an oddly-shaped structure or building that might prevent compliance with zoning); or
  - c. Topography (half of the land is too steep for building upon and thus prevents compliance with zoning);
2. The circumstances do not generally affect other land or structures in the zoning district in which the property is located;
3. Due to the circumstances related to the soil, shape, or topography, the petitioner or appellant would suffer a hardship if the zoning is enforced as adopted;
4. The hardship may be financial or another hardship, but it may not be personal and must relate to the soil, shape, or topography, e.g., "The cost of blasting ledge on this lot, which is the only lot in the area with ledge, in order to permit compliance with the zoning, and the potential of destroying wells in the neighborhood through use of explosives, outweigh the literal enforcement of zoning and thus the ledge creates a hardship";
5. The variance requested may be granted without substantial detriment to the public good, e.g., "Because the petitioner will construct a street light, the dangerous intersection will be improved by granting the variance and property values will be enhanced";
6. The variance requested may be granted without nullifying or substantially derogating from the intent or purpose of the zoning

ordinance or by-law, e.g., "Although a variance is granted to permit construction of a house on a lot that has insufficient frontage, the structure is to be placed on the lot so that it will comply with all required setbacks and thus will not nullify or substantially derogate from the zoning purpose of protecting open space in a residential neighborhood"; and

7. The owner cannot make reasonable use of the property under existing zoning.

☛ When making the specific statutory findings, the PGA may not simply repeat the statutory language; it must also include factual reasoning based on evidence presented at the hearing (testimony, reports, etc.) that supports each finding in its decision.

☛ In granting a variance, the PGA may adopt conditions, safeguards, and limitations on the time and use of the variance. To avoid an arbitrary and unreasonable decision, the PGA should rely on evidence presented at the hearing and sound reasoning that supports such impositions.

1. An example of a condition is "The commercial use may be operated from 8:00 AM to 6:00 PM in order to protect the adjacent residential neighborhood."
2. An example of a safeguard is "No salt shall be used on the parking lot in the winter in order to protect the adjacent wetlands."
3. An example of a limitation is "No outdoor storage is permitted in order to lessen the visual impact of the retail use on the adjacent residential property."

☛ The PGA may not impose a condition, safeguard or limitation that requires continued ownership of the land or structure to which the variance pertains by the original owner at the time the variance is granted, e.g., the PGA may not adopt a condition such as the following: "If the owner conveys the land to another grantee this variance shall lapse."

☛ The PGA must deny a variance if all of the statutory findings are not met.

☛ If a variance is denied, the petitioner or appellant has a right to request a rehearing as set forth under M.G.L., ch. 40A, § 16.

☛ The petitioner, appellant, or any interested or aggrieved party may appeal the grant or denial of the variance as set forth under M.G.L., ch. 40A, § 17.

☛ Unless the time for action on the variance is extended by mutual agreement of the petitioner/appellant and the PGA, the PGA must act (vote to approve or deny) on the variance within 100 days after the petition or appeal is filed with the PGA in order to avoid constructive grant as set forth under M.G.L., ch. 40A, § 15.

1. A three-member board must unanimously vote to grant a variance.
2. Four members of a five-member board must vote to grant a variance.

☛ Within 14 days after acting on a variance petition, the PGA must:

1. File a copy of its detailed record (minutes that specify the decision and reasons for the decision and include a record of the votes by each

member or the absence of a member or failure of a member to vote) with the city or town clerk;

- a. The courts have deemed the 14 day requirement as directory, not mandatory. However, the detailed record should be filed within 14 days of the 100<sup>th</sup> day for making the decision.
2. Mail a notice of the decision to the petitioner or appellant, all parties in interest, and all persons who requested notice at the public hearing; and
3. Note on the mailed notice of decision that an appeal pursuant to M.G.L., ch. 40A, § 17 may be filed within 20 days after the PGA filed the decision with the city or town clerk.

➤ If there is constructive grant, the following process must be followed in order for the constructively granted approval to be in effect:

1. The petitioner must notify the city or town clerk in writing of such constructive approval within 14 days from the expiration of the time for action (100 days from the date of filing for the variance or any extended time),
2. The petitioner must send notice of the constructive grant to all parties in interest and specify in the notice to the city or town clerk that such notice has been sent,
3. The petitioner must specify in the notice to parties in interest that an appeal pursuant to M.G.L., ch. 40A, § 17 may be filed within 20 days after the date the petitioner gave written notice to the city or town clerk,
4. After the 20 day appeal period expires without the filing of an appeal (or after a certified decision on an appeal that is favorable to the petitioner), the city or town clerk must issue a certificate stating the date of approval, that the PGA failed to take final action within the required time period, and that the approval resulting from such approval has become final, and
5. The city or town clerk must mail the certificate to the petitioner.

➤ A variance is not effective until it is recorded at the applicable registry of deeds as set forth under M.G.L., ch. 40A, § 11.

➤ A variance must be exercised in one year after grant or it lapses and must be reestablished, unless the PGA grants an extension based on a proper application as follows:

1. The owner (grantee) of the land or structure to which the variance pertains must file a written application with the PGA before the expiration of one year after grant;
2. The PGA has discretion to extend the time to exercise the variance to up to six months after it lapses; and
3. If the PGA fails to grant the extension within 30 days after the date of written application, and if the one year for exercise has expired, the variance may only be re-established after notice, hearing, and the required statutory findings for grant of a the variance by the PGA.

- ☛ A properly exercised variance runs with the land and is good indefinitely, unless limited in time.
- ☛ A special permit may not be used to alter, extend, or change a structure or use permitted by variance. Another variance is required.
- ☛ A variance is exercised when an application for a building or occupancy permit is made and when the property is subdivided, even though construction is delayed.

### **NO ONE IS ENTITLED TO A VARIANCE**

**Although each case should be analyzed on its own merits, the Courts rarely uphold the grant of a variance. The Courts have found that the following arguments related to hardship did not support the grant of a variance:**

- *Frontage on two streets*
- *Split-zoned lot*
- *Undersized lot*
- *Only way to make profitable use of property*
- *Shortage of housing for large families*
- *Mistake in construction and too costly to raze structure that violates zoning*
- *Spent substantial money in building without a permit*
- *Pre-existing zoning violation*
- *Creation of nonconforming lot by division of land and conveyance of one lot to another person*
- *Other nonconforming uses or structures in neighborhood*
- *Property is located next to another district or use*
- *Neighborhood is changing*
- *Want to expand pre-existing, nonconforming use onto adjacent lot just purchased*
- *Was told could use property for a particular use*
- *Need access to business across residential property*
- *Rezoning*
- *Eminent domain taking to support use variance*
- *Lot is triangular shaped and has no frontage and thus a residential use should be permitted in an industrial zone*
- *Lot is undersized because it is located on a cul-de-sac*
- *The proposed use is desirable*
- *The proposal will increase property taxes in the municipality*
- *Health of property owner*
- *Poor financial condition of property owner*

## **RELATED CASE LAW**

☐ *39 Joy Street Condominium Assoc. v. Board of Appeal of Boston*, 426 Mass. 485, 688 N.E.2d 1363 (1998) (because space was usable for residential use, variance for beauty parlor was not justified; owner of condo unit had standing to seek use variance for unit).

☐ *Abbott v. Appleton Nursing Home*, 362 Mass. 290, 285 N.E.2d 436 (1969) (fact that nursing home would no longer be economical without an increase in beds was not hardship that justifies grant of a variance; expansion of use would derogate from intent of zoning to limit expansion of nonconforming uses).

☐ *Adams v. Brolly*, 46 Mass. App. Ct. 1, 702 N.E.2d 200 (1998) (where taking created pork chop lot unlike any other in area, hardship based on shape existed).

☐ *Alpert v. Board of Appeals of Chelsea*, 6 Mass. App. Ct. 885, 376 N.E.2d 1265 (1978) (mere repetition of statutory requirements is not sufficient to grant variance).

☐ *Amero v. Board of Appeal of Gloucester*, 283 Mass. 45, 186 N.E.2d 61 (1933) (financial situation of owner does not justify grant of a variance; evidence supported grant of variance for second gasoline pump in residential district).

☐ *Anesse v. Board of Appeal of Somerville*, 361 Mass. 893, 282 N.E.2d 677 (1972) (special permits do not need to satisfy more stringent variance requirements).


☐ *Aronson v. Board of Appeals of Stoneham*, 349 Mass. 593, 211 N.E.2d 228 (1965) (zoning violation is not a unique condition that justifies grant of a variance; even though porch would be in line with existing house, porch would serve invalid child, and high shrubbery would screen porch these are not hardship sufficient for grant of a variance).


☐ *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 429 N.E.2d 355, review denied, 385 Mass. 1101, 440 N.E.2d 1173 (1981) (in order to divide one parcel into two building lots with undersized frontage two approvals are necessary – a variance from the frontage requirements under zoning and a planning board waiver of frontage requirements under the subdivision control law; a self-created hardship does not support a variance).


☐ *Asack v. Board of Appeals of Westwood*, 47 Mass. App. Ct. 733, 716 N.E.2d 135 (1999) (person who bought two separately described, but adjoining lots is not entitled to a variance in order to build on both lots; party cannot claim variance not aware of).


☐ *Atherton v. Board of Appeals of Bourne*, 334 Mass. 451, 136 N.E.2d 201 (1956) (allowing a commercial boat repair and storage use in a residential district would substantially derogate from the intent of the zoning; must be hardship finding in order to grant variance).


☐ *Barbato v. Board of Appeal of Chelsea*, 355 Mass. 264, 244 N.E.2d 308 (1969) (variance to erect a mechanical shop did not permit storage and repair of heavy commercial equipment).


 *Bateman v. Board of Appeals of Georgetown*, 56 Mass. App. Ct. 236, 775 N.E.2d 1276 (2002) (upholding hardship base on shape due to eminent domain taking).


 *Benjamin v. Board of Appeals of Swansea*, 338 Mass. 257, 154 N.E.2d 913 (1959) (because of rezoning of property to residential, owner was not entitled to variance to change from pre-existing perfume shop to restaurant).


 *Bertrand v. Board of Appeals of Bourne*, 58 Mass. App. Ct. 912, 790 N.E.2d 704 (2003) (ruling that there was no hardship to support the grant of the variance to build on two undersized lots, despite these lots being only undersized lots in area and that petitioner had paid taxes on two lots, because hardship did not relate to soil, shape, or topography; size of lot does not qualify as "shape of the land" grounds for grant of a variance).


 *Bicknell Realty Co. v. Board of Appeal of Boston*, 330 Mass. 676, 116 N.E.2d 570 (1954) (fact that cannot put building to profitable use unless business permitted in residential district does not justify grant of a variance; even though soil conditions make construction more expensive, all lots in area suffer from same soil conditions and lot is not uniquely affected; location next to business district does not justify variance for a business use in a residential district).


 *Blackman v. Board of Appeals of Barnstable*, 334 Mass. 446, 136 N.E.2d 198 (1956) (financial situation of owner is not hardship that justifies grant of a variance; grant of variance not upheld for failure to find one of statutory requirements).


 *Board of Appeals of Westwood v. Lambergs*, 42 Mass. App. Ct. 411, 677 N.E.2d 270, *rev. denied*, 425 Mass. 1101, 680 N.E.2d 101 (1997) (constructive grant occurred for failure of board to make decision within 100 days, and board could not change result by filing amended decision more than 100 days after original variance petition was filed).


 *Board of Selectmen of Stockbridge v. Monument Inn, Inc.*, 14 Mass. App. Ct. 901 (1982) (detailed record is not restricted to minutes of board).


 *Boston Edison Co. v. Boston Redev. Auth.*, 374 Mass. 37, 371 N.E.2d 728 (1977) (in granting variance board should consider existing property uses in area to proposed use).


 *Bottomley v. Board of Appeals of Yarmouth*, 354 Mass. 474, 238 N.E.2d 354 (1968) (no one has a legal right to a variance).


 *Bouchard v. Ramos*, 362 Mass. 290, 285 N.E.2d 436 (1963) (fact that lot was split-zoned lot for business and residential did not create hardship to justify variance for a supermarket).


 *Boyajian v. Board of Appeal of Wellesley*, 6 Mass. App. Ct. 282, 374 N.E.2d 1237 (1978) (board must find all statutory prerequisites before granting variance; closeness of parcel to commercial district is one factor to consider in determining if lot is economically useless for single family house).


 *Brackett v. Board of Appeals of Building Dept. of Boston*, 311 Mass. 52, 39 N.E.2d 956 (1942) (purchase of land for a particular purpose is not grounds for granting a variance).


 *Broderick v. Board of Appeal of Boston*, 361 Mass. 472, 280 N.E.2d 670 (1972) (no one has a legal right to a variance; in case involving hospital in single-family residential district, hospital use was found to be within intent of zoning; hospital would not cause detriment to the public good, as it would not have adversely affected property values in the area).


 *Bruzzese v. Board of Appeals of Hingham*, 342 Mass. 421, 179 N.E.2d 269 (1962) (lost profit is not a hardship that justifies grant of a variance).


 *Callahan & Sons, Inc. v. Board of Appeals of Lenox*, 30 Mass. App. Ct. 36 (1991) (discussing renewal of temporary variance).


 *Cary v. Board of Appeals of Worcester*, 340 Mass. 748 (1960) (detrimental effect must be determined by looking at effect on entire neighborhood).


 *Cass v. Board of Appeal of Fall River*, 2 Mass. App. Ct. 555, 317 N.E.2d 77 (1974) (shortage of housing for large families does not constitute hardship for a variance; findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).


 *Cavanaugh v. DiFlumera*, 9 Mass. App. Ct. 396, 401 N.E.2d 867 (1980) (denial of use variance would have denied virtually all use of property in an area that was not all residential and under circumstances in which previous local decisions had permitted commercial use in the residential district upon which owner had reasonably relied).


 *Cefalo v. Board of Appeal of Boston*, 332 Mass. 178, 124 N.E.2d 247 (1955) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).


 *Chater v. Board of Appeals of Milton*, 348 Mass. 237, 202 N.E.2d 805 (1964) (inability to use lot for any purpose should be considered in granting a variance).


 *Circle Lounge & Grille v. Board of Appeal of Boston*, 324 Mass. 427, 86 N.E.2d 920 (1949) (injury from business competition is not grounds to overturn the grant of a variance).


 *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 307 N.E.2d 316 (1974) (declining profits was not hardship that would permit increase in number of units in apartment complex).


 *Coolidge v. Zoning Bd. of Appeals of Framingham*, 343 Mass. 742, 180 N.E.2d 670 (1962) (location of parcel next to commercialized area and increased cost to construct single family residence were not conditions especially affecting the lot and did not justify grant of a variance).


 *Costa v. Board of Appeals of Framingham*, 6 Mass. App. Ct. 869, 374 N.E.2d 1239 (1978) (location next to sand and gravel pit does not on its own justify grant of variance).


 *Crosby v. Board of Appeals of Weston*, 3 Mass. App. Ct. 713, 323 N.E.2d 772 (1975) (hardship was not self-created, even though this was last lot in subdivision to be built upon).


 *Delgaudio v. Board of Appeals of Medford*, 1 Mass. App. Ct. 850, 303 N.E.2d 126 (1973) (variance should not be granted for six story motel in two story district where there were no unique conditions affecting lot that did not affect rest of property in zoning district).


 *DiCicco v. Berwick*, 27 Mass. App. Ct. 312, N.E.2d (1989) (hardship, in this case allegedly ledge outcropping, does not create hardship, as hardship is due to lot's failure to meet area requirements and variance cannot be granted to remedy a hardship created by post-zoning division which created a substandard lot).


 *DiGiovanni v. Board of Appeals of Rockport*, 19 Mass. App. Ct. 339, 474 N.E.2d 198, *review denied*, 394 Mass. 1103, 477 N.E.2d 595 (1985) (no one has a legal right to a variance; upheld denial of variance because proposed plan violated prior variance).


 *Dion v. Board of Appeals of Waltham*, 344 Mass. 547, 183 N.E.2d 479 (1962) (variance may be initiated on appeal or direct petition; discussing appropriate petition language in order to request a variance; loss of profit in resale is not a hardship that justifies grant of a variance; person with fiduciary interest may apply for variance; amendment of decision to include detailed reasons for decision that takes place before expiration of 20 day appeal period is valid).


 *District Atty. for the Northwestern Dist. v. Board of Selectmen of Sunderland*, 11 Mass. App. Ct. 663 (1981) (one vote does not constitute majority of a quorum of a three-member board when one member votes to go into executive session and the other two members abstain).


 *Dowd v. Board of Appeals of Dover*, 5 Mass. App. Ct. 824, 360 N.E.2d 640 (1977) (hardship for a variance may not be personal, but must especially affect real estate).

 *Everpure Ice Mfg. v. Board of Appeals of Lawrence*, 324 Mass. 433, 86 N.E.2d 906 (1949) (discussing detrimental to public good and derogation from purposes of ordinance findings; loss of gain from a business in a residential zone does not justify grant of a variance).

 *Fandel v. Board of Zoning Adjustment*, 280 Mass. 195, 182 N.E. 343 (1932) (communications received after hearing that were read at subsequent open meeting did not affect validity of decision).

 *Feldman v. Board of Appeals of Boston*, 29 Mass. App. Ct. 296, 559 N.E.2d 1263 (1990) (in interpreting Boston zoning ordinance, court held that deficiency in frontage does not satisfy hardship requirement).

 *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962) (fact that owner had expended substantial money in constructing a building without a permit does not justify grant of a variance; fact that other nonconforming buildings are in district does not justify variance; findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

 *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215, 438 N.E.2d 82 (1982) (personal hardship such as expenses incurred or loss of profit do not constitute

hardship for a variance; findings for denial are less rigorous than findings to grant a variance; board may deny variance for mobile home park if town's policy is against permitting such parks; vacancy on board does not transform five member board into a four member board; board member's visit to property is not invalid action).

📖 *Garfield v. Board of Appeals of Rockport*, 356 Mass. 37, 247 N.E.2d 270 (1969) (board must find all statutory prerequisites before granting variance; no hardship where property can be used for permitted residential use rather than motor inn and loss of sale for business use and cost of razing nonconforming building are personal and not hardship for a variance).

📖 *Gordon v. Zoning Bd. of Appeals of Lee*, 22 Mass. App. Ct. 343, 494 N.E.2d 14, *review denied*, 398 Mass. 1109, 497 N.E.2d 1096 (1986) (creation of nonconforming lot by conveyance of land to another lot does not establish grounds for a variance).

📖 *Guiragossian v. Board of Appeals of Watertown*, 21 Mass. App. Ct. 111, 485 N.E.2d 686, *review denied*, 396 Mass. 1105, 487 N.E.2d 855 (1985) (triangular shape of parcel and lack of street frontage did not justify grant of use variance for residential condominiums in an industrial zoning district).

📖 *Haiko v. Board of Appeals of Billerica*, 349 Mass. 465, 209 N.E.2d 323 (1965) (intent of town in amending zoning should be considered in determining derogation from intent of zoning in order to grant a variance).

📖 *Harrow v. Board of Appeals of Pittsfield*, 7 Mass. App. Ct. 937, 391 N.E.2d 276 (1979) (variance improperly granted as there was no evidence in the record that property could not be used for permitted use).

📖 *Healy v. Board of Appeals of Watertown*, 356 Mass. 130, 248 N.E.2d 1 (1969) (failure to attach board's decision to appeal was not fatal, as pleading specified wherein variance did not meet statutory requirements).

📖 *Hogan v. Hayes*, 19 Mass. App. Ct. 399, 474 N.E.2d 1158 (1985) (conveyance of lot within one year and subdivision of lot was sufficient to prevent lapse for failure to exercise variance in one year, even though construction was delayed).

📖 *Howland v. Acting Super. of Blds. of Cambridge*, 328 Mass. 155, 102 N.E.2d 423 (1952) (variance properly denied to allow division of lot into three separate lots).

📖 *Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne*, 14 Mass. App. Ct. 76, 436 N.E.2d 978 (1982) (owner must satisfy all conditions for grant of another variance once the original variance has lapsed; board members do not need to give detailed reasons for denying variance).

📖 *Huntington v. Zoning Bd. of Appeals of Hadley*, 12 Mass. App. Ct. 710, 428 N.E.2d 826 (1981) (variance may not be limited in duration to ownership; must reestablish lapsed variance with new notice and hearing).

📖 *Hurley v. Kolligian*, 333 Mass. 170, 129 N.E.2d 920 (1955) (there are no grounds to issue a use variance because of purchase of adjacent lot for purpose of adding it to existing business use).

☞ *Johnson v. Board of Appeals of Wareham*, 360 Mass. 872, 277 N.E.2d 695 (1972) (finding that reuse of church for viable use would increase value of lot and not be a detriment to the public good).  
 ☞ *Josephs v. Board of Appeals of Brookline*, 362 Mass. 290, 285 N.E.2d 436 (1972) (upholding height variance for a loading bay).  
 ☞ *Kairies v. Board of Appeal of Cambridge*, 337 Mass. 278, 150 N.E.2d 278 (1958) (board was justified in granting variance for gasoline filling station in zone which permitted public garages).  
 ☞ *Karet v. Zoning Bd. of Appeals of Worcester*, 27 Mass. App. Ct. 439, 539 N.E.2d 81 (1989) (deficiency in frontage of lot does not satisfy soil, shape, or topography prerequisite for grant of a variance to construct two houses on a lot).  
 ☞ *Kelloway v. Board of Appeal of Melrose*, 361 Mass. 249, 280 N.E.2d 160 (1972) (although board should not have granted variance for elderly apartment complex in residence district, use is built and being used and variance should not now be withdrawn from the local housing authority).  
 ☞ *Kirker v. Board of Appeals of Rockport*, 33 Mass. App. Ct. 111, 596 N.E.2d 398 (1992) (variance is not required for a farm building located on a farm).  
 ☞ *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 458 N.E.2d 1213 (1984) (owner is not entitled to most beneficial use of property, as hardship exists only when owner cannot make reasonable use of property under existing zoning requirements; ledge that affected lot affected other lots in area, thus was not a hardship).  
 ☞ *Knott v. Zoning Bd. of Appeals of Natick*, 12 Mass. App. Ct. 1002, 429 N.E.2d 353 (1981) (discussing unconditional variance granted for specific footprint and failure to build what approved).  
 ☞ *Kosla v. Board of Appeals of Holden*, 55 Mass. App. Ct. 62, 768 N.E.2d 1115 (2002) (board may not grant variance concerning land in another town).  
 ☞ *Lapenas v. Zoning Bd. of Appeals of Brockton*, 352 Mass. 350, 226 N.E.2d 361 (1967) (discussing variance for access to abutting land zoned for business use in an adjacent city).  
 ☞ *Lewicki v. Board of Appeals of Haverhill*, 8 Mass. App. Ct. 906, 394 N.E.2d 1129 (1979) (personal financial hardship caused by zoning change that no longer permitted gravel removal and compliance with restoration requirements did not justify grant of variance to permit continued gravel removal).  
 ☞ *Lapenas v. Zoning Bd. of Appeals of Brockton*, 352 Mass. 530 (1967) (board may not grant relief concerning land in another town).  
 ☞ *Lopes v. Board of Appeals of Fairhaven*, 27 Mass. App. Ct. 754, 543 N.E.2d 421, review denied, 406 Mass. 1103, 548 N.E.2d 887 (1989) (after lapse of variance, owner could not depend on favorable court decision to support grant of replacement variance).  
 ☞ *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 340 N.E.2d 487 (1976) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

📖 *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972, 482 N.E.2d 336, review denied, 396 Mass. 1102, 484 N.E.2d 102 (1985) (desirability does not equate to hardship; need to remove ancient oak tree is not basis for variance where garage could be located in other area).

📖 *Maurice Callahan & Sons, Inc. v. Board of Appeals of Lenox*, 30 Mass. App. Ct. 36, 565 N.E.2d 813, review denied, 409 Mass. 1104, 569 N.E.2d 832 (1991) (variance for off-premises billboards).

📖 *McCabe v. Board of Appeals of Arlington*, 10 Mass. App. Ct. 934, 413 N.E.2d 358 (1980) (board must make finding concerning soil, shape, or topography in order to grant variance; undersized lot does not satisfy shape requirement).

📖 *McLaughlin v. Rockland Zoning Bd. of Appeals*, 351 Mass. 678, 223 N.E.2d 521 (1967) (loss of sale for business use and cost of razing nonconforming building are personal and not hardship for a variance).

📖 *McNeely v. Board of Appeal of Boston*, 358 Mass. 94, 262 N.E.2d 36 (1970) (financial situation of owner is not hardship that justifies grant of a variance; proposed use derogated from the intent of zoning to protect adjacent historic district; mere repetition of statutory requirements does not support grant of variance).

📖 *Mendes v. Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 552 N.E.2d 604, review denied, 407 Mass. 1103, 554 N.E.2d 1214 (1990) (a use permitted by a variance may not be expanded with a special permit).

📖 *Miller v. Emergency Hous. Comm'n*, 330 Mass. 693, 116 N.E.2d 663 (1954) (discussing detrimental to public good and derogation from purposes of ordinance findings).

📖 *Mitchell v. Board of Appeals of Revere*, 27 Mass. App. Ct. 1119, 537 N.E.2d 595, review denied, 405 Mass. 1203, 542 N.E.2d 601 (1989) (fact that lot is too small for construction of house and has no grandfather exemption does not justify grant of a variance; hardship, in this case slope, must prevent construction of house).

📖 *Moore v. Cataldo*, 356 Mass. 325, 249 N.E.2d 578 (1969) (special permits do not need to satisfy more stringent variance requirements).

📖 *Moran v. School Comm. of Littleton*, 317 Mass. 591 (1945) (discussing rule of necessity where conflicted member may need to vote for board to act).

📖 *Morin v. Board of Appeals of Leominster*, 352 Mass. 620, 227 N.E.2d 466 (1967) (a nonconforming use may continue without the necessity for a variance).

📖 *O'Brian v. Board of Appeals of Brockton*, 3 Mass. App. Ct. 740, 326 N.E.2d 728 (1975) (discussing standing of a party; discussing adverse soil condition).

📖 *O'Kane v. Board of Appeals of Hingham*, 20 Mass. App. Ct. 162, 478 N.E.2d 962 (1985) (board has 14 days after the end of the 100 day approval period to file decision even if decision is made in less than 100 days, as 14 day provision is only directory and not mandatory).

📖 *Pasqualino v. Board of Appeals of Wareham*, 14 Mass. App. Ct. 989, 440 N.E.2d 523 (1982) (failure to give notice of filing to town clerk prevents initiation of constructive grant period).

- 📖 *Paulding v. Bruins*, 18 Mass. App. Ct. 707, 470 N.E.2d 398 (1984) (health of lot owner and financial situation do not relate to real estate and are not considered in hardship; fact that lot was "pork chop" shaped, was larger than most lots in the area, that lot could support a driveway, and that lot was not useable without a frontage and width variance supported hardship for grant of a variance).
- 📖 *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555 (1954) (renewal of variance).
- 📖 *Phillips v. Board of Appeals of Springfield*, 286 Mass. 469, 190 N.E.2d 601 (1934) (financial situation of owner is not hardship that justifies grant of a variance).
- 📖 *Planning Bd. of Barnstable v. Board of Appeals of Barnstable*, 358 Mass. 824, 267 N.E.2d 923 (1971) (variance not justified by fact that a more economical use can be made of property as an apartment building rather than a single family house; owner's mistake in purchasing property for apartment building is not hardship that justifies grant of a variance).
- 📖 *Planning Bd. of Falmouth v. Board of Appeals of Falmouth*, 5 Mass. App. Ct. 324, 362 N.E.2d 1199 (1977) (a decision to grant a variance with conditions that must be subsequently satisfied is a decision that may be appealed).
- 📖 *Planning Bd. of Framingham v. Gargiulo*, 362 Mass. 290, 285 N.E.2d 436 (1981) (to allow an apartment building in a single-family district would substantially derogate from the intent of the zoning that does not permit apartment houses in district)
- 📖 *Planning Bd. of Nantucket v. Board of Appeals of Nantucket*, 15 Mass. App. Ct. 733, 448 N.E.2d 778, *review denied*, 389 Mass. 1104, 451 N.E.2d 1167 (1983) (decision for relief from parking requirements was not treated as a variance as hearing notice and decision did not invoke variance requirements).
- 📖 *Planning Bd. of Springfield v. Board of Appeals of Springfield*, 355 Mass. 460, 245 N.E.2d 454 (1969) (board must find all statutory prerequisites before granting variance).
- 📖 *Planning Bd. of Springfield v. Board of Appeals of Springfield*, 338 Mass. 160, 154 N.E.2d 349 (1958) (even though owner had previously operated store on another lot and had developed substantial good will, hardship did not exist on nearby lot that owner had purchased in order to expand store and because landlord would not renew old lease; findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).
- 📖 *Planning Bd. of Watertown v. Board of Appeals of Watertown*, 5 Mass. App. Ct. 833, 363 N.E.2d 293 (1977) (condition need not affect all property in district to be a condition generally affecting property within a zoning district; railroad track that ended at property affected all other properties in district along which it passed).
- 📖 *Prusik v. Board of Build. Depart. of Boston*, 262 Mass. 451, 160 N.E.2d 312 (1928) (financial situation of owner does not justify grant of a variance).

☞ *Racette v. Zoning Bd. of Appeals of Gardner*, 27 Mass. App. Ct. 617, 541 N.E.2d 369 (1989) (constructive grant period commences with filing of petition with town clerk and not with filing for permit with building official).

☞ *Rafferty v. Sancta Maria Hosp.*, 5 Mass. App. Ct. 624, 367 N.E.2d 856 (1977) (proximity of property to nonconforming hospital and to industrial zone are not unique conditions that justify grant of variance for office building and parking garage).

☞ *Raia v. Board of Appeals of No. Reading*, 4 Mass. App. Ct. 318, 347 N.E.2d 694 (1976) (fact that foundation was constructed in violation of zoning does not justify grant of a variance; hardship does not exist in order to create two nonconforming lots out of a conforming lot).

☞ *Real Properties v. Board of Appeal of Boston*, 319 Mass. 180, 65 N.E.2d 199 (1946) (financial situation of owner does not justify grant of a variance; quorum when unanimous vote required is all members of the board as it is constituted).

☞ *Reynolds v. Board of Appeal of Springfield*, 335 Mass. 464, 140 N.E.2d 491 (1956) (change in neighborhood does not supply grounds for variance).

☞ *Robichaud v. Board of Appeals of Methuen*, 6 Mass. App. Ct. 835, 372 N.E.2d 280 (1978) (owners did not require variance to build greenhouses in an agricultural district).

☞ *Rose v. Board of Appeals of Wrentham*, 352 Mass. 301, 225 N.E.2d 63 (1967) (discussing need for a variance to repair a porch within confines of a Great Pond).

☞ *Schiffone v. Zoning Bd. of Appeals of Walpole*, 28 Mass. App. Ct. 981, 553 N.E.2d 1308 (1990) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).


☞ *Security Mills Lt. Part. V. Board of Appeals of Newton*, 413 Mass. 562, 600 N.E.2d 995 (1992) (four of five members must agree on the result, though not on the reasoning for reaching the result).


☞ *Sesnovich v. Board of Appeal of Boston*, 313 Mass. 393, 47 N.E.2d 943 (1943) (when unanimous vote required quorum of board is all members as the board is constituted).


☞ *Shacka v. Board of Appeals of Chelmsford*, 341 Mass. 593, 171 N.E.2d 167 (1961) (governmental taking of property does not create hardship to permit use variance for an automobile service station in a residential district).


☞ *Shafer v. Zoning Bd. of Appeals of Scituate*, 24 Mass. App. Ct. 966, 511 N.E.2d 635 (1987) (maximization of taxes is not a valid reason for granting a variance; inadequate width at building line does not satisfy shape requirement for a hardship).


☞ *Shalbey v. Board of Appeal of Norwood*, 6 Mass. App. Ct. 519, 378 N.E.2d 1001 (1978) (findings to grant a special permit are less stringent than findings to grant a variance; decision not annulled because associate member spoke in favor of application as a private citizen).


 *Shriners' Hosp. For Crippled Children v. Boston*, 4 Mass. App. Ct. 551, 353 N.E.2d 778 (1976) (discussing zoning variances to permit redevelopment).


 *Shuman v. Board of Alderman of Newton*, 361 Mass. 758, 282 N.E.2d 653 (1972) (special permits do not need to satisfy more stringent variance requirements; board may amend decision as long as does not prejudice those entitled to notice).


 *Simone v. Board of Appeals of Haverhill*, 6 Mass. App. Ct. 599, 380 N.E.2d 718 (1978) (variance should not be granted for retail food store and gas pumps in a residential area where lot had value for residential purposes and removal of exiting gas pumps was not unreasonable; proximity of use to nonconforming business use does not justify grant of variance; \$40,000 difference in lot value without variance does not justify grant of variance).


 *Smith v. Board of Appeals of Scituate*, 347 Mass. 755, 200 N.E.2d 279 (1964) (variance not justified by fact that compliance will be more expensive, unless such expenses are related to conditions especially affecting property; variance cannot be granted until all statutory requirements are met).


 *Spaulding v. Board of Appeals of Leicester*, 334 Mass. 668, 138 N.E.2d 367 (1956) (variance cannot be granted until hardship is found).


 *Stark v. Board of Appeals of Quincy*, 341 Mass. 118, 167 N.E.2d 611 (1960) (fact that business use was conducted in residential zone in violation of zoning does not justify grant of a variance).


 *Sullivan v. Board of Appeals of Belmont*, 346 Mass. 82, 190 N.E.2d 83 (1963) (to grant variance must do more than repeat statutory language – factual findings are necessary; separation of lot from remainder of zoning district by a street is one consideration in granting a variance; even though property was less valuable for residential use due to its proximity to commercial zone, devaluation of property in district by non-commercial use must be considered; it is not a hardship that access across adjacent residential lot is needed to serve business use).


 *Sullivan v. Board of Appeals of Canton*, 345 Mass. 117, 185 N.E.2d 746 (1962) (variance cannot be granted until all statutory requirements are met).


 *Tanner v. Board of Appeals of Belmont*, 27 Mass. App. Ct. 1181 (1989) (a vote of two in favor, two opposed, and one member absent is a denial where four favorable votes are required; as long as detailed record specifies the vote of each member, all members do not need to sign detailed record).


 *Tanzilli v. Casassa*, 324 Mass. 113, 85 N.E.2d 220 (1949) (upholding variance to allow addition to nonconforming garage in a neighborhood not exclusively residential).


 *Tenneco Oil Co. v. City Council of Springfield*, 406 Mass. 658 (1990) (a board may correct clerical error, but may not change relief without notice and another hearing).


 *Todd v. Board of Appeals of Yarmouth*, 337 Mass. 162, 148 N.E.2d 380 (1958) (variance granted for maintenance of owner's boats does not support subsequent variance to use property for sale and services of boats and motors).


 *Tsagronis v. Board of Appeals of Wareham*, 33 Mass. App. Ct. 55, 596 N.E.2d 369, *appeal decided*, 415 Mass. 329, 613 N.E.2d 893 (1992) (even though lot has different shape because located on a cul-de-sac, this does not justify grant of an area and frontage variance; undersized lot does not meet hardship requirement because of shape; size of lot does not qualify as "shape of the land" grounds for grant of a variance).


 *Tutela v. Hines*, 1 Mass. App. Ct. 860, 304 N.E.2d 206 (1973) (upholding grant of sign variance as not a detriment to public good and not substantially derogating from intent of zoning).


 *Twomey v. Board of Appeals of Worcester*, 347 Mass. 684, 199 N.E.2d 682 (1964) (variance cannot be granted until all statutory requirements are met).


 *Uglietta v. City Clerk of Somerville*, 32 Mass. App. Ct. 742, 594 N.E.2d 887 (1992) (constructive grant is lost for failure to follow process to obtain constructive grant in a timely manner).


 *Vainas v. Board of Appeals of Lynn*, 337 Mass. 591, 150 N.E.2d 721 (1958) (hardship must relate to property, not owner).


 *Vassalotti v. Board of Appeals of Sudbury*, 348 Mass. 658, 204 N.E.2d 924 (1965) (variance is unnecessary if person is entitled to building permit; variance may limit any further building on lot in order to ensure adequate space for parking to serve use).

 *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *review denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (discussing unlawful construction beyond scope of variance granted for storage and maintenance of commercial vehicles and equipment).

 *Warren v. Board of Appeals of Amherst*, 383 Mass. 1, 416 N.E.2d 1382 (1981) (to grant variance must not only describe land in question but specify why such land is unique within the zoning district in which it is located; creation of nonconforming lot by conveyance of land to another lot does not establish grounds for a variance; mere recital of statutory findings does not support grant of variance).

 *Whelan v. Zoning Bd. of Appeals of Norfolk*, 430 Mass. 1009, 722 N.E.2d 969 (2000) (party may not claim hardship based on odd shaped lot because portion of lot is in adjoining town, especially when owned abutting lot and could have used land from such lot to satisfy frontage).

 *Winn v. Board of Appeals of Saugus*, 358 Mass. 804, 263 N.E.2d 440 (1970) (frontage on two streets is not a unique condition that justifies the grant of a variance).

 *Wolfman v. Board of Appeals of Brookline*, 15 Mass. App. Ct. 112, 444 N.E.2d 943, *review denied*, 388 Mass. 1104, 447 N.E.2d 670 (1983) (because soil conditions affected the parcel in question and not generally other property in the zoning district, a financial hardship existed that supported grant of a variance for an apartment building; board may review proposed draft of decision filed by attorney in making its decision).

📖 *Wolfson v. Sun Oil Co.*, 357 Mass. 87, 256 N.E.2d 308 (1970) (board must find all statutory prerequisites before granting variance and not simply repeat statutory findings; findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings; need to increase profits is not hardship).

📖 *Woods v. City of Newton*, 351 Mass. 98, 217 N.E.2d 728 (1966) (intent of zoning was to maintain area and bulk and granting of height variance would derogate from such purpose).

📖 *Wrona v. Board of Appeals of Pittsfield*, 338 Mass. 87, 153 N.E.2d 631 (1958) (must find hardship in order to grant variance).

📖 *Wyman v. Zoning Bd. of Appeals of Grafton*, 47 Mass. App. Ct. 635, 715 N.E.2d 459, *rev. denied*, 430 Mass. 1112, 722 N.E.2d 977 (1999) (building inspector to enforce conditions on variances and special permits).

📖 *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980) (public hearing and deliberations must both take place at an open meeting).

📖 *Zinck v. Board of Appeals of Framingham*, 345 Mass. 394, 187 N.E.2d 665 (1963) (to support hardship a condition must especially affect lot in question that does not generally affect other lots in the district).

📖 *Zuckerman Zoning Bd. of Appeals of Greenfield*, 394 Mass. 663, 477 N.E.2d 132 (1985) (board has 14 days after the end of the 100 day approval period to file decision even if decision is made in less than 100 days, as 14 day provision is only directory and not mandatory; board must only send notice of decision and does not have to ensure that it is received).

### **CAUTIONARY NOTES**

- ✓ In making its findings the board may not simply repeat the findings, it must give reasons therefor based on evidence obtained at the public hearing.
- ✓ Size of a lot does not qualify for hardship based on shape.
- ✓ Failure to meet time limits will result in constructive grant of a variance.
- ✓ Any person who did not attend all public hearings should not vote on the variance.
- ✓ The variance vote requires an extraordinary vote of unanimous for a board of three members and 4 of 5 for a board of 5 members.
- ✓ If a variance lapses after one year, the municipality must prohibit the use or construction of the structure or building until either an extension is granted or another variance is granted.

**SAMPLE VARIANCE PETITION:**

***TIME FOR ACTING ON THE PETITION WILL NOT COMMENCE UNTIL ALL ITEMS ON THE PETITION ARE COMPLETE.***

**PETITIONER--**

Petitioner's name: \_\_\_\_\_

Petitioner's address: \_\_\_\_\_

Petitioner's phone #: \_\_\_\_\_

**OWNER --**

If the petitioner and owner are not the same person, the following must be completed:

Owner's name: \_\_\_\_\_

Owner's address: \_\_\_\_\_

Owner's phone #: \_\_\_\_\_

The owner hereby appoints \_\_\_\_\_ (name of person appointed) to act as agent for purposes of submitting and processing this petition for a variance.

Date: \_\_\_\_\_

Owner's signature

**TITLE TO THE PROPERTY --**

The owner's title to the land that is the subject matter of this petition is

derived from deed/will/other of \_\_\_\_\_,

dated \_\_\_\_\_, and recorded in \_\_\_\_\_

Registry of Deeds, Volume \_\_\_\_\_, Page \_\_\_\_\_

Or as Land Court Certificate of Title No. \_\_\_\_\_

registered in \_\_\_\_\_ District, Volume \_\_\_\_\_, Page \_\_\_\_\_

**ASSESSOR'S RECORDS --**

The land shown on the plan is located on Map \_\_\_\_\_, Lot \_\_\_\_\_ of the

Assessor's records and has an address of \_\_\_\_\_.

**ZONING REQUIREMENTS --**

The land is located in the \_\_\_\_\_ zoning district.

THE PLAN (If Applicable) --

Title of plan: \_\_\_\_\_

Drawn by: \_\_\_\_\_

P.E.'s or surveyor's registration #: \_\_\_\_\_

Date of plan: \_\_\_\_\_

THE VARIANCE REQUEST --

Section(s) of Zoning By-law/Ordinance that relief is requested from: \_\_\_\_\_

\_\_\_\_\_

Description of relief requested: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Purpose of requesting relief (what do you want to do):

\_\_\_\_\_

\_\_\_\_\_

THE FINDINGS --

Explain your support for the following findings.

Hardship -- related to soil conditions, shape, topography:

Proposal will not be a substantial detriment to the public good:

Proposal will not nullify or substantially derogate from the intent and purpose of the zoning ordinance/by-law:

\_\_\_\_\_  
Signature of petitioner

\_\_\_\_\_  
Date

Received by city/town clerk

Date: \_\_\_\_\_

Filing fee paid: \$ \_\_\_\_\_

\_\_\_\_\_  
Signature of city/town clerk

**SAMPLE DECISION**

**CERTIFICATE OF DECISION ON VARIANCE PETITION**

Date: \_\_\_\_\_

Petitioner

Petitioner's address

*SENT BY CERTIFIED MAIL:*

# \_\_\_\_\_

City/Town Clerk

City/Town of \_\_\_\_\_

Address, Massachusetts

RE: Title of variance petition proposal

With respect to the above-captioned variance petition submitted to the permit granting authority of the city/town of \_\_\_\_\_ by \_\_\_\_\_ on \_\_\_\_\_, the permit granting authority hereby certifies that:

1. after due notice, the board held a public hearing on this proposal duly noticed on \_\_\_\_\_
2. at an open meeting duly noticed and held on \_\_\_\_\_, the board made the following findings:
  - that the following circumstances relating to the soil conditions, shape, or topography of such land or structures, especially affect such land or structures, but do not affect generally the zoning district in which it is located:
  - that a literal enforcement of the provisions of the zoning ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner, based on such soil, shape, or topography condition because of:

- that desirable relief may be granted without substantial detriment to the public good based on the following:

- that desirable relief may be granted without nullifying or substantially derogating from the intent or purpose of such zoning ordinance or by-law based on the following:

On the basis of these findings, the permit granting authority voted to

\_\_\_\_\_ grant the variance(s)

\_\_\_\_\_ deny the variance(s)

The permit granting authority adopted the following conditions, safeguards, and limitations on the variance granted:

If the rights authorized by this variance are not exercised within one year of the date of grant, such rights shall lapse.

This variance shall not be in effect until a copy of this decision is recorded at the \_\_\_\_\_ Registry of Deeds at the petitioner's expense.

This decision is subject to appeal in accordance with M.G.L. ch. 40A, § 17 within 20 days after this decision is filed with the city/town clerk.

Permit Granting Authority

|  |  |
|--|--|
|  |  |
|  |  |
|  |  |
|  |  |

**21 SAMPLE CERTIFICATION BY THE CITY OR TOWN CLERK FOR FAILURE OF  
THE PERMIT GRANTING AUTHORITY TO TAKE TIMELY ACTION ON A  
VARIANCE PETITION:**

**CERTIFICATE OF CONSTRUCTIVE APPROVAL**

The accompanying variance petition was filed by \_\_\_\_\_

on \_\_\_\_\_.

The variance petition concerns land owned by \_\_\_\_\_

The permit granting authority did not take timely action and did not file a decision with the city/town clerk concerning the petition as required under M.G.L. ch. 40A, § 15.

As city/town clerk of the city/town of \_\_\_\_\_,  
(name of city or town)

I hereby certify that due to the failure of the permit granting authority to take timely action on said petition and failure to file a copy of its decision with the city/town clerk as required by M.G.L. ch. 40A, § 15, the variance petition shall be deemed approved.

This constructive approval is subject to appeal in accordance with M.G.L. ch. 40A, § 17 within 20 days after the date of this certification by me.

Date: \_\_\_\_\_

\_\_\_\_\_  
City/Town Clerk

Cc: Permit granting authority

## **LINKS**

- 🔑 <http://www.landlaw.com> (lower court cases available from landlaw)
- 🔑 <http://www.sociallaw.com/sjcslip/8067.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

- 📁 The Land Use Manager, Vols. I – II
- 📁 The Land Use Manager, Vols. VI – VII
- 📁 The Land Use Manager, Selected Articles from July 1991 through March 1999.
- 📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 11, 13, & 15 (2004).

# SECTION 11.

## PUBLIC HEARINGS



### THE LAW

In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. "Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town. The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes. The permit granting authority or special permit granting authority may accept a waiver of notice from, or an affidavit of actual notice to any party in interest or, in his stead, any successor owner of record who may not have received a notice by mail, and may order special notice to any such person, giving not less than five nor more than ten additional days to reply.

### ANNOTATIONS

*Notice of public hearing to be published in a newspaper with the first notice at least 14 days before the day of the hearing*

*Notice of public hearing to be posted in city or town hall at least 14 days before the day of the public hearing*

*Notice to be mailed, postage prepaid to parties in interest as defined*

*Assessors to certify the names and addresses of parties in interest*

*Parties in interest may waive notice of public hearing*

Publications and notices required by this section shall contain the name of the petitioner, a description of the area or premises, street address, if any, or other adequate identification of the location, of the area or premises which is the subject of the petition, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of action or relief requested if any. No such hearing shall be held on any day on which a state or municipal election, caucus or primary is held in such city or town.

Zoning ordinances or by-laws may provide that petitions for special permits shall be submitted to and reviewed by one or more of the following and may further provide that such reviews may be held jointly:- the board of health, the planning board or department, the city or town engineer, the conservation commission or any other town agency or board. Any such board or agency to which petitions are referred for review shall make such recommendations as they deem appropriate and shall send copies thereof to the special permit granting authority and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto.

Upon the granting of a variance or special permit, or any extension, modification or renewal thereof, the permit granting authority or special permit granting authority shall issue to the owner and to the applicant if other than the owner a copy of its decision, certified by the permit granting authority or special permit granting authority, containing the name and address of the owner, identifying the land affected, setting forth compliance with the statutory requirements for the issuance of such variance or permit and certifying that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk. No variance or special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the city or town clerk that twenty days have elapsed after

*Requirements for content of public hearing notice*

*Public hearing shall not be held on day of state or municipal election, caucus, or primary*

*Review of special permit applications*

*Failure of reviewing board to make recommendations within 35 days of receipt of the special permit application shall be deemed lack of opposition thereto*

*Upon granting a variance or special permit, the issuing board shall provide copy of decision to owner and applicant if other than owner*

*No variance or special permit shall take effect until a copy of the decision or certificate of the city or town clerk in the case of a*

the decision has been filed in the office of the city or town clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied, and if it is a variance or special permit which has been approved by reason of the failure of the permit granting authority or special permit granting authority to act thereon within the time prescribed, a copy of the application for the special permit or petition for the variance accompanied by the certification of the city or town clerk stating the fact that the permit granting authority or special permit granting authority failed to act within the time prescribed and no appeal has been filed and that the grant of the application or petition resulting from such failure to act has become final or that if an appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

*constructive grant is recorded by the owner or applicant with the applicable registry of deeds*

*Owner or applicant to pay fee for recording*

### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by St. 1977, c. 829, §§ 4C-4F; St. 1979, c. 117; St. 1987, c. 498, § 2.

### **PERMISSIBLE/REQUIRED ACTIONS**

➤ A public hearing notice meets the constitutional mandate for procedural due process. A notice allows any person interested to attend the public hearing and voice his/her support or concerns.

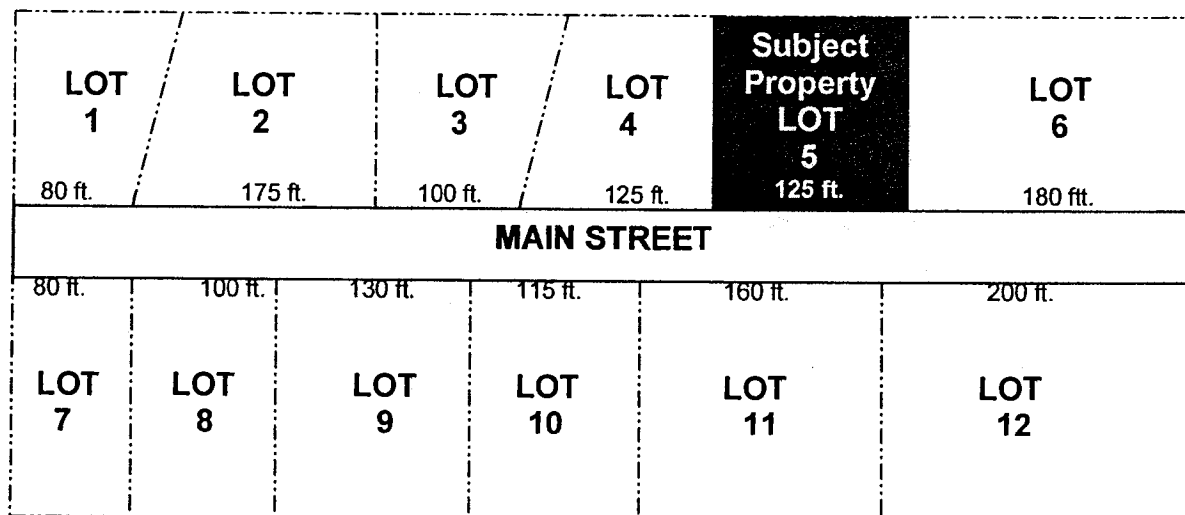
➤ Notice of a public hearing must be:

- published in a newspaper of general circulation in the community once in each of two successive weeks
  - the notice must be published in a newspaper, not an advertising flier
  - the newspaper in which the notice appears does not have to be published in the city or town, but it must be generally circulated in the city or town
  - the first notice must be at least 14 days before the day of the hearing
    - Once in each of two successive weeks means calendar weeks and not at least one full week apart. *Crall v. Leominster*, 362 Mass. 95, 284 N.E.2d 610 (1972).

- The day of the public hearing should not be counted in determining the 14-day period. *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 275 N.E.2d 525 (1971).
- posted in the city or town hall 14 days before the day of the hearing
  - the notice is to be posted in a conspicuous place
- mailed, postage prepaid and within a reasonable time (14 days is sufficient, but not required), to the "parties in interest," even if located in the neighboring city or town, including the following:
  - applicant, petitioner, or appellant;
  - abutters to the property at issue;
  - owners of land directly opposite the property at issue on any public or private street or way;
  - abutters to abutters within 300 feet of the property line of the property at issue;
  - planning board of the community; and
  - planning board of every abutting city or town

### **WHO RECEIVES NOTICE?**

The example below indicates the property owners who would qualify as "parties in interest" who should receive notice of a public hearing.



#### **"Parties in Interest"**

| LOT CLASSIFICATION  | LOT #s     |
|---|------------|
| Abutters  | 4 & 6      |
| Abutters across a street or way                             | 11 & 12    |
| Abutters to abutters within 300 feet                        | 2 & 3      |
| Abutters to abutters within 300 feet across a street or way | 8, 9, & 10 |

#### **Non-"Parties in Interest"**

Lots 1 & 7

☛ The names and addresses of the abutters and abutters to abutters should be prepared by and mailed by the board holding the public hearing. The city or town assessors maintaining the tax list should certify the names and addresses to the board holding the public hearing.

☛ **The board holding the public hearing may appoint a clerk to prepare the list of "parties in interest" and mail the notice, but the board SHOULD NOT delegate these functions to the applicant or others as this could result in invalidating the board's decision.** *Del Grosso v. Board of Appeal of Revere*, 330 Mass. 29, 110 N.E.2d 836 (1953); *Kane v. Board of Appeals of Medford*, 273 Mass. 97, 173 N.E. 1 (1930); *Planning Bd. of Peabody v. Board of Appeals of Peabody*, 358 Mass. 81, 260 N.E.2d 738 (1970).

☛ If there is a mistake in the notice of public hearing, the conservative approach is to give notice again by publishing, posting, and mailing the notice to all "parties in interest." A flawed notice could result in a costly court case and an invalid decision.

☛ Any party in interest or any successor owner of record who does not receive notice of the public hearing may provide the board with a written waiver of such notice or an affidavit of actual notice, and if the person is able to prepare for and participate in the hearing, this is likely to be treated as a waiver. *Kasper v. Board of Appeals of Watertown*, 3 Mass. App. Ct. 251 (1975).

- The board may also order special notice to any person not receiving notice and shall give such person five to ten additional days to reply to the board with comments.

☛ The contents of a public hearing notice must include the following:

- name of applicant, petitioner, or appellant;
- address or location of the subject property;
- date, time, and place of the hearing;
- subject matter of the hearing; and
- description of the action or relief requested.

NOTE: The notice must be sufficient to warn "parties in interest" of how the proposed action may affect them. *Carson v. Bd. of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947).

## **SAMPLE NOTICE OF PUBLIC HEARING**

The [Permit/Special Permit] Granting Authority of the City/Town of [name of City/Town] will hold a public hearing on [date], at [place], scheduled for [time].

The public hearing concerns a [special permit application/variance petition/administrative appeal] filed by [name of applicant/petitioner/appellant].

The subject property is located at [street address or other adequate identification for purposes of locating the property] and is owned by [owner and prospective owner's name], who has an address of [address of owner and prospective owner].

The [applicant/petitioner/appellant] requests the following relief under the City/Town Zoning Ordinance/By-law [specify relief requested and zoning provisions under which relief is requested, e.g., a special permit under section 6.1 of the Zoning Ordinance; a variance from the frontage requirements of Section 5.4 of the Zoning By-law; reversal of the decision of the building inspector denying a building permit for failure to comply with section 4.7 of the Zoning By-law.]

If the requested relief is granted [specify nature of relief, e.g., the subject property may be used for (specify special permit use); construction of a house may take place on the property with 80 feet of frontage, as opposed to 100 feet of frontage as required by zoning; the building inspector will be ordered to issue a building permit).

All interested persons should attend the public hearing. A copy of the [application/petition/appeal] is available for review at [office where can be reviewed] between the hours of [hours available].

\_\_\_\_\_  
Board Name

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

☛ A public hearing must be held within 65 days after the date of filing with the Special Permit or Permit Granting Authority. M.G.L. ch. 40A, §§ 9 & 15.

☛ Some additional requirements when holding a public hearing include the following:

- A public hearing may not be held on any day on which a state or municipal election, caucus, or primary is held in such city or town.
- The time for holding a public hearing may be extended by mutual agreement of all parties involved and such written agreement must be filed with the city/town clerk. M.G.L. ch. 40A, §§ 9 & 15.
- To continue the hearing the board should give verbal notice at the hearing and post the new date for the hearing in accordance with the open meeting law, M.G.L. ch. 39, § 23B. *Tebo v. Bd. of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 495 N.E.2d 892 (1986).
- The proper quorum for holding a public hearing is 3 for a board consisting of 3 members; 4 for a board consisting of 5 members; and 2/3rds for a board consisting of more than 5 members. M.G.L. ch. 40A, §§ 9 & 15; see *Gamache v. Acushnet*, 14 Mass. App. Ct. 215 (1982) (temporary vacancy on board does not transform a five member board into a four member board).
- Only those members of the board who attended the hearing are entitled to vote on the matter. *Mullin v. Planning Bd. of Brewster*, 17 Mass. App. Ct. 139 (1983) (where proceedings before a planning board on a special permit application are adjudicatory in nature, only those members who had attended the public hearing on the application could vote).
- Under the conflict of interest law, a member of any board should disqualify himself or herself from any proceeding in which he or she has a personal or monetary interest. M.G.L. ch. 268A; *Graham v. McGrail*, 370 Mass. 130 (1976) (ordinarily, the wise course for one who is disqualified from all participation is to leave the room).
- If the only way for a board to make a decision is to have a board member who is disqualified due to conflict participate, the rule of necessity may permit such member to participate after proper disclosure. *Moran v. School Com. of Littleton*, 317 Mass. 591 (1945) (setting forth the "rule of necessity").
- All hearings and decisions must take place at open meetings. *Yaro v. Bd. of Appeals of Newburyport*, 10 Mass. App. Ct. 587 (1980) (ZBA must deliberate and arrive at decision under public observation).
- The board should follow its own rules and regulations in giving notice and holding public hearings.

## **HOLDING THE PUBLIC HEARING**

***A public hearing is part of procedural due process afforded under the constitution. Any person interested should be permitted to speak at a public hearing concerning the matter before the board.***

### **Suggested Format for Holding a Public Hearing**

- Open hearing, read public hearing notice, and give rules for participation
- Applicant, petitioner, or appellant presents proposal
- Other boards present reports and recommendations
- Board members ask questions
- Those in favor speak
- Those opposed speak
- Applicant, petitioner, or appellant presents rebuttal
- Hearing is closed

### **Some Additional Pointers in Holding a Public Hearing**

- The chair is usually the one responsible for conducting and controlling the hearing, maintaining decorum, requesting the removal of unruly persons, and granting permission to speak. Those speaking should be requested to identify who they are and their address for the record.
- The person chairing the hearing may exclude testimony that is irrelevant, immaterial, or repetitive. Rules for such exclusions should be set forth at the beginning of the hearing.
- The board should carefully keep a record of all documents and oral testimony obtained at the hearing. No documents or testimony received by the board after close of the hearing may be used in making the decision.
- It is expected that the board members will bring their personal knowledge to bear in making a decision.
- Once the hearing is closed, the board should deliberate in public, but should refuse to allow further public input into the process without another notice and public hearing.
- Decisions are made with a motion, second, discussion, and vote. A motion may be amended and seconded and must be voted upon before the main motion. A record should be kept of how all board members vote on each question.
- If the application, petition, or appeal is incomplete the board should open the hearing, read the notice, and deny the relief requested.
- The board may take a view of the property without complying with the Open Meeting Law, as long as no deliberation of a quorum of the board takes place.
- Under the open meeting law, the public has a right to make audio and video recordings as long as they do not actively interfere with the hearing or meeting.

➤ A zoning ordinance or by-law may provide for review of special permit applications by the following boards or agents:

- Board of health
- Planning board of department
- City or town engineer
- Conservation commission
- Any other board, agency, or officer
  - It is recommended that the zoning ordinance or by-law, the operating rules of the issuing board, or both specify such other boards, agencies, or officers who may be reviewing entities. These might include police and fire officials, departments of public works, historical commissions, and water and sewer commissions.

➤ A reviewing board or agent may act on its own or jointly with other reviewing boards and agents in making recommendations deemed appropriate concerning the special permit application.

- The recommendations shall be sent to the special permit granting authority and to the applicant.
  - The applicant may request the reviewing board to hold a separate public hearing concerning the recommendations
- Recommendations should include any conditions that might be necessary to protect the public health, safety, and welfare.
- If the board or agent fails to make recommendations within 35 days after receipt of the special permit application it shall be deemed that the board or agent does not oppose issuance of the special permit.

➤ Decisions by the Permit and Special Permit Granting Authority are to be recorded at the applicable registry of deeds in order to provide notice to third parties of any conditions and limitations of approval and in order to be in effect. If the board fails to make a timely decision the city or town clerk will be required to issue a certificate of constructive grant accompanied by a copy of the application, petition, or appeal.

- A copy of the decision or city or town clerk certificate of constructive grant is to be issued to the owner or applicant, petitioner, or appellant if other than the owner.
- The decision or certificate of constructive grant shall include the following:
  - The name and address of the owner;
  - Identification of the land affected;
  - Specification of how the permitted special permit use, variance, or order on an appeal complies with statutory requirements for approval (not required on clerk's certificate);

- Certification by the issuing board that a copy of the decision and all plans referred to in the decision have been filed with the planning board and the city or town clerk; and
- Certification by the city or town clerk that 20 days have elapsed after filing of the decision in the clerk's office and no appeal has been filed, or if an appeal has been filed that it has been dismissed or denied.
- The applicant, petitioner, or appellant is required to record the decision or certificate at the applicable registry of deeds where the land at issue is located or register the decision or certificate at land court and pay the cost of recording or registering before the decision is in effect. The register of deeds will include the decision in the grantor index under the name of the owner of record or register it in land court and note it on the owner's certificate of title.

NOTE: See sections 9, 10, and 15 for sample constructive grant certificates that could be used by the city or town clerk and then be recorded in lieu of a special permit, variance, or appeal decision.

➤ Because a special permit, variance, or appeal or any modification thereof is not in effect until the decision is recorded, the official issuing building permits should not issue a permit until satisfied that the decision has been recorded.

## **RELATED CASE LAW**

☞ *Amero v. Board of Appeal of Gloucester*, 283 Mass. 45, 186 N.E.2d 61 (1933) (notice must be mailed to all parties in interest, even if did not participate in proceedings).

☞ *Baxter v. Board of Appeals of Barnstable*, 29 Mass. App. Ct. 993, 562 N.E.2d 841 (1990) (presumption that abutters are aggrieved was rebutted as abutter failed to provide evidence of a legitimate interest and smells from a permitted use or failure to obtain a license outside the ZBA's jurisdiction did not make the abutter aggrieved).

☞ *Bonan v. Board of Appeals of Boston*, 21 Mass. App. Ct. 678 (1986) (abutter who did not receive notice, but knew of proceedings and was not prejudiced cannot have decision invalidated).

☞ *Booker v. Chief Engineer of Fire Dept. of Woburn*, 324 Mass. 264, N.E.2d (1949) (unless otherwise qualified, the word day means a calendar day or the space between two midnights).

☞ *Burlington v. Dunn*, 318 Mass. 216, 61 N.E.2d 243, *cert. denied*, 326 U.S.739 (1945) (discussing adequate notice).

☞ *Carson v. Board of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947) (interested parties to receive full notice of hearing; board of appeals clerk may send notice as agent of board; notice that describes use, but not size is sufficient; notice with wrong address not defective if can determine location of property).

☞ *Cities Service Oil Co. v. Board of Appeals of Bedford*, 338 Mass. 719, 157 N.E.2d 225 (1959) (notice and hearing required before board of appeals can revoke permit).

☞ *Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston*, 328 Mass. 103, 101 N.E.2d 888 (1951) (board to make reasonable efforts to find correct address of those who are to receive notice of hearing).

☞ *Crall v. Leominster*, 362 Mass. 95, 284 N.E.2d 610 (1972) (discussing sufficiency of contents of notice and timing of notice publication).

☞ *Del Grosso v. Board of Appeal of Revere*, 330 Mass. 29, 110 N.E.2d 836 (1953) (board of appeals is responsible for mailing notice of hearing to parties in interest).

☞ *Dion v. Board of Appeals of Waltham*, 344 Mass. 547, 183 N.E.2d 479 (1962) (notice that indicated hearing concerned petition to erect building for filling station in residential zone, but did not specify variance, was sufficient to indicate was for a variance).

☞ *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 715 N.E.2d 470 (1999) (notice that specified property was to be used for small engine repair and requested special permit was sufficient notice and board could reclassify nature of relief to finding for nonconformity).

☞ *Fish v. Town of Canton*, 322 Mass. 219, 77 N.E.2d 231 (1948) (may not correct failure to give notice by informal advertisement in local newspaper and announcement at public meeting; notice must be more specific than statement that it is for a variance or special permit).

☞ *Gallagher v. Board of Appeals of Falmouth*, 351 Mass. 410, 221 N.E.2d 756 (1966) (defect in hearing notice cannot be overcome by appearance of some citizens at hearing and grant of permit was invalid).

☞ *Gamache v. Acushnet*, 14 Mass. App. Ct. 215, 438 N.E.2d 82 (1982) (person who had time to prepare for hearing was not prejudiced by lack of notice).

☞ *Godfrey v. Building Comm'r of Boston*, 263 Mass. 589, 161 N.E.2d 819 (1928) (presumption is that board notified all parties in interest).














☞ *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 275 N.E.2d 525 (1971) (two successive weeks means two successive calendar weeks).

☞ *Harvard Square Defense Fund v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 540 N.E.2d 182, *rev. denied*, 405 Mass. 1204, 542 N.E.2d 602 (1989) (persons who requested notice of hearing, but not party in interest, did not have standing to appeal).

☞ *Healy v. Board of Appeals of Watertown*, 356 Mass. 130, 248 N.E.2d 1 (1969) (zoning board did not lack jurisdiction where notice was for both a variance and special permit).

☞ *Johnson v. Board of Appeals of Wareham*, 360 Mass. 872, 277 N.E.2d 695 (1972) (adequate notice given when only record owner and not prospective purchaser named in notice).

☞ *Johnson v. Framingham*, 354 Mass. 750, 242 N.E.2d 420 (1968) (discussing adequate notice).

-  *Kane v. Board of Appeals of Medford*, 273 Mass. 97, 173 N.E. 1 (1930).  
 (board of appeals is responsible for determining mailing list and mailing notice of hearing to parties in interest and may not delegate duty to petitioner; notice must indicate whether building is for residence or business and if a business, the nature of the business and cannot simply state is variance petition).
-  *Kasper v. Board of Appeals of Watertown*, 3 Mass. App. Ct. 251 (1975)  
 (abutting owner who did not receive required written notice must show is prejudiced by such failure in order to appeal board's decision; if abutting owner had time to prepare for and participate in hearing then waived objection to failure to receive notice).
-  *Kenrick v. Board of Appeals of Wakefield*, 27 Mass. App. Ct. 774 (1989) (time for action runs from close of public hearing, where hearing is continued).
-  *Lane v. Board of Selectmen of Great Barrington*, 352 Mass. 523, 226 N.E.2d 238 (1967) (failure to give 14 day notice and failure to state reasons for grant of permit resulted in nullification of board's decision).
-  *Martin v. Church of Latter-Day Saints*, 434 Mass. 141, 747 N.E.2d 131 (2001) (there is a rebuttable presumption that abutter is a person aggrieved).
-  *Medeiros v. Board of Alderman Woburn*, 350 Mass. 767, 213 N.E.2d 921 (1966) (failure to give required notice to planning board made grant of special permit invalid).
-  *Milton Commons Assocs. V. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 436 N.E.2d 1236, *rev. denied*, 387 Mass. 1101, 440 N.E.2d 21 (1982) (public hearing ends when rights of interested persons to present information is terminated).
-  *Moore v. Cataldo*, 356 Mass. 325, 249 N.E.2d 578 (1969) (purpose of zoning is to stabilize property values, thus notice and hearing required to obtain input from parties in interest; failure to comply with notice and hearing requirements likely to make board's action invalid; size of nursing home and number of patients do not need to be provided in notice of public hearing).
-  *Nelson v. Belmont*, 274 Mass. 35, 174 N.E. 320 (1931) (interested parties to receive full notice of hearing).
-  *Paulding v. Bruins*, 18 Mass. App. Ct. 707, 470 N.E.2d 398 (1984) (rebuttable presumption that abutters entitled to notice of hearing are persons aggrieved).
-  *Pelletier v. Board of Appeals of Leominster*, 4 Mass. App. Ct. 58, 340 N.E.2d 912 (1976) (application for variance cannot be treated as appeal of building inspector's decision).
-  *Pitman v. Medford*, 312 Mass. 618, 45 N.E.2d 973 (1943) (abutter waived failure to receive notice when was able to file objections and participate in hearing).
-  *Planning Bd. of Nantucket v. Board of Appeals of Nantucket*, 15 Mass. App. Ct. 733, 448 N.E.2d 778, *rev. denied*, 389 Mass. 1104, 451 N.E.2d 1167 (1983) (notice was not invalid because it specified wrong section of by-law to provide relief from parking requirements, when it was clear which section was intended).


☐ *Planning Bd. of Peabody v. Board of Appeals of Peabody*, 358 Mass. 81, 260 N.E.2d 738 (1970) (board's decision was invalid where did not mail notices for public hearing, but rather gave attorney of petitioner notices for mailing).  
 ☐ *Roman Catholic Archbishop of Boston v. Board of Appeals of Boston*, 268 Mass. 416, 167 N.E. 672 (1929) (notice of hearing on variance petition is mandatory; board may not waive hearing notice requirement).  
 ☐ *Rousseau v. Building Inspect. of Framingham*, 349 Mass. 31, 206 N.E.2d 399 (1965) (failure to give reasonable timely notice of hearing to objecting parties made action by board invalid, as notice must give parties reasonable time to prepare and 4 days is not sufficient, although a 14 day notice is not required).  
 ☐ *Save the Bay, Inc. v. Department of Pub. Utilities*, 366 Mass. 667, 322 N.E.2d 742 (1975) (property separated from property subject to DPU hearing by a road could be impacted by proposal and owner entitled to notice of hearing).  
 ☐ *Shoppers' World v. Beacon Terrace Realty*, 353 Mass. 63, 228 N.E.2d 446 (1967) (although petition was an appeal of denial of building permit, public hearing notice described relief as special permit and board had inherent administrative powers to allow modification of application).  
 ☐ *Smith v. Board of Appeals of Plymouth*, 340 Mass. 230, 163 N.E.2d 654 (1960) (newspaper publication need not be in town newspaper, as long as newspaper used for publication is generally circulated in town).  
 ☐ *Sylvania Electric Products v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962) (discussing when changes in decision require new notice and hearing).  
 ☐ *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 495 N.E.2d 892 (1986) (notice need not be mailed to parties in interest for adjourned and continued hearing, as hearing can be continued to a date certain by announcing such date at the initial or any successive hearing dates).  
 ☐ *Tenneco Oil Co. v. City Council of Springfield*, 406 Mass. 658, 549 N.E.2d 1135 (1990) (special permit is adjudicatory and not legislative and thus requires notice and hearing; substantive changes to and revocation of permit, as opposed to clerical corrections, requires a new notice and hearing).  
 ☐ *Walker v. Board of Appeals of Harwich*, 388 Mass. 42, 445 N.E.2d 141 (1983) (as an abutter who received the hearing notice, plaintiff was presumed to be aggrieved and had standing to appeal board's decision).  
 ☐ *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980) ( all meetings of a quorum of a board must be held in public).


## **CAUTIONARY NOTES**

✓ All reports and evidence from other boards must be presented at the public hearing and may not be accepted after the hearing is closed. *Milton Commons Assocs. v. Bd. of Appeals of Milton*, 14 Mass. App. Ct. 111 (1982) (hearing ends when all evidence presented and rights of parties to present information and argue is cut off); see also *Fairbairn v. Planning Bd. of*


*Barnstable*, 5 Mass. App. Ct. 171 (1977) (applicant must be advised of all facts and materials in possession of the board upon which it intends to rely).

### **LINKS**

 <http://www.landlaw.com> (lower court cases available from landlaw)

 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

### **REFERENCES**

 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 9, 9A, 10, & 15 (2004).



## SECTION 12.

### ESTABLISHING THE BOARD OF APPEALS



#### THE LAW

Zoning ordinances or by-laws shall provide for a zoning board of appeals, according to the provisions of this section, unless otherwise provided by charter. The mayor subject to confirmation of the city council, or board of selectmen shall appoint members of the board of appeals within three months of the adoption of the ordinance or by-law. Pending appointment of the members of the board of appeals, the city council or board of selectmen shall act as the board of appeals. Any board of appeals established hereunder shall consist of three or five members who, unless otherwise provided by charter, shall be appointed by the mayor, subject to the confirmation by the city council, or by the selectmen, for terms of such length and so arranged that the term of one member shall expire each year. Each zoning board of appeals shall elect annually a chairman from its own number and a clerk, and may, subject to appropriation, employ experts and clerical and other assistants. Any member may be removed for cause by the appointing authority upon written charges and after a public hearing. Vacancies shall be filled for unexpired terms in the same manner as in the case of original appointments. Zoning ordinances or by-laws may provide for the appointments in like manner of associate members of the board of appeals; and if provision for associate members has been made the chairman of the board may designate any such associate member to sit on the board in case of absence, inability to act or conflict of interest on the part of any member thereof, or in the event of

#### ANNOTATIONS

*Zoning board of appeals to be established in every municipality in accordance with this section or by charter*

*Appointment of board of appeals*

*Board of appeals to consist of three or five members*

*Zoning board of appeals to elect a chair annually*

*Board of appeals may employ appropriate experts and clerical and other assistants*

*Removal of members and filling vacancies*

*Appointment of associate members*

*Designation by chair for associate member to sit on case*

a vacancy on the board until said vacancy is filled in the manner provided in this section.

The board of appeals shall adopt rules, not inconsistent with the provisions of the zoning ordinance or by-law for the conduct of its business and for purposes of this chapter and shall file a copy of said rules with the city or town clerk. In the event that a board of appeals has appointed a zoning administrator in accordance with section thirteen said rules shall set forth the fact of such appointment, the identity of the persons from time to time appointed to such position, the powers and duties delegated to such individual and any limitations thereon.

*Board of appeals to adopt rules for the conduct of its business and file a copy with the city or town clerk*

*If there is a zoning administrator, the rules shall set forth such appointment*

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3.

## **PERMISSIBLE/REQUIRED ACTIONS**

➤ Every municipality must establish a zoning board of appeals in accordance with this section or by charter.

- The zoning by-law or ordinance shall establish the number of members that will make up the zoning board of appeals – either 3 or 5.
- The zoning by-law or ordinance may provide for associate members to be appointed as set forth below to ensure that the board will have an adequate number of members to sit on cases when there is an absence, inability to act, conflict of interest, or vacancy on the board.
  - The chair of the zoning board of appeals designates the associate member to sit on a case when needed.
  - Many boards have associate members attend all hearings and meetings to ensure that a case can be decided when there is the need for designation of an associate to sit on a case after the public hearing.
    - Common law requires that those members who will decide a case must be present at all public hearings. (See section 11 of this Guidebook)

NOTE: Associate members may be established for a planning board that has authority to act on special permits, as set forth under section 9 of The Zoning Act.

➤ The process for establishing a zoning board of appeals under this section shall be by appointment as follows:

- In a town by the selectmen
- In a city by the mayor subject to confirmation of the city council.

- The process for filling vacancies for unexpired terms shall be the same as that used for making the original appointments.
- The appointing authority may remove a member for cause after written charges are made and a public hearing is held.
- Before appointment of the board members, the board of selectmen in a town and the city council in a city shall act as the zoning board of appeals.
- Unless otherwise provided by charter, the terms of the board members shall be of such length and shall be arranged so that the term of one member expires each year.
- After establishment, the zoning board of appeals shall:
  - annually elect a chair from its own number;
  - annually elect a clerk from its own number;
  - adopt operational rules (see sample below);
    - If a zoning administrator has been appointed as set forth under section 13 of The Zoning Act, the rules must include the following:
      - that a zoning administrator has been appointed;
      - the identity of the zoning administrator (to be amended when the identity is changed);
      - the powers and duties delegated to the zoning administrator; and
      - any limitations on the zoning administrator's authority; and
  - file its operational rules and any amendments thereto with the city or town clerk.
- After establishment, the zoning board of appeals may:
  - employ experts and clerical and other assistants if an appropriation has been made by the city or town for such purpose.

## **RELATED CASE LAW**

- 📖 *Burwick v. Zoning Bd. of Appeals of Worcester*, 1 Mass. App. Ct. 739, 306 N.E.2d 455 (1974) (failure of board of appeals to adopt rules did not invalidate special permits for failure to specify how rules would have been a benefit).
- 📖 *Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston*, 328 Mass. 103, 101 N.E.2d 888 (1951) (compliance with rules presumed where nothing in record concerning noncompliance).
- 📖 *Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 355 N.E.2d 461 (1976) (failure of board to file rules with town clerk does not invalidate special permit issued by board).
- 📖 *Ray v. Mayor of Everett*, 328 Mass. 305, 103 N.E.2d 269 (1952) (removal of board members under city charter).
- Reynolds v. Board of Appeal of Springfield*, 335 Mass. 464, 140 N.E.2d 491 (1956) (discussing non-compliance of board composition with building code).

- ☞ *Ricci v. Mayor of Everett*, 333 Mass. 766, 127 N.E.2d 669 (1955) (board of appeals not required if municipality has not adopted zoning).
- ☞ *Roman Catholic Archbishop of Boston v. Board of Appeals of Boston*, 268 Mass. 416, 167 N.E. 672 (1929) (compliance with rules presumed where nothing in record concerning noncompliance).
- ☞ *Sandberg v. Board of Appeals of Taunton*, 349 Mass. 769, 211 N.E.2d 341 (1965) (zoning board of appeals is not same as building code board of appeals).
- ☞ *Shalbey v. Board of Appeals of Norwood*, 6 Mass. App. Ct. 521, 378 N.E.2d 1001 (1978) (associate member not sitting on a case may appear at the hearing and speak in favor of an application).

### **CAUTIONARY NOTES**

✓ A zoning board of appeals should make sure it has adopted operational rules, as the possibility exists that such failure could result in invalidation of its actions.

### **SAMPLE OPERATIONAL RULES FOR A ZONING BOARD OF APPEALS:**

#### **CITY/TOWN OF** **ZONING BOARD OF APPEALS RULES AND REGULATIONS** Adopted \_\_\_\_\_

### **ARTICLE I – ORGANIZATION**

#### **SECTION 1. ELECTION OF OFFICERS**

The Zoning Board of Appeals (ZBA) a/k/a the "Permit Granting Authority" and "Special Permit Granting Authority" shall annually elect the following officers from among its members: chair; vice-chair; and clerk. A majority of all regularly appointed ZBA members must vote favorably to elect each officer. Associate ZBA members shall not participate in the vote.

#### **SECTION 2. DUTIES OF OFFICERS**

##### **A. Chair:**

The chair shall transact the official business of the ZBA; coordinate with the clerk and staff when necessary; conduct the meetings and public hearings of the ZBA; and decide all points of order, unless overruled by a majority of the members of the ZBA. The chair shall vote and be recorded on all matters coming before the ZBA.

**B. Vice-chair:**

The vice-chair shall act as chair in case the chair is absent, disabled, or otherwise unable to perform his or her duties.

**C. Clerk:**

The clerk shall supervise all clerical work of the ZBA, subject to the direction of the ZBA and the chair. Clerical work shall include, but not be limited to correspondence of the ZBA; sending of all notices required by law and these Rules and Regulations; filing the ZBA's Rules and Regulations and all amendments thereto with the city/town clerk; compiling, filing, and mailing copies of all decisions and detailed records; maintaining necessary files and indexes; and calling the roll at all ZBA meetings. If the clerk is absent, the chair shall appoint an acting clerk.

**SECTION 3. ASSOCIATE MEMBERS**

The chair shall designate an associate member to sit on the ZBA in case of the absence, inability to act, or conflict of interest on the part of any ZBA member. In the event of a vacancy on the ZBA, the chair may designate an associate member to act as a member of the ZBA until another person is appointed to fill the unexpired portion of the vacated term. Associate members are encouraged to attend all ZBA meetings and hearings in case it is necessary for the chair to designate an associate in the middle of a case. With permission from the chair, associate members may participate in meetings and hearings.

**ARTICLE II - MEETINGS**

**SECTION 1. QUORUM**

A quorum for taking any action on zoning applications, petitions, and appeals is three members (when the board is established as a three-member board)/four members (when the board is established as a five-member board). Only those members who have participated in all aspects of a case may decide the case.

**SECTION 2. REGULAR MEETINGS**

Regular meetings of the ZBA shall be held at \_\_\_\_ PM on \_\_\_\_\_ at \_\_\_\_\_, unless notice is otherwise provided. All regular meetings of the ZBA shall be posted publicly in the city/town hall. If a regular meeting day falls on a holiday or election day, the meeting shall be rescheduled and held at such time and place as publicly posted in the city/town hall.

### **SECTION 3. SPECIAL MEETINGS**

Special meetings may be called by the chair, or at the request of two members. Written notice of a special meeting shall be given to each member at least 48 hours before the time set. A notice of every special meeting shall be posted publicly in the city/town hall.

### **SECTION 4. VIEWING**

The ZBA may conduct a site visit of the property that is the subject of a petition, application, or appeal. No deliberations or decisions shall be made by the ZBA on such site visit that would be in conflict with the Open Meeting Law.

### **SECTION 5. OPEN MEETING LAW**

All meetings of the ZBA shall be subject to and comply with the Open Meeting Law, M.G.L. Chapter 39, Sections 23A-23C.

## **ARTICLE III – PUBLIC HEARINGS**

### **SECTION 1. NOTICE**

#### **A. Notice Contents:**

Notice of public hearings shall be advertised as required by M.G.L., chapter 40A, Section 11. The notice shall contain the name and address of the applicant, petitioner, or appellant; a description of the area or premises and street address, if any, or other identification of the property that is the subject of the application, petition, or appeal; the date, time, and place of the public hearing; and the subject matter of the special permit application, variance petition, or administrative appeal.

#### **B. Newspaper Publication/City/Town Hall Posting:**

Notice shall be published once in each of two successive weeks in a newspaper of general circulation in the City/Town. The first notice shall be not less than 14 days before the date of the public hearing. The date of the public hearing shall not be counted in the 14 days. Notice of the public hearing shall also be posted in a conspicuous place in the City/Town Hall not less than 14 days before the date of the public hearing.

#### **C. Mailing to Parties in Interest:**

A copy of the notice shall be sent by mail, postage prepaid, not less than 14 days prior to the date of the hearing to the parties in interest who include: the applicant, petitioner, or appellant; abutters to the property that is the subject of the application, petition, or appeal; owners of land directly opposite on any public

or private street or way from the property that is the subject of the application, petition, or appeal; abutters to abutters within 300 feet of the property line of the property that is the subject of the application, petition, or appeal as they appear on the most recent applicable tax list and including property owners located in an abutting city or town, if any; the City/Town Planning Board; and the Planning Boards of all abutting cities and towns, which include

---

**D. Assessors to Certify List:**

The ZBA or its designee is responsible for determining the parties in interest to receive notice. The assessors maintaining any applicable tax list shall certify to the ZBA the names and addresses of the parties in interest and such certification shall be conclusive for all purposes.

**E. Waivers of Notice:**

The ZBA may accept a waiver of notice from, or an affidavit of actual notice to any party in interest or any successor owner of record who may not have received a notice by mail. The ZBA may also order special notice to any person, giving not less than five nor more than 10 additional days to reply.

**G. No Public Hearing on Date of Election:**

No public hearing shall be held on the day on which a state or municipal election, caucus, or primary is held in the City/Town.

**H. Time for Holding a Public Hearing:**

A public hearing shall take place within 65 days after an application, petition, or appeal is filed with the ZBA. A public hearing may be continued until all necessary evidence is gathered for making a decision.

**SECTION 2. HEARINGS TO BE PUBLIC**

All hearings shall be open to the public. No person shall be excluded unless considered by the chair to hinder seriously the workings of the ZBA.

**SECTION 3. REPRESENTATION AT HEARINGS**

An applicant, petitioner, or appellant may choose to be represented by an agent at the public hearing. The applicant, petitioner, or appellant shall authorize such representation by an agent in writing, as part of the application, petition, or appeal form used by the ZBA. If the applicant, petitioner, appellant, or agent fails to appear for a duly scheduled public hearing, the ZBA may decide on the application, petition, or appeal using the information it has otherwise received.

## **SECTION 4. ORDER OF BUSINESS**

The public hearing shall be held at the call of the chair, who shall describe the rules of procedure for the hearing and then read or direct the reading of the public hearing notice to open the public hearing. After the opening of the public hearing the order of business shall generally proceed as set forth below:

- a. Applicant, petitioner, appellant, or agent presents the application, petition, or appeal
- b. ZBA members ask questions
- c. Those in favor speak after first providing their names and addresses for the record
- d. Those opposed speak after first providing their names and addresses for the record
- e. All reports of boards, municipal officials, or others are read into the record
- f. Municipal board representatives and officials ask questions
- g. ZBA members ask for additional information from any or all parties
- h. The applicant, petitioner, appellant, or agent provides a rebuttal restricted to the matters raised by others' presentations or questions
- i. The chair, upon majority vote of the ZBA, continues the public hearing to a date, time, and place certain that is announced at the public hearing or closes the public hearing if all testimony, documentation, and evidence has been gathered

The members of the ZBA may direct appropriate questions at the end of any party's or person's presentation. Testimony may be given under oath of the chair or the chair's designee. All questions shall be directed through the chair.

## **SECTION 5. INFORMATION FROM OTHER MUNICIPAL BOARDS AND OFFICIALS**

The following municipal boards and officials shall receive copies of the application, petition, or appeal and may provide comments to the ZBA concerning such application, petition, or appeal: Planning Director, City Council/Board of Selectmen, Board of Health, Conservation Commission, Department of Public Works, Sewer Department, Water Department, Inspector of Buildings, City/Town Engineer, Fire Chief, Police Chief, and

\_\_\_\_\_. Such board or official shall make recommendations on the application, petition, or appeal as are appropriate and shall send copies of such recommendations to the ZBA and to the applicant, petitioner, or appellant, who shall have the right to a hearing before any such board. Any board or official who fails to make recommendations within 35 days after receipt of the application, petition, or appeal shall be deemed to have no opposition thereto.

Failure of a board or official to make recommendations shall not vitiate that board's or official's jurisdiction over the proposal.

## **SECTION 6. CONFLICT OF INTEREST**

### **A. Conflict of Interest:**

No member of the ZBA who has a conflict in interest, under the meaning of M.G.L., chapter 268A, shall remain an active participant of the ZBA on any hearing or proceeding concerning a special permit, variance, or appeal. A conflict of interest shall include, but not be limited to a financial interest; personal interest; potential for self-gain or gain of a relative; and when a member has a substantial personal animosity, ill-will, bias, prejudice, or hostility towards an applicant, petitioner, appellant, or agent. Any member who has a conflict of interest shall leave the hearing and meeting room to avoid any appearance of impropriety, unless such member is a party in interest, who has a right to present evidence and testify to the ZBA.

### **B. Rule of Necessity:**

The rule of necessity shall permit a member who should be disqualified to participate in a hearing, vote, or both, when the only way that a decision can be reached is with the participation of such member. Before any participation on the matter, such member shall make the reasons that would have required disqualification public, and the remaining members of the ZBA may not consider such reasons that would have required disqualification in participating on the matter, making a decision, or both.

## **ARTICLE IV – FILING**

### **SECTION 1. FORMS**

All applicants, petitioners, and appellants shall use the forms provided in the Appendix of these Rules and Regulations. (See forms under the following sections of this Guidebook – Special Permit Form (Section 9); Variance Form (Section 10); Administrative Appeal Form (Section 15)). Any communication, purporting to be an application, petition, or appeal shall be treated as mere notice of an intention to seek a special permit, variance, or appeal, until such time as a complete and accurate application, petition, or appeal form is filed together with all additional required materials and fees.

### **SECTION 2. REQUIREMENTS FOR FILING**

#### **A. Failure to Comply with Requirements:**

Applications, Petitions, and Appeals shall comply with all requirements of the City/Town Zoning Ordinance/By-law and The Zoning Act, including

requirements concerning size, form, content, and style of required plans. Any application, petition, or appeal that is not complete and accurate shall not trigger the times for action under The Zoning Act, even if the application, petition, or appeal is filed with the City/Town clerk and the ZBA. The ZBA may deny any incomplete and inaccurate application, petition, or appeal and notify the City/Town clerk of such denial.

#### **B. Requirements for Plans:**

Any plans filed with the application, variance, or appeal shall comply with the following::

- (1) The plan for a proposal shall be drawn by a Civil Engineer registered in Massachusetts on mylar to a maximum scale of 1" = 40';
- (2) The plan shall contain the following:
  - a. a north arrow
  - b. names of abutting and proposed streets
  - c. indication of zoning district boundaries if the property is located in more than one district
  - d. names and addresses of abutters
  - e. property lines and location of buildings on abutting properties and properties across any street or way
  - f. dimensions of the subject property and verified distances from buildings, structures, and uses on abutting properties
  - g. location of all uses, structures, and buildings on the subject property, principal or accessory
  - h. location of all entrances, exits, drives, ways, parking, and loading
  - i. elevations and location on the plan, of all signs proposed for the property
  - j. drainage calculations
  - k. location of sewer and water lines and connections on the subject property
  - l. location of all vegetated areas
  - m. location of all trash disposal areas
  - n. all additional information required by the Zoning Ordinance/By-law

### **SECTION 3. FILING PROCEDURE**

The applicant, petitioner, appellant, or agent shall file \_\_\_\_ copies of a complete and accurate application, petition, or appeal form, together with required plans and associated material, with the ZBA. Notice of the date of such filing shall be given to the City/Town clerk, who shall certify the date and time of filing in the case of failure of the ZBA to act in a timely manner.

## **SECTION 4. FEES**

The applicant, petitioner, or appellant shall pay all fees for advertising a public hearing, not limited to the cost of newspaper advertisement and postage costs for mailing notices. In addition, the applicant, petitioner, or appellant shall pay all fees required by the ZBA to engage consultants to review plans or to determine compliance with approved plans. The initial application, petition, or appeal shall be accompanied by a check made payable to the City/Town of \_\_\_\_\_ in the amount of \_\_\_\_\_ dollars.

## **ARTICLE V - DECISION**

### **SECTION 1. VOTING REQUIREMENTS**

#### **A. Required Vote:**

Any member who participates in making the decision must attend all public hearings concerning the matter, unless the rule of necessity applies and the only way to permit a vote is to have members review the record prior to such decision. All favorable actions, including adoption of all conditions and limitations, shall require three members (for a three member board)/four members (for a five-member board) of the ZBA to vote in favor.

#### **B. Findings:**

In order to issue a special permit, variance, or decide an appeal, the ZBA must make all findings required by The Zoning Act and the Zoning Ordinance/By-law.

### **SECTION 2. CONDITIONS**

The ZBA may adopt conditions, safeguards, and limitations on the time or use of any special permit, variance, or appeal granted, except that a variance may not be subject to a condition based on continuous ownership.

### **SECTION 3. TIME LIMITS ON DECISION-MAKING**

The ZBA shall act on special permit applications, variances, and appeals as follows:

- For a special permit, final action, which includes the final vote of the ZBA on the special permit and the filing of the decision with the City/Town clerk, shall take place within 90 days after close of the public hearing or any extended public hearing, unless the time is extended by mutual agreement. Mailing of the decision to the applicant and a notice of decision to parties in interest and those whose requested a notice, shall be completed 14 days after the decision is made.

- For a variance or appeal the ZBA shall make its decision within 100 days after the variance petition or appeal was filed with the ZBA, unless the time is extended by mutual agreement. The filing of the decision with the City/Town clerk and mailing of the decision to the petitioner or appellant and a notice of decision to parties in interest and those whose requested a notice, shall be completed 14 days after the decision is made.
- The ZBA and the applicant, petitioner, or appellant may mutually agree in writing to extend the time to act. A copy of such written agreement shall be filed with the City/Town clerk.

#### **SECTION 4. DETAILED RECORD**

The vote of each member on each question shall be made a part of the public record, including any absence or failure of a member to vote. The detailed record shall set forth clearly the reason or reasons for the ZBA's decision and its official actions and shall be filed with the City/Town clerk within 14 days of the decision.

#### **SECTION 5. FILING AND MAILING DECISION**

After filing its decision in the office of the City/Town Clerk, the ZBA shall mail a notice of its decision, noting the date of filing with the City/Town clerk, within 14 days of such filing to the applicant, petitioner, or appellant and to all parties in interest as set forth in these Rules and Regulations and under applicable law, and to all parties who requested notice at the public hearing and provided an address to which such notice was to be sent. Such notice shall specify that appeals, if any, must be filed within 20 days after the date of the ZBA's filing of the decision in the office of the City/Town clerk.

#### **SECTION 6. RECORDING THE DECISION**

No special permit, variance, or appeal shall be in effect until the applicant, petitioner, or appellant at his/her/its expense, records a copy of the decision with the \_\_\_\_\_ Registry of Deeds.

### **ARTICLE VI – WITHDRAWAL AND RECONSIDERATION**

#### **SECTION 1. WITHDRAWAL**

An applicant, petitioner, or appellant may withdraw an application, petition, or appeal without prejudice at any time before the public hearing for such application, petition, or appeal is published. After the public hearing is published, the ZBA must agree by a unanimous vote (three-member board)/concurring vote

of four members (five-member board) to permit such application, petition, or appeal to be withdrawn without prejudice.

## **SECTION 2. REAPPLICATION FOR RECONSIDERATION**

If a special permit, variance, or appeal is denied, the applicant, petitioner, or appellant must wait two years from the date of the final unfavorable action before reapplying for such special permit, variance, or appeal unless the applicant, petitioner, or appellant complies with the reconsideration procedures set forth in Section 3 under this Article.

## **SECTION 3. RECONSIDERATION PROCEDURES**

When a special permit, variance, or appeal is denied, an applicant, petitioner, or appellant may file for reconsideration of such special permit, variance, or appeal after showing specific and material changes in the proposal concerning the reasons upon which the previous unfavorable action was based. All but one member of the planning board must consent to the reconsideration before the ZBA will determine if there are specific and material changes in the proposal. If such planning board consent is granted, and if the ZBA finds specific and material changes in the proposal concerning the reasons upon which the previous unfavorable action was based, then the applicant, petitioner, or appeal may file for reconsideration before the ZBA. After the planning board consent, the ZBA may find specific and material changes and reconsider the proposal at the same public hearing, as long as such hearing complies with the procedures set forth in these Rules and Regulations and The Zoning Act.

# **ARTICLE VII - ZONING ADMINISTRATOR**

## **SECTION 1. DESIGNATION**

The ZBA hereby designates \_\_\_\_\_ as the zoning administrator, as established under the City/Town Zoning Ordinance/By-law.

## **SECTION 2. POWERS AND DUTIES**

The zoning administrator shall have the following powers and duties:

- The power to act on special permits submitted to the zoning administrator by the ZBA
- The power to act on dimensional variances submitted to the zoning administrator by the ZBA

NOTE: The ZBA may give any power, including the power to act on administrative appeals, to the zoning administrator.

### SECTION 3. LIMITATIONS ON THE ZONING ADMINISTRATOR

In designating the zoning administrator to act on specific cases, the ZBA may limit the zoning administrator's authority on a case-by-case basis.

## **ARTICLE VIII - ADOPTION**

The foregoing Rules and Regulations are hereby adopted/amended this \_\_\_\_\_ day of \_\_\_\_\_, by the \_\_\_\_\_ ZBA as required by M.G.L., Ch. 40A, § 12. All prior Rules and Regulations concerning the matters addressed in these Rules and Regulations are hereby repealed. A copy of these Rules and Regulations and any amendments thereto shall be filed with the City/Town Clerk.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**NOTE: Any board other than the ZBA that has authority to issue special permits, must also adopt operational rules. These sample rules provide a template for such rules.**

### **LINKS**

🔑 <http://www.landlaw.com> (lower court cases available from landlaw)

🔑 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 9, 10, 11, 13, 14, & 15 (2004).

📁 M.G.L., Ch. 268A (conflict of interest).

# SECTION 13.

## ZONING ADMINISTRATORS



### **THE LAW**

A zoning ordinance or by-law may authorize the appointment of a zoning administrator, who, unless otherwise provided by charter, shall be appointed by the board of appeals, subject to confirmation by the city council or board of selectmen, to serve at the pleasure of the board of appeals pursuant to such qualifications as may be established by the city council or board of selectmen. The board of appeals may delegate to said zoning administrator some of its powers and duties by a concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of all except one member of a board consisting of five members. Any person aggrieved by a decision or order of the zoning administrator, whether or not previously a party to the proceeding, or any municipal office or board, may appeal to the board of appeals, as provided in section fourteen, within thirty days after the decision of the zoning administrator has been filed in the office of the city or town clerk. Any appeal, application or petition filed with said zoning administrator as to which no decision has issued within thirty-five days from the date of filing shall be deemed denied and shall be subject to appeal to the board of appeals as provided in section eight.

### **ANNOTATIONS**

*Zoning may authorize appointment of a zoning administrator*

*Zoning administrator to serve at pleasure of board of appeals, unless otherwise provided by charter*

*Board of appeals may delegate some of its powers and duties to zoning administrator*

*A decision of a zoning administrator may be appealed to the board of appeals within 30 days after decision has been filed with the city or town clerk*

*Failure of zoning administrator to act on appeal, application, or petition within 35 days from date of filing shall be deemed denial*

### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3.

## **PERMISSIBLE/REQUIRED ACTIONS**

➤ A municipality may establish the position of zoning administrator under its zoning ordinance or by-law.

- A few communities have appointed a person who is a local building inspector as the zoning administrator to handle simple cases that would normally be presented to the zoning board of appeals.
- Establishing the position of a zoning administrator could relieve the zoning board of appeals from the routine cases, thus permitting the board to spend time in gathering evidence and deciding the more complicated matters. Few communities have taken advantage of this statutory provision.

➤ Unless a charter provides another method of appointment, the zoning board of appeals will appoint the zoning administrator, subject to confirmation by the city council or board of selectmen.

➤ If a zoning administrator is established under zoning, then the zoning board of appeals may delegate certain of its powers and duties to the zoning administrator.

- The vote to make such delegation must be unanimous for a three member board and at least four members of a five member board must concur.

➤ The delegated powers and duties should be set forth in the board's operational rules as required by Section 12 of The Zoning Act. The powers and duties might include the right to decide upon the following:

- variance petitions, usually the simple cases
- special permit applications, usually the simple cases
- specific administrative appeals, such as those based on denial of a building permit for reasons related to zoning

➤ When deciding a matter, the zoning administrator should act as follows:

- Gather evidence and make a decision at a public meeting/hearing.
  - There is no express requirement for notice and a public hearing before a zoning administrator makes a decision, but due process would require that the zoning administrator give notice and hold a public hearing in order to gather evidence to support a decision. It is recommended that the zoning administrator follow Section 11 of The Zoning Act in giving notice and holding the public hearing, and that the Zoning Board of Appeals include such requirement in its operational rules.
- Make a decision within 35 days after the application, petition, or administrative appeal is filed with the zoning administrator.
- File a copy of the decision with the city or town clerk together with a detailed record within the 35 days.
  - Neither the general law nor common law mandates filing of the decision or detailed record within the 35 days, as issuance of the decision within 35 days is all that is required. However, the

conservative approach is to complete the entire process within 35 days.

- Failure of the zoning administrator to issue a decision within the 35 days results in a denial, which may be appealed to the board of appeals.
  - Such appeal is subject to the procedural requirements of Section 15 of The Zoning Act.

➤ Any aggrieved person or municipal officer or board may appeal a zoning administrator's decision to the zoning board of appeals within 30 days after the zoning administrator's decision has been filed in the office of the city or town clerk.

### **RELATED CASE LAW**

📖 *Massachusetts Bread Co. v. Brice*, 13 Mass. App. Ct. 1053, 434 N.E.2d 672 (1982) (appeals under section 15 of chapter 40A concern administrative appeals under section 8 and appeals from a decision of the zoning administrator under section 13 of the Act.

### **CAUTIONARY NOTES**

✓ The Zoning Board of Appeals must establish in its operational rules and regulations the powers and duties of the zoning administrator and any limitations that the zoning administrator must follow. Be sure to take this step or the zoning administrator may not have authority to act.

### **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

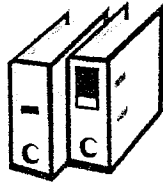
🔗 <http://www.socialaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 8, 9, 10, 11, 12, 14, & 15 (2004).

## **SECTION 14.**

### **POWERS OF THE ZONING BOARD OF APPEALS**



#### **THE LAW**

A board of appeals shall have the following powers:-  
(1) To hear and decide appeals in accordance with section eight.

(2) To hear and decide applications for special permits upon which the board is empowered to act under said ordinance or by-laws.

(3) To hear and decide petitions for variances as set forth in section ten.

(4) To hear and decide appeals from decisions of a zoning administrator, if any, in accordance with section thirteen and this section.

In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.

#### **ANNOTATIONS**

*Powers of the board of appeals*

*Board of appeals may reverse, affirm, or modify orders or decisions and may issue or direct the issuance of a permit*

#### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3.

#### **PERMISSIBLE/REQUIRED ACTIONS**

☛ The Zoning Board of Appeals (ZBA) has the following powers:

- hear and decide administrative appeals, as set forth under section 8 of The Zoning Act
- hear and decide special permit applications, which the zoning by-law or ordinance has empowered the ZBA to act upon
- hear and decide variance petitions
- hear and decide appeals from decisions of a zoning administrator, if one exists, as set forth under section 13 of The Zoning Act

- make a finding to permit extension of a nonconformity, as set forth under Section 6 of The Zoning Act.
- In exercising its powers, the ZBA may take several actions including the following:
- make orders
  - make decisions
  - reverse, affirm, or modify, in whole or in part, orders or decisions (including its own)
  - issue a permit
  - direct the issuance of a permit
    - The statute provides that the ZBA shall have all the powers of the officer from whom an administrative appeal is taken. Usually the ZBA should direct the issuance of a permit, as the ZBA may not have authority to issue some permits that concern more than zoning issues, such as building permits.

## **RELATED CASE LAW**

- ☞ *Adams v. Board of Appeals of Concord*, 356 Mass. 709, 255 N.E.2d 372 (1970) (zoning may permit use with less frontage than required by subdivision control law, but subdivision control law must still be complied with).
- ☞ *Assessors of Dover v. Dominican Fathers, Province of St. Joseph*, 334 Mass. 530, 137 N.E.2d 225 (1956) (may not adopt condition pertaining to taxes when grant variance).
- ☞ *Bearce v. Zoning Bd. of Appeals of Brockton*, 351 Mass. 316, 219 N.E.2d 15 (1966) (zoning board of appeals has no authority to determine validity of zoning).
- ☞ *Benjamin v. Board of Appeals of Swansea*, 338 Mass. 257, 154 N.E.2d 913 (1959) (power to grant variance to be exercised sparingly).
- ☞ *Bennett v. Board of Appeal of Cambridge*, 268 Mass. 419, 167 N.E. 659 (1929) (board of appeal has authority to grant variance from zoning ordinance).
- ☞ *Bicknell Realty Co. v. Board of Appeal of Boston*, 330 Mass. 676, 116 N.E.2d 570 (1954) (power to grant variance to be exercised sparingly).
- ☞ *Board of Appeals of Dedham v. Corporation Tifereth Israel*, 7 Mass. App. Ct. 876, 386 N.E.2d 772 (1979) (board of appeals has sole discretion to determine if special permit should be granted with conditions; board should approve modifications and changes to special permit).
- ☞ *Board of Appeals of Southampton v. Boyle*, 4 Mass. App. Ct. 824, 349 N.E.2d 373 (1976) (board not required to make detailed findings when deny special permit).
- ☞ *Board of Appeals of Westwood v. Aristids*, 42 Mass. App. Ct. 411 (1997) (second decision filed by ZBA not considered an amendment, where substantively changed first decision).
- ☞ *Boyajian v. Board of Appeal of Wellesley*, 6 Mass. App. Ct. 282, 374 N.E.2d 1237 (1978) (grant of special permit for office building in residence zone where

building was on boundary of zoning district, was next to commercial establishments on a busy road, and where use was needed and residential use was unsuitable was within authority of board of appeals; all statutory findings are required for board to grant variance and judge to uphold such grant).

📖 *Brackett v. Board of Appeal of Boston*, 311 Mass. 52, 39 N.E.2d 956 (1942) (discussing hardship sufficient for grant of variance).

📖 *Bradshaw v. Board of Appeals of Sudbury*, 346 Mass. 558, 194 N.E.2d 716 (1963) (ZBA had no authority to review grant of liquor license by selectmen, even though the use violated zoning).

📖 *Brockton Pub. Market v. Board of Appeals of Sharon*, 357 Mass. 783, 260 N.E.2d 222 (1970) (denial of special permit for filling station in shopping center parking lot did not require detailed findings).

📖 *Bruzzese v. Board of Appeals of Hingham*, 343 Mass. 421, 179 N.E.2d 269 (1962) (no landowner has a legal right to a variance).

📖 *Building Comm'rs of Medford v. C. & H. Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946) (requirement in zoning for approval of dump by aldermen before building permit can be issued does not infringe on ZBA authority).

📖 *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 128 N.E.2d 772 (1955) (discussing sufficient standards to guide board's decision-making; grant of permit by ZBA to permit use does not constitute rezoning).

📖 *Burwick v. Zoning Bd. of Appeals of Worcester*, 1 Mass. App. Ct. 739 (1974) (board could amend written decision that did not set forth conditions approved during verbal vote without new public hearing).

📖 *Carson v. Board of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947) (comparing variance with special permit).

📖 *Caruso v. Pastan*, 1 Mass. App. Ct. 28, 294 N.E.2d 501 (1973) (ZBA should not discuss PUD with planning board after conclusion of hearing).

📖 *Cary v. Board of Appeals of Worcester*, 340 Mass. 748, 166 N.E.2d 690 (1960) (board must make all requisite statutory findings in order to issue a variance; discussing detriment to public good and derogation from intent and purpose of by-law findings for grant of variance).

📖 *Cass v. Board of Appeal of Fall River*, 2 Mass. App. Ct. 555, 317 N.E.2d 77 (1974) (even though judge must make statutory findings to uphold grant of variance on de novo appeal, board must also make findings and set forth reasons for its decision).

📖 *Cavanaugh v. DiFlumera*, 9 Mass. App. Ct. 396, 401 N.E.2d 867 (1980) (discussing derogation from public good finding as requiring use to significantly detract from zoning district plan).

📖 *Chater v. Board of Appeals of Milton*, 348 Mass. 237, 202 N.E.2d 805 (1964) (inability to use lot for any purpose is consideration in deciding variance petition).

📖 *Chilson v. Zoning Bd. of Appeal of Attleboro*, 344 Mass. 406, 182 N.E.2d 535 (1962) (zoning must provide standards for ZBA decision making).

**Colabufalo v. Board of Appeal of City of Newton**, 336 Mass. 213, 143 N.E.2d 536 (1957) (granting extension of nonconforming use is exercise of more limited power than granting a variance; board of alderman had no authority to decide variance).

**Coleman v. Board of Appeal of Boston**, 281 Mass. 112, 183 N.E. 166 (1932) (board of appeals power is quasi-judicial; finding did not support hardship for grant of variance).

**Colonial Acres v. Inhabitants of No. Reading**, 3 Mass. App. Ct. 384, 331 N.E.2d 549 (1975) (discussing special permit running only to town).

**Coolidge v. Zoning Bd. of Appeals of Framingham**, 343 Mass. 742, 180 N.E.2d 670 (1962) (ZBA has no authority to determine whether zoning district boundary lines are appropriate and beneficial to the community).

**Di Rico v. Board of Appeals of Quincy**, 341 Mass. 607, 171 N.E.2d 144 (1961) (power to grant variance to be exercised sparingly).

**Dion v. Board of Appeals of Waltham**, 344 Mass. 547, 183 N.E.2d 479 (1962) (power to grant variance to be exercised sparingly; ZBA may amend decision during appeal period to include further reasons).

**E.A.D. Realty Corp. v. Board of Selectmen of Shrewsbury**, 6 Mass. App. Ct. 824, 371 N.E.2d 446 (1977) (in issuing license, board of selectmen was not bound by decision of ZBA to permit use and structures).

**Everpure Ice Mfg. v. Board of Appeals of Lawrence**, 324 Mass. 433, 86 N.E.2d 906 (1949) (discussing special permit for fuel oil business; power to grant variance to be exercised sparingly).

**Ferrante v. Board of Appeals of Northampton**, 345 Mass. 158, 186 N.E.2d 471 (1962) (board of appeals did not have to grant variance despite grant of building permit for commercial use; detailed findings not required to deny variance; no person has right to variance and court should rarely order such grant).

**Gamache v. Acushnet**, 14 Mass. App. Ct. 215, 438 N.E.2d 82 (1982) (ZBA does not have power to determine validity of zoning).

**Garvey v. Board of Appeals of Amherst**, 9 Mass. App. Ct. 856, 400 N.E.2d 880 (1980) (discussing application of commercial parking lot standards in a residential zoning district).

**Gaunt v. Board of Appeals of Methuen**, 327 Mass. 380, 99 N.E.2d 60 (1951) (power to grant variance to be exercised sparingly).

**Haynes v. Grasso**, 353 Mass. 731, 234 N.E.2d 877 (1968) (if zoning permits, ZBA may allow smaller lot size by special permit).

**Healy v. Board of Appeals of Watertown**, 356 Mass. 130, 248 N.E.2d 1 (1969) (public hearing notice for special permit and variance, where ZBA had no authority to issue special permit, did not invalidate variance that was granted).

**Howland v. Board of Appeals of Plymouth**, 13 Mass. App. Ct. 520, 434 N.E.2d 1286 (1982) (board of appeals may not issue special permit for addition to restaurant if there is non-compliance with parking requirements).

☞ *Josephs v. Board of Appeals of Brookline*, 362 Mass. 290, 285 N.E.2d 436 (1972) (board's findings did not support grant of special permit relating to dimensional and parking controls).

☞ *Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, N.E.2d (1976) (validity of special permit not affected by chair who presided at hearing and was in law firm that represented seller of land to applicant; issuance of a special permit for use permitted in by-law does not constitute spot zoning; board did not improperly delegate authority where required planning board and board of appeals to approve plans and other matters before construction commenced; criteria for granting special permit less stringent than those for a variance).

☞ *Lambert v. Board of Appeals of Lowell*, 295 Mass. 224, 3 N.E.2d 784 (1936) (discussing appeal from building inspector's decision).

☞ *Lynch v. Board of Appeal of Boston*, 1 Mass. App. Ct. 353, 297 N.E.2d 63 (1973) (discussing lack of fee and when ZBA obtains jurisdiction).

☞ *Mahoney v. Board of Appeals of Winchester*, 344 Mass. 598, 183 N.E.2d 850 (1962) (board's decision to deny commercial greenhouse in area not in residential use and on heavily traveled highway was in excess of its authority).

☞ *Malcomb v. Board of Appeals of Southborough*, 361 Mass. 887, 282 N.E.2d 681 (1972) (ZBA's authority to grant and deny permits is discretionary).

☞ *Marino v. Board of Appeals of Beverly*, 2 Mass. App. Ct. 859, 311 N.E.2d 580 (1974) (condition on subdivision may not be appealed to ZBA).

☞ *McAleer v. Board of Appeals of Barnstable*, 361 Mass. 317, 280 N.E.2d 166 (1972) (upholding denial of special permit for conversion of nonconforming use of dormitory for employees to lodging house use; finding that alteration would not be more detrimental to neighborhood was same standard as without substantial detriment to the public good).

☞ *McNeely v. Board of Appeal of Boston*, 358 Mass. 94, 261 N.E.2d 36 (1970) (discussing hardship and derogation from intent and purpose findings required to grant variance).

☞ *Murphy v. Zoning Bd. of Appeals of Lawrence*, 2 Mass. App. Ct. 876, 317 N.E.2d 90 (1974) (discussing ZBA's discretionary authority and standards for issuance of a special permit).

☞ *O'Donnell v. Board of Appeals of Billerica*, 349 Mass. 324, 207 N.E.2d 877 (1965) (building by-law issue may not be appealed to ZBA).

☞ *Pelletier v. Board of Appeals of Leominster*, 4 Mass. App. Ct. 58, 340 N.E.2d 912 (1976) (comparing variance and administrative appeal and ZBA's authority to order issuance of permit; board may only consider matter pending before it).


☞ *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 120 N.E.2d 916 (1954) (ZBA rules apply to both variances and special permits).


☞ *Phillips v. Board of Appeals of Springfield*, 286 Mass. 469, 190 N.E. 601 (1934) (power to grant variance to be exercised sparingly).


☞ *Pierce v. Board of Appeals of Carver*, 2 Mass. App. Ct. 5, 307 N.E.2d 587 (1974) (board must find that mobile home park would not be detrimental to character of town before it can issue special permit for such use).


☐ *Pioneer Home Sponsors v. Board of Appeals of Northampton*, 1 Mass. App. Ct. 830, 297 N.E.2d 73 (1973) (grant of special permit is discretionary and no one is entitled to a special permit).  
 ☐ *Planning Bd. of Easton v. Koenig*, 12 Mass. App. Ct. 1009, 429 N.E.2d 81 (1981) (ZBA has no authority to issue permit for a lot that is not released from a subdivision covenant).  
 ☐ *Planning Bd. of Falmouth v. Board of Appeals of Falmouth*, 5 Mass. App. Ct. 324, 362 N.E.2d 1199 (1977) (grant of a variance subject to submission of a new plan was grant of a variance that could be appealed immediately).  
 ☐ *Planning Bd. of Northborough v. Board of Appeals of Northborough*, 356 Mass. 732, 254 N.E.2d 262 (1969) (board must find variance may be granted without substantial detriment to public good).  
 ☐ *Potter v. Board of Appeals of Mansfield*, 1 Mass. App. Ct. 89, 294 N.E.2d 587 (1989) (board may not amend decision unless record indicates board intends to keep proceedings open).  
 ☐ *Raia v. Board of Appeals of No. Reading*, 4 Mass. App. Ct. 318, 347 N.E.2d 694 (1976) (on appeal petitioner and board issuing variance had burden to prove statutory findings that supported grant of variance, and judge was required to also make findings).  
 ☐ *Raimondo v. Board of Appeals of Bedford*, 331 Mass. 228, 118 N.E.2d 67 (1954) (ZBA had jurisdiction to hear gravel removal case and could deny permit to remove large quantity of sand and gravel from residential property).  
 ☐ *Real Properties v. Board of Appeal of Boston*, 319 Mass. 180, 65 N.E.2d 199 (1946) (despite fact property was contiguous to business zone, this was a pre-existing condition when zoning was amended and should be given little consideration in deciding a variance case).  
 ☐ *Rice v. Board of Appeals of Dennis*, 342 Mass. 499, 174 N.E.2d 355 (1961) (ZBA may not issue setback variance under building code).  
 ☐ *Roman Catholic Archbishop of Boston v. Board of Appeals of Boston*, 268 Mass. 416, 167 N.E. 672 (1929) (hearing is required before acting on variance).  
 ☐ *Russell v. Zoning Bd. of Appeals of Brookline*, 349 Mass. 532, 209 N.E.2d 337 (1965) (zoning may permit ZBA to vary parking requirements, but board exceeded authority when granted variance for 100 units of low rental housing with 15 parking spaces when 90 spaces were required).  
 ☐ *S. Kemble Fischer Realty Trust v. Board of Appeals of Concord*, 9 Mass. App. Ct. 477, 402 N.E.2d 100, *cert. denied*, 449 U.S. 1011 (1980) (no one is entitled to special permit, and board may deny special permit as long as based on legal grounds and is not unreasonable, whimsical, capricious, or arbitrary).  
 ☐ *S. Volpe & Co. v. Board of Appeals of Wareham*, 4 Mass. App. Ct. 357, 348 N.E.2d 807 (1976) (ZBA has discretion to deny golf course use in order to protect marshland).  
 ☐ *Sellors v. Concord*, 329 Mass. 259, 107 N.E.2d 784 (1952) (discussing adequate standards for making decisions).


☞ *Shacka v. Board of Appeals of Chelmsford*, 341 Mass. 593, 171 N.E.2d 167 (1961) (variance should not be granted because change of uses in zoning district, as that was for town to consider in rezoning amendment).  
 ☞ *Sherman v. Board of Appeals of Worcester*, 354 Mass. 133, 235 N.E.2d 800 (1968) (soil conditions that precluded almost all permitted uses created hardship that warranted grant of variance for radio tower in residential district).  
 ☞ *Shoppers' World v. Beacon Terrace Realty*, 353 Mass. 63, 228 N.E.2d 446 (1967) (petition in form of appeal was in substance application for special permit which board could act upon; board could allow applicant to modify application so as to conform with zoning requirements; board did not improperly delegate authority to planning board where zoning bylaw gave power to planning board to determine classification of projects for purposes of determining access requirements).  
 ☞ *Shuman v. Board of Alderman of Newton*, 361 Mass. 758, 282 N.E.2d 653 (1972) (board may amend original decision as long as does not prejudice those entitled to notice of decision).  
 ☞ *Simeone Stone Corp. v. Oliva*, 350 Mass. 31, 213 N.E.2d 230 (1965) (building inspector had no authority to issue special permit; discussing findings and conditions of use that warranted issuance of a special permit by board of appeals).  
 ☞ *Sisters of the Holy Cross v. Brookline*, 347 Mass. 486, 198 N.E.2d 624 (1964) (religious uses are exempt from zoning and do not require a variance).  
 ☞ *Slater v. Board of Appeals of Brookline*, 350 Mass. 70, 213 N.E.2d 394 (1966) (may not deny special permit based on reasons not related to standards of zoning by-law).  
 ☞ *Smith v. Board of Appeals of Scituate*, 347 Mass. 755, 200 N.E.2d 279 (1964) (on appeal petitioner and board issuing variance had burden to prove statutory findings that supported grant of variance).  
 ☞ *Smith v. Building Comm'r of Brookline*, 367 Mass. 765, 328 N.E.2d 866 (1975) (discussing court remand and ZBA's jurisdiction to exercise powers of officer from who appeal was taken; by-law amendment during appeal did not apply to original permit, as long as defects were removed).  
 ☞ *Stark v. Board of Appeals of Quincy*, 341 Mass. 118, 167 N.E.2d 611 (1960) (power to grant variance to be exercised sparingly).  
 ☞ *Stivaletta v. Zoning Bd. of Appeals of Medfield*, 12 Mass. App. Ct. 994, 429 N.E.2d 66 (1981) (discussing ZBA's discretionary authority to deny permit in watershed protection district; applicant must satisfy burden of demonstrating proposed use would not endanger health and safety of area).  
 ☞ *Subaru of New England v. Board of Appeals of Canton*, 8 Mass. App. Ct. 483, 395 N.E.2d 880 (1979) (board's inability to determine adverse effect on flood control was grounds for denial of special permit).  
 ☞ *Sullivan v. Board of Appeals of Belmont*, 346 Mass. 81, 190 N.E.2d 83 (1963) (ZBA may not support grant of variance by determining that boundary lines of zoning districts were not logical in light of existing ways).


 *Sullivan v. Board of Appeals of Harwich*, 15 Mass. App. Ct. 286, 445 N.E.2d 174, *rev. denied*, 388 Mass. 1105, 448 N.E.2d 766 (1983) (board properly denied application where special permit was unnecessary).


 *S. Volpe & Co. v. Board of Appeals of Wareham*, 4 Mass. App. Ct., 348 N.E.2d 807 (1976) (discussing meaning of term "injurious" and conditions that board could impose to ensure use is not injurious).


 *Tanzilli v. Casassa*, 324 Mass. 113, 85 N.E.2d 220 (1949) (pecuniary hardship on owner does not qualify as hardship to support grant of variance).


 *Turner v. Board of Appeals of Milton*, 305 Mass. 189, 25 N.E.2d 203 (1940) (comparing building code with zoning).


 *Tenneco Oil Co. v. City Council of Springfield*, 406 Mass. 658, N.E.2d (1990) (board may correct inadvertent or clerical errors in its written decision).


 *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972) (standards must be provided in municipal zoning to guide board's discretionary decision on special permit).


 *Vazza Properties v. City Council of Woburn*, 1 Mass. App. Ct. 308, 296 N.E.2d 220 (1973) (denial of special permit is discretionary, as long as such denial is not arbitrary).


 *Vetter v. Zoning Bd. of Appeal of Attleboro*, 330 Mass. 628, 116 N.E.2d 277 (1953) (upholding denial of variance by board of appeals).


 *Webster v. Board of Appeals of Reading*, 349 Mass. 17, 206 N.E.2d 92 (1965) (board of appeals may not grant special permit for use which is prohibited in a district, although use is permitted in another district in town).


 *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376, 187 N.E.2d 854 (1963) (ZBA cannot issue advisory opinion).

 *Wolfman v. Board of Appeals of Brookline*, 15 Mass. App. Ct. 112, 444 N.E.2d 943, *rev. denied*, 388 Mass. 1104, 447 N.E.2d 670 (1983) (upholding board's allowance of balconies by variance based on more stringent findings than required by general laws).

 *Wolfson v. Sun Oil Co.*, 357 Mass. 87, 256 N.E.2d 308 (1970) (discussing hardship requirement).

 *Wrona v. Board of Appeals of Pittsfield*, 338 Mass. 87, 153 N.E.2d 631 (1958) (ZBA may permit extension of nonconformity up to setback lines with a special permit, but a variance was required to exceed the setback lines).

 *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 255 N.E.2d 732 (1970) (ZBA standards for making decision may be flexible).

 *Zaltman v. Board of Appeals of Stoneham*, 357 Mass. 482, 258 N.E.2d 565 (1970) (ZBA did not abuse discretion in denying convalescent home use in residential district).

## **CAUTIONARY NOTES**

✎ In exercising its powers, the ZBA must always give notice and hold a public hearing to gather evidence to support its decisions or orders.

## **LINKS**

🔑 <http://www.landlaw.com> (lower court cases available from landlaw)

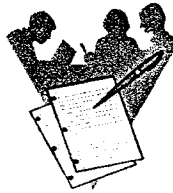
🔑 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 8, 9, 10, 11, 13, & 15 (2004).

## SECTION 15.

### APPEALS TO PERMIT GRANTING AUTHORITY; BOARD OF APPEALS HEARINGS AND PROCEDURES



#### THE LAW

Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed. The petitioner shall file a notice of appeal specifying the grounds thereof, with the city or town clerk, and a copy of said notice, including the date and time of filing certified by the town clerk, shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed, and to the permit granting authority, specifying in the notice grounds for such appeal. Such officer or board shall forthwith transmit to the board of appeals or zoning administrator all documents and papers constituting the record of the case in which the appeal is taken.

Any appeal to a board of appeals from the order or decision of a zoning administrator, if any, appointed in accordance with section thirteen shall be taken within thirty days of the date of such order or decision or within thirty days from the date on which the appeal, application or petition in question shall have been deemed denied in accordance with said section thirteen, as the case may be, by having the petitioner file a notice of appeal, specifying the grounds thereof with the city or town clerk and a copy of said notice including the date and time of filing certified by the city or town clerk shall be filed forthwith in the office of the zoning administrator and in the case of an appeal under section eight with the officer whose decision was the subject of the initial

#### ANNOTATIONS

*Section 8 appeal to permit granting authority to be filed within 30 days of decision begin appealed*

*Procedure for filing notice of appeal*

*Officer or board whose decision is being appealed shall transmit all documents of record to the permit granting authority*

*Appeals barred if filed more than 30 days after decision being appealed*

appeal to said zoning administrator. The zoning administrator shall forthwith transmit to the board of appeals all documents and papers constituting the record of the case in which the appeal is taken. An application for a special permit or petition for variance over which the board of appeals or the zoning administrator as the case may be, exercise original jurisdiction shall be filed by the petitioner with the city or town clerk, and a copy of said appeal, application or petition, including the date and time of filing, certified by the city or town clerk, shall be transmitted forthwith by the petitioner to the board of appeals or to said zoning administrator.

Meetings of the board shall be held at the call of the chairman or when called in such other manner as the board shall determine in its rules. The board of appeals shall hold a hearing on any appeal, application or petition within sixty-five days from the receipt of notice by the board of such appeal, application or petition. The board shall cause notice of such hearing to be published and sent to parties in interest as provided in section eleven. The chairman, or in his absence the acting chairman, may administer oaths, summon witnesses, and call for the production of papers.

The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law.

All hearings of the board of appeals shall be open to the public. The decision of the board shall be made within one hundred days after the date of the filing of an appeal, application or petition, except in regard to special permits, as provided for in section nine. The required time limits for a public hearing and said action, may be extended by written agreement between the applicant and the board of appeals. A copy of such agreement shall be filed in the office of the city or town clerk. Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the

*If zoning administrator's decision is appealed, zoning administrator to transmit record documents to board of appeals*

*Filing procedure for a variance or special permit from the board of appeals*

*Hearing required by the board of appeals within 65 days of application or petition*

*Procedures and requirements for notice of hearing*

*Administration of oaths and summons for witnesses*

*Voting requirements for a board of appeals*

*Decision required by board of appeals on variance or appeal within 100 days of appeal or petition, unless time is extended in writing*

*File copy of extension of time agreement with city or town clerk*

*Failure of board of appeals to take timely action is*

appeal, application or petition. The petitioner who seeks such approval by reason of the failure of the board to act within the time prescribed shall notify the city or town clerk, in writing, within fourteen days from the expiration of said one hundred days or extended time, if applicable, of such approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest, by mail and each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the board failed to act within the time prescribed. After the expiration of twenty days without notice of appeal pursuant to section seventeen, or, if appeal has been taken, after receipt of certified records of the court in which such appeal is adjudicated, indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the board failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

*deemed a grant of the appeal or variance*

*Process for securing city or town certification of approval due to failure of timely action*

*Notice of constructive grant due to failure of timely action*

*City or town clerk to issue certificate of approval after all appeals final*

*Board of appeals to make a detailed record of its proceedings*

*Detailed records to be filed within 14 days of decision with city or town clerk and notice of decision mailed to petitioner, applicant or appellant; parties in interest; and others who request notice*

*Notice of decision to specify 20 day time period for filing appeals*

## **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by 1987, c. 498, § 3; St. 1989, c. 341, § 23.

## **PERMISSIBLE/REQUIRED ACTIONS**

NOTE: The permissible and required actions for acting upon special permits and variances are covered in depth under sections 9 and 10 of this Guidebook.

- A permit granting authority (the zoning board of appeals or a zoning administrator as set forth under M.G.L., ch. 40A, § 13) is the only entity that may hear an administrative appeal, as set forth under M.G.L., ch. 40A, § 8.
- An appellant (any person with an ownership interest or acting as an agent of an owner) may file an administrative appeal within 30 days from the date of the order or decision that is being appealed by

1. filing a notice of appeal, specifying the grounds thereof, with the city or town clerk
2. filing a copy of the notice of appeal, including the grounds for the appeal, with the PGA, including the date and time of filing certified by the city or town clerk
3. filing a copy of the notice of appeal, including the grounds for the appeal, with the officer or board whose decision is being appealed, including the date and time of filing certified by the city or town clerk

- After the administrative appeal is filed, the board or officer whose decision is being appealed shall immediately transmit all documents and papers constituting the record of the case to the PGA.

- An appellant (any person with an ownership interest or acting as an agent of an owner) may also appeal the decision of a zoning administrator appointed to hear a variance, special permit, or administrative appeal by the board of appeals.

- An appeal of a zoning administrator's decision must be taken within 30 days of the date of any order or decision or within 30 days from the date on which the administrative appeal, special permit application, or variance petition was deemed denied for failure of the zoning administrator to take timely action thereon.

- An appellant who appeals a zoning administrator's decision or failure to act commences the appeal by

1. filing a notice of appeal, specifying the grounds thereof, with the city or town clerk
2. filing a copy of the notice of appeal, including the grounds for the appeal, with the PGA, including the date and time of filing certified by the city or town clerk
3. filing a copy of the notice of appeal, including the grounds for the appeal, with the zoning administrator, including the date and time of filing certified by the city or town clerk and
4. if the appeal concerns an administrative appeal, filing a copy of the notice of appeal, including the grounds for the appeal, with the officer or board whose decision was initially appealed to the zoning

administrator, including the date and time of filing certified by the city or town clerk

➤ After the appeal is filed, the zoning administrator shall immediately transmit all documents and papers constituting the record of the case to the PGA.

➤ Before the PGA may act on an appeal it must:

1. give notice of a public hearing by publication and posting, and by mailing to all parties in interest, as set forth under M.G.L., ch. 40A, § 11 and
2. hold the public hearing at an open meeting at the call of the chair of the board and as set forth in the notice
  - a. The public hearing must be held within 65 days after the PGA receives the notice of appeal, unless the appellant and PGA mutually agree to extend the date for the hearing.
  - b. The chair or acting chair, in the absence of the chair, may
    - i. Administer oaths,
    - ii. summon witnesses, and
    - iii. call for the production of papers.

➤ In deciding on an appeal the PGA must consider the grounds for the appeal and all evidence presented at the hearing (testimony, reports, etc.) that supports the relief requested in the appeal.

➤ In granting the relief requested by the appeal, the PGA may take one of the following actions:

1. reverse a decision or order, in whole or in part
2. affirm a decision or order, in whole or in part
3. modify a decision or order, in whole or in part
4. issue a permit
5. direct the issuance of a permit
  - Section 14 of M.G.L., ch.40A provides that the ZBA shall have all the powers of the officer from whom an administrative appeal is taken. Usually the ZBA should direct the issuance of a permit, as the ZBA may not have authority to issue some permits that concern more than zoning issues, such as building permits.

➤ In granting the relief requested by the appeal, the PGA may adopt conditions to protect the public. To avoid an arbitrary and unreasonable decision, the PGA should rely on evidence presented at the hearing and sound reasoning that supports the conditions imposed.

➤ Unless the time for action on the appeal is extended by mutual agreement of the appellant and the PGA, the PGA must act on the appeal within 100 days after the appeal is filed with the PGA in order to avoid constructive grant as set forth under this section.

1. A three-member board must unanimously vote to grant the requested relief.
2. Four members of a five-member board must vote to grant the requested relief.

☛ Within 14 days after acting on an appeal, the PGA must:

1. File a copy of its detailed record (minutes that specify the decision and reasons for the decision and include a record of the votes by each member or the absence of a member or failure of a member to vote) with the city or town clerk;
  - a. The courts have deemed the 14 day requirement as directory, not mandatory. However, the detailed record should be filed within 14 days of the 100<sup>th</sup> day for making the decision.
2. Mail a notice of the decision to the petitioner or appellant, all parties in interest, and all persons who requested notice at the public hearing; and
3. Note on the mailed notice of decision that an appeal pursuant to M.G.L., ch. 40A, § 17 may be filed within 20 days after the PGA filed the decision with the city or town clerk.

☛ If there is constructive grant, the following process must be followed in order for the constructively granted approval to be in effect:

1. The appellant must notify the city or town clerk in writing of such constructive approval within 14 days from the expiration of the time for action (100 days from the date of filing the appeal or any extended time),
2. The appellant must send notice of the constructive grant to all parties in interest and specify in the notice to the city or town clerk that such notice has been sent,
3. The appellant must specify in the notice to parties in interest that an appeal pursuant to M.G.L., ch. 40A, § 17 may be filed within 20 days after the date the appellant gave written notice to the city or town clerk,
4. After the 20 day appeal period expires without the filing of an appeal (or after a certified decision on an appeal that is favorable to the appellant), the city or town clerk must issue a certificate stating the date of approval, that the PGA failed to take final action within the required time period, and that the approval resulting from such approval has become final, and
5. The city or town clerk must mail the certificate to the appellant.

☛ If the relief requested is denied, the appellant has a right to request a rehearing as set forth under M.G.L., ch. 40A, § 16.

☛ The appellant or any interested or aggrieved party may appeal the decision on an appeal as set forth under M.G.L., ch. 40A, § 17.

☛ The relief granted in a decision concerning an appeal is not effective until it is recorded at the applicable registry of deeds as set forth under M.G.L., ch. 40A, § 11.

## **RELATED CASE LAW**

NOTE: Most of the cases pertaining to special permits and variances are referenced under the related case law for Sections 9 and 10 respectively and are

not repeated in this section. Also see cases under Section 14 of the Guidebook that concern the board of appeal's authority.

☞ *Balcam v. Hingham*, 41 Mass. App. Ct. 260 (1996) (state building code does not give building code board of appeals right to hear zoning appeal).

☞ *Board of Aldermen of Newton v. Maniace*, 45 Mass. App. Ct. 829, 702 N.E.2d 391, rev. denied, 429 Mass. 726, 711 N.E.2d 565 (1999) (when a special permit is denied, detailed reasons for the denial are unnecessary as long as the result of the vote is in writing within the required time period for final action in order to avoid constructive grant).

☞ *Board of Selectmen of Stockbridge v. Monument Inn, Inc.*, 14 Mass. App. Ct. 901 (1982) (detailed record is not restricted to minutes of board).

☞ *Board of Selectmen of Tewksbury v. Granfield*, 17 Mass. App. Ct. 1011, 460 N.E.2d 199 (1984) (municipalities must also exhaust administrative remedies before filing a court appeal).

☞ *Building Inspect. of Attleboro v. Attleboro Landfill, Inc.*, 384 Mass. 109, 423 N.E.2d 1009 (1981) (final action on a special permit within 90 days after close of the public hearing includes filing written decision with city or town clerk).

☞ *Burnham v. Town of Hadley*, 58 Mass. App. Ct. 479, 790 N.E.2d 1098 (2003) (reaffirming *O'Kane* analysis that oral vote on an administrative appeal must be taken within 100 days to avoid constructive grant, but written vote and detailed record may be filed 14 days after expiration of the 100 day period; ruling that an existing home occupation had increased its intensity to such a degree that it could not longer be considered a home occupation).


☞ *Cameron v. Board of Appeals of Yarmouth*, 23 Mass. App. Ct. 144, 499 N.E.2d 847 (1986) (constructive grant of appeal where decision filed 108 days after application filed, but no relief can be granted because no specific action was requested).


☞ *Cardwell v. Board of Appeals of Woburn*, 61 Mass. App. Ct. 118, 807 N.E.2d 207 (2004) (applying *O'Kane* analysis to constructive grant of comprehensive permit and ruling that oral vote must take place within 40 days of close of hearing, but written decision and record may be filed after expiration of the 40 days).


☞ *Cass v. Board of Appeal of Fall River*, 2 Mass. App. Ct. 555, 317 N.E.2d 77 (1974) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).


☞ *Cefalo v. Board of Appeal of Boston*, 332 Mass. 178, 124 N.E.2d 247 (1955) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).


☞ *Chongris v. Board of Appeals of Andover*, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (1984) (voluntary association with purpose of village preservation was not aggrieved party with standing to appeal).


 *Chwaliszewski v. Board of Appeals of Lynnfield*, 29 Mass. App. Ct. 247, 559 N.E.2d 627 (1990) (in interpreting Lynnfield zoning by-law, court ruled that board of appeals should require permit for basketball court, which is a structure under zoning).


 *Commissioner v. A. Graziano, Inc.*, 35 Mass. App. Ct. 555, 361 N.E.2d 385, rev. denied, 416 Mass. 1103, 621 N.E.2d 380 (1993) (building inspector does not need to exhaust administrative remedies before filing criminal complaint).


 *Cunha v. City of New Bedford*, 47 Mass. App. Ct. 407, 713 N.E.2d 385 (1999) (board may prohibit use which has risen to level where no longer subordinate and minor in significance to residential use; if zoning ordinance does not limit personnel for a home occupation use, persons reasonably necessary for the use are permitted).


 *Delgaudio v. Board of Appeals of Medford*, 1 Mass. App. Ct. 850, 303 N.E.2d 126 (1973) (variance should not be granted for six story motel in two story district where there were no unique conditions affecting lot that did not affect rest of property in zoning district).


 *DiGovanni v. Board of Appeals of Rockport*, 19 Mass. App. Ct. 339, 474 N.E.2d 198, review denied, 394 Mass. 1103, 477 N.E.2d 595 (1985) (no one has a legal right to a variance; upheld denial of variance because proposed plan violated prior variance; board cannot grant relief not requested).


 *Dion v. Board of Appeals of Waltham*, 344 Mass. 547, 183 N.E.2d 479 (1962) (discussing appropriate petition language in order to request a variance; loss of profit in resale is not a hardship that justifies grant of a variance; person with fiduciary interest may apply for variance).

 *District Atty. for the Northwestern Dist. v. Board of Selectmen of Sunderland*, 11 Mass. App. Ct. 663 (1981) (one vote does not constitute majority of a quorum of a three-member board when one member votes to go into executive session and the other two members abstain).

 *Dufault v. Millennium Power Partners*, 49 Mass. App. Ct. 137, 727 N.E.2d 89 (2000) (decision of board conducting site plan review cannot be appealed to board of appeals as is not decision of administrative board; must first apply for building permit and be denied and then appeal, including an appeal of any conditions that were imposed as a result of site plan review).

 *Elio v. Zoning Bd. of Appeals of Barnstable*, 55 Mass. App. Ct. 424, 771 N.E.2d 199 (2002) (administrative appeal must be filed within 30 days of decision being appealed).

 *Fandel v. Board of Zoning Adjustment*, 280 Mass. 195, 182 N.E. 343 (1932) (communications received after hearing that were read at subsequent open meeting did not affect validity of decision).

 *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Gallagher v. Board of Appeals of Acton*, 44 Mass. App. Ct. 906, 687 N.E.2d 1277 (1997) (board of appeals correctly affirmed building inspector's decision that addition of four unit rooming house to single-family residence was not accessory to such use, especially when it was three times larger than the principal use).

☞ *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215, 438 N.E.2d 82 (1982) (personal hardship such as expenses incurred or loss of profit do not constitute hardship for a variance; findings for denial are less rigorous than findings to grant a variance; board may deny variance for mobile home park if town's policy is against permitting such parks; vacancy on board does not transform five member board into a four member board; where only 4 of 5 members present at hearing and 1 of 4 members resigned at hearing, proper course was to continue hearing until at least a quorum of 4 members was present).

☞ *Goldman v. Planning Bd. of Burlington*, 347 Mass. 320, 197 N.E.2d 789 (1964) (revocation of a building permit is an order or decision subject to an administrative appeal).

☞ *Greeley v. Zoning Bd. of Appeals of Framingham*, 350 Mass. 549, 215 N.E.2d 791 (1966) (administrative appeal must be filed within 30 days of decision being appealed).

☞ *Green v. Board of Appeals of Provincetown*, 404 Mass. 571 (1989) (municipal officers and boards have right to appeal; business competitor lacks standing to appeal).

☞ *Jaffe v. Zoning Bd. of Appeals of Newton*, 346 Mass. 762, 109 N.E.2d 87 (1993) (to qualify as an aggrieved person must show definitive violation of private right, property interest, or legal interest, but do not need to reside in same zoning district as use objecting to).

☞ *Jordan v. City Clerk of Northampton*, 14 Mass. App. Ct. 916 (1982) (decision of special permit granting authority is not subject to administrative appeal process and must appeal to court).

☞ *Kolodny v. Board of Appeals of Brookline*, 346 Mass. 285, 191 N.E.2d 689 (1963) (administrative appeal must be filed within 30 days of decision being appealed).

☞ *Lane v. Board of Selectmen of Great Barrington*, 352 Mass. 523, 226 N.E.2d 238 (1967) (decision of special permit granting authority is not subject to administrative appeal process and must appeal to court).

☞ *Lanner v. Board of Appeals of Tewksbury*, 348 Mass. 220, 202 N.E.2d 777 (1964) (issuance of building permit is an order or decision subject to an administrative appeal).

☞ *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 340 N.E.2d 487 (1976) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Maselbas v. Board of Appeals of N. Attleborough*, 45 Mass. App. Ct. 54, 694 N.E.2d 1314 (1998) (board of appeals correctly affirmed building inspector's

decision to issue a permit for an accessory structure to a residential use that contained a three-car garage, swimming pool, and unfinished space on the second floor).

☞ *Moran v. School Comm. of Littleton*, 317 Mass. 591 (1945) (discussing rule of necessity where conflicted member may need to vote for board to act).

☞ *Nasca v. Board of Appeals of Medway*, 27 Mass. App. Ct. 46, 534 N.E.2d 792 (1989) (when board is acting on court order constructive grant provisions do not apply).

☞ *O'Kane v. Board of Appeals of Hingham*, 20 Mass. App. Ct. 162, 478 N.E.2d 962 (1985) (to "act" means to take an oral vote within the statutory time period for making a decision; board has 14 days after the end of statutory decision period to file its written decision and detailed record with the city or town clerk, as 14 day provision is only directory and not mandatory).

☞ *Planning Bd. of Springfield v. Board of Appeals of Springfield*, 355 Mass. 460, 245 N.E.2d 454 (1969) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

☞ *Racette v. Zoning Bd. of Appeals of Gardner*, 27 Mass. App. Ct. 617, 541 N.E.2d 369 (1989) (there was no constructive grant where city first required filing of petition with building inspector, as clock does not begin until filing with city clerk and applicant had right to insist that city clerk accept petition without first filing with building inspector).

☞ *Real Properties v. Board of Appeal of Boston*, 319 Mass. 180, 65 N.E.2d 199 (1946) (financial situation of owner does not justify grant of a variance; quorum when unanimous vote required is all members of the board as it is constituted).

☞ *Schiffone v. Zoning Bd. of Appeals of Walpole*, 28 Mass. App. Ct. 981, 553 N.E.2d 1308 (1990) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).


☞ *Security Mills Lt. Part. V. Board of Appeals of Newton*, 413 Mass. 562, 600 N.E.2d 995 (1992) (four of five members must agree on the result, though not on the reasoning for reaching the result).


☞ *Sesnovich v. Board of Appeal of Boston*, 313 Mass. 393, 47 N.E.2d 943 (1943) (when unanimous vote required quorum of board is all members as the board if constituted).


☞ *Shalbey v. Board of Appeals of Norwood*, 6 Mass. App. Ct. 521, 378 N.E.2d 1001 (1978) (decision not annulled because associate member spoke in favor of application as a private citizen).


☞ *Sherrill House, Inc. v. Board of Appeals of Boston*, 19 Mass. App. Ct. 274 (1985) (owner of nonconforming nursing home lacked standing to object to abutting property owner's change to a new nonconforming use).


☞ *Shoppers' World, Inc. v. Beacon terrace Realty*, 353 Mass. 63, 228 N.E.2d 446 (1967) (board must state reasons for decision, not merely repeat statutory requirements or court will annul decision).


1  *Shuman v. Board of Alderman of Newton*, 361 Mass. 758, 282 N.E.2d 653 (1972) (special permits do not need to satisfy more stringent variance requirements; board may amend decision as long as does not prejudice those entitled to notice).


 *Tanner v. Board of Appeals of Belmont*, 27 Mass. App. Ct. 1181 (1989) (a vote of two in favor, two opposed, and one member absent is a denial where four favorable votes are required; as long as detailed record specifies the vote of each member, all members do not need to sign detailed record).


 *Tenneco Oil Co. v. City Council of Springfield*, 406 Mass. 658 (1990) (a board may correct clerical error, but may not change relief without notice and another hearing).


 *Uglietta v. City Clerk of Somerville*, 32 Mass. App. Ct. 742, 594 N.E.2d 887 (1992) (constructive grant is lost for failure to follow process to obtain constructive grant in a timely manner).


 *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 718 N.E.2d 389 (1999) (case involving split frontage and whether frontage had to be contiguous, an issue not decided by the court).

 *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 468 N.E.2d 271, *review denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (discussing unlawful construction beyond scope of variance granted for storage and maintenance of commercial vehicles and equipment).

2  *Wolfman v. Board of Appeals of Brookline*, 388 Mass. 1104, 447 N.E.2d 670 (1983) (board may review proposed draft of decision filed by attorney in making its decision).

 *Wolfson v. Sun Oil Co.*, 357 Mass. 87, 256 N.E.2d 308 (1970) (findings to support grant of special permit, variance, or other relief must be based on detailed facts and evidence, while denial does not require such detailed findings).

 *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980) (public hearing and deliberations must both take place at an open meeting).

 *Zuckerman Zoning Bd. of Appeals of Greenfield*, 394 Mass. 663, 477 N.E.2d 132 (1985) (board may file its written detailed record within 14 days after end of 100 day decision period, as 14 day requirement is directory, not mandatory; board must only send notice of decision and does not have to ensure that it is received).

### **CAUTIONARY NOTES**

✓ See cautionary notes under sections 9 and 10 that also apply under this section with respect to variances and special permits.

✓ Failure to meet time limits will result in constructive grant of an appeal.

✓ The board should not hear an appeal that is not filed within 30 days of the decision being appealed.

✓ The board cannot make a decision on an appeal if no relief was requested.

✓ Any person who did not attend all public hearings should not vote on an appeal.

✓ The vote on an appeal requires an extraordinary vote of unanimous for a board of three members and 4 of 5 for a board of 5 members.

**SAMPLE NOTICE OF ADMINISTRATIVE APPEAL:**

***TIME FOR ACTING ON THIS ADMINISTRATIVE APPEAL WILL NOT COMMENCE UNTIL ALL ITEMS ON THIS APPEAL FORM ARE COMPLETE.***

**APPELLANT--**

Appellant's name: \_\_\_\_\_

Appellant's address: \_\_\_\_\_

Appellant's phone #: \_\_\_\_\_

**OWNER --**

If the appellant and owner are not the same person, the following must be completed:

Owner's name: \_\_\_\_\_

Owner's address: \_\_\_\_\_

Owner's phone #: \_\_\_\_\_

The owner hereby appoints \_\_\_\_\_ (name of person appointed) to act as agent for purposes of submitting and processing this administrative appeal.

Date: \_\_\_\_\_  
Owner's signature \_\_\_\_\_

**TITLE TO THE PROPERTY --**

The owner's title to the land that is the subject matter of this administrative appeal is

derived from deed/will/other of \_\_\_\_\_,

dated \_\_\_\_\_, and recorded in \_\_\_\_\_

Registry of Deeds, Volume \_\_\_\_\_, Page \_\_\_\_\_

Or as Land Court Certificate of Title No. \_\_\_\_\_

registered in \_\_\_\_\_ District, Volume \_\_\_\_\_, Page \_\_\_\_\_

**ASSESSOR'S RECORDS --**

The land shown on the plan is located on Map \_\_\_\_\_, Lot \_\_\_\_\_ of the

Assessor's records and has an address of \_\_\_\_\_.

**ZONING REQUIREMENTS --**

The land is located in the \_\_\_\_\_ zoning district.

THE PLAN (If Applicable) --

Title of plan: \_\_\_\_\_

Drawn by: \_\_\_\_\_

P.E.'s or surveyor's registration #: \_\_\_\_\_

Date of plan: \_\_\_\_\_

THE REQUEST --

This administrative appeal is based on a decision by: \_\_\_\_\_

dated: \_\_\_\_\_

which decision was: (indicate the details of the decision you are appealing, e.g., denial of building permit for a massage parlor on the basis that a massage parlor is not a commercial use permitted by right under section 3.2 of the zoning by-law)

**YOU MUST ATTACH A COPY OF THE DECISION YOU ARE APPEALING.**

Relief is requested (what do you want the board to do, e.g., reverse the decision being appealed)

**IF YOU FAIL TO REQUEST SPECIFIC RELIEF, THE BOARD MUST DENY YOUR ADMINISTRATIVE APPEAL, AS IT HAS NOTHING UPON WHICH TO ACT.**

Purpose of requesting relief (what do you want to do):

**THE GROUNDS --**

Explain grounds for your appeal and explain why the board should find in favor of your request for relief.

\_\_\_\_\_  
Signature of appellant

\_\_\_\_\_  
Date

Received by city/town clerk

Date: \_\_\_\_\_

Filing fee paid: \$ \_\_\_\_\_

\_\_\_\_\_  
Signature of city/town clerk

**SAMPLE DECISION**

**CERTIFICATE OF DECISION ON ADMINISTRATIVE APPEAL**

Date: \_\_\_\_\_

Appellant  
Appellant's address

*SENT BY CERTIFIED MAIL:*

# \_\_\_\_\_

City/Town Clerk  
City/Town of \_\_\_\_\_  
Address, Massachusetts

RE: Title of administrative appeal

With respect to the above-captioned administrative appeal submitted to the permit granting authority of the city/town of \_\_\_\_\_ by \_\_\_\_\_ on \_\_\_\_\_, the permit granting authority hereby certifies that:

1. after due notice, the board held a public hearing on this appeal duly noticed on \_\_\_\_\_
2. at an open meeting duly noticed and held on \_\_\_\_\_, the board made the following findings with respect to the relief requested:

On the basis of these findings, the permit granting authority voted to

\_\_\_\_\_ grant the relief requested in the administrative appeal

\_\_\_\_\_ deny the relief requested in the administrative appeal

The permit granting authority adopted the following conditions, safeguards, and limitations on the grant of relief:

The decision concerning this administrative appeal shall not be in effect until a copy of this decision is recorded at the \_\_\_\_\_ Registry of Deeds at the petitioner's expense.

This decision is subject to appeal in accordance with M.G.L. ch. 40A, § 17 within 20 days after this decision is filed with the city/town clerk.

Permit Granting Authority

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**21 SAMPLE CERTIFICATION BY THE CITY OR TOWN CLERK FOR FAILURE  
OF THE PERMIT GRANTING AUTHORITY TO TAKE TIMELY ACTION ON AN  
ADMINISTRATIVE APPEAL:**

**CERTIFICATE OF CONSTRUCTIVE APPROVAL**

The accompanying administrative appeal was filed by \_\_\_\_\_  
on \_\_\_\_\_.

The administrative appeal concerns land owned by \_\_\_\_\_

The permit granting authority did not take timely action and did not file a decision with the city/town clerk concerning the administrative appeal as required under M.G.L. ch. 40A, § 15.

As city/town clerk of the city/town of \_\_\_\_\_,  
(name of city of town)

I hereby certify that due to the failure of the permit granting authority to take timely action on said administrative appeal and failure to file a copy of its decision with the city/town clerk as required by M.G.L. ch. 40A, § 15, the relief requested in the administrative appeal shall be deemed granted.

This constructive approval is subject to appeal in accordance with M.G.L. ch. 40A, § 17 within 20 days after the date of this certification by me.

Date: \_\_\_\_\_  
City/Town Clerk

Cc: Permit granting authority

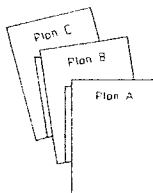
## **LINKS**

- 🔑 <http://www.landlaw.com> (lower court cases available from landlaw)
- 🔑 <http://www.sociallaw.com/sjcslip/8067.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

- 📁 The Land Use Manager, Vols. I – II
- 📁 The Land Use Manager, Vols. VI – VII
- 📁 The Land Use Manager, Selected Articles from July 1991 through March 1999.
- 📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 8, 9 (special permit requirements, cases, application & decision forms), 10 (variance requirements, cases, petition & decision forms), 11, 13, & 14 (2004).

**SECTION 16.**  
**UNFAVORABLE DECISIONS; RECONSIDERATION;**  
**WITHDRAWAL**



**THE LAW**

No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

Any petition for a variance or application for a special permit which has been transmitted to the permit granting authority or special permit granting authority may be withdrawn, without prejudice by the petitioner prior to the publication of the notice of a public hearing thereon, but thereafter be withdrawn without prejudice only with the approval of the special permit granting authority or permit granting authority.

**ANNOTATIONS**

*Unfavorable action on appeal, application, or petition bars same appeal, application, or petition for 2 years unless findings by board taking unfavorable action and all but one member of the planning board consents to reapplication*

*Before notice of public hearing, application may be withdrawn without prejudice*

*After notice of public hearing, application may be withdrawn without prejudice with approval of granting authority*

**LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3.

Massachusetts Federation of Planning and Appeals Board 1960  
(Revised 1969, 1973, 1977, 1988, 1997, 2004)

## **PERMISSIBLE/REQUIRED ACTIONS**

➤ The purpose of this section is to limit the special permit applications, variance petitions, and administrative appeals that a board must reconsider after a final unfavorable vote, such that those who do not intend to make any changes in the original application, petition, or appeal must wait two years before filing again with the same board.

➤ If a person intends to make specific and material changes in the application, petition, or appeal that was denied, then section 16 provides that reconsideration before expiration of the two years is possible only if certain requirements are met.

➤ Although section 16 does not specify a detailed process for reconsideration of an application, petition, or appeal that was unfavorably acted upon within two years after the unfavorable action, it is clear that it is a two-step process:

1. All but one member of a planning board, as that board is constituted, must give its consent to apply, petition or appeal again.
  - a. It is recommended that this step take place first and that the planning board adopt some simple rules and regulations that specify the procedures for such a consent vote.
  - b. There is no express requirement for advertisement and a full public hearing for the consent consideration, although notice to parties in interest of the time and place of the consent proceeding is required. Due process and case law suggest that at a minimum advertisement and notice of the meeting at which consent will be considered should follow the procedures as set forth under section 11 of The Zoning Act.
  - c. There is no requirement that the planning board find specific and material changes in the conditions resulting in the original unfavorable action before giving its consent to proceed, but such finding provides an objective standard for the planning board's decision.
    - If the planning board was the board that took the unfavorable action on a special permit application, after giving its consent, it must next make a finding of specific and material changes in the application it denied before reconsideration can take place.
      - After giving its consent and then finding specific and material changes in the application, the planning board may want to proceed immediately to the public hearing on the application. Thus, it may make sense to advertise and give notice of a public hearing under section 11 and hold such hearing for all three actions.
2. After planning board consent to proceed, the board that took the unfavorable action must find specific and material changes in the

conditions that resulted in the unfavorable action on the application, petition, or appeal and include those findings in its minutes.

- a. Although a public hearing is not expressly required under section 16, due process and case law suggest at a minimum advertising and notice of the reconsider meeting, as set forth under section 11 of The Zoning Act. The notice of the public hearing should specify that the board will be considering whether there have been specific and material changes in the conditions upon which the original denial was based.
- b. The board's vote should be unanimous for a board of three members; four favorable votes for a board of five members; and two-thirds vote for a board that is larger than five members.
- c. Because the board may want to proceed immediately to the public hearing on the application, petition, or appeal if the reconsideration vote is favorable and the planning board has consented, it may make sense to advertise and give notice of a public hearing under section 11 and hold such hearing for both actions.
- d. In processing the actual application, petition, or appeal on reconsideration, all statutory procedures and those set forth in the board's rules and regulations for filing, notice and hearing, time for acting, voting requirements, etc. must be followed.

➤ A person may withdraw an application, petition, or appeal before the notice of public hearing without further action by the board that was to consider the application, petition, or appeal.

➤ After notice of the public hearing, the board that was to consider the application, petition, or appeal must approve its withdrawal to avoid prejudice, which could result in imposition of the two-year waiting period for reconsideration.

1. Because no voting requirements are specified for allowing withdrawal after the public hearing notice, the conservative approach would be to have the board's vote be unanimous for a board of three members; four favorable votes for a board of five members; and two-thirds vote for a board that is larger than five members.

## **RELATED CASE LAW**

📖 *Griffith v. Board of Appeals of Framingham*, 27 Mass. App. Ct. 227, 537 N.E.2d 161 (1989) (discussing effect of dismissal of court case on reapplication under section 16).

📖 *Halko v. Board of Appeals of Billerica*, 349 Mass. 465, 209 N.E.2d 323 (1965) (denial of a special permit application does not preclude application for a variance within two years of denial).

Massachusetts Federation of Planning and Appeals Board 1960  
(Revised 1969, 1973, 1977, 1988, 1997, 2004)

📖 *Hall v. Zoning Board of Appeals of Edgartown*, 40 Mass. Ct. 918 (1996) (discussing relationship between repetitive petitions and elimination of conditions of approval).

📖 *Klein v. Planning Bd. of Wrentham*, 31 Mass. App. Ct. 777, 583 N.E.2d 892, rev. denied, 413 Mass. 1103, 598 N.E.2d 1133 (1992) (planning board may not permit reapplication if there have been no specific and material changes in conditions upon which application was originally denied).

📖 *Kosla v. Board of Appeals of Holden*, 55 Mass. App. Ct. 62, 768 N.E.2d 1115 (2002) (when first application withdrawn without prejudice, second application considered amendment to first application, thus constituting a single case).

📖 *Paquin v. Board of Appeals of Barnstable*, 27 Mass. App. Ct. 577 (1989) (likely the legislature intended planning board to approve reconsideration before the board of appeals can consider the merits of the repetitive petition).

📖 *Ranney v. Board of Appeals of Nantucket*, 11 Mass. App. Ct. 112, 414 N.E.2d 373 (1981) (discussing purpose of two-year limit as giving finality to proceedings; planning board's change of opinion on traffic and property value issues that resulted in denial of original permit is a change in circumstances that supports a second application within two years of denial; discussing specific and material changes to application by applicant; notice is required for meeting at which reconsideration will be addressed).

📖 *Shalbey v. Board of Appeal of Norwood*, 6 Mass. App. Ct. 519, 378 N.E.2d 1001 (1978) (discussing application of requirements under prior law because town had not yet accepted 1975 Zoning Act at time of application).

## **CAUTIONARY NOTES**

✍ Because this section remains ambiguous, local boards should make sure that they specify the detailed process for reconsideration of denied applications, petitions, and appeals, and withdrawal of applications, petitions, and appeals in their operational rules and regulations.

## **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

🔗 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

## **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 9, 10, & 15 (2004).

## SECTION 17.

### COURT APPEALS



#### **THE LAW**

Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of the district court department, any party shall have the right to file a claim for trial of said appeal in the superior court department within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and

#### **ANNOTATIONS**

*Any aggrieved person may appeal the decision of the board of appeals or the special permit granting authority*

*Appeal for failure of board to take timely action*

*Others who may appeal*

*Jurisdiction for appeal with land court, superior court, housing court, and district court*

*Appeal to be filed within 20 days after decision filed with city or town clerk*

*Notice of action must be filed with city or town clerk within 20 day appeal period*

*Complaint to allege that board exceeded its authority and shall contain a prayer that the decision be annulled*

any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed. No answer shall be required but an answer may be filed and notice of such filing with a copy of the answer and an affidavit of such notice given to all parties as provided above within seven days after the filing of the answer. Other persons may be permitted to intervene, upon motion. The clerk of the court shall give notice of the hearing as in other cases without jury, to all parties whether or not they have appeared. The court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding

*Copy of decision to be attached to complaint*

*All members of issuing board and original applicant, petitioner, or appellant, if not the one filing the appeal, shall be named as parties in the appeal*

*Plaintiff to serve process by sending notice with a copy of the complaint by delivery or certified mail to all parties to the action*

*Within 21 days of service of process, plaintiff to file affidavit of notice with clerk of court to avoid dismissal*

*No answer to the complaint is required*

*Other parties may intervene upon motion*

*Non-jury trial*

*Remedy as set forth under this section is exclusive*

*Appeals with respect to procedural flaws in notice permitted within 90 days after decision filed with city or town clerk*

|  |   |
|--|---|
| <p>commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.</p> <p>A city or town may provide any officer or board of such city or town with independent legal counsel for appealing, as provided in this section, a decision of a board of appeals or special permit granting authority and for taking such other subsequent action as parties are authorized to take.</p> <p>Costs shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice.</p> <p>Costs shall not be allowed against the party appealing from the decision of the board or special permit granting authority unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court.</p> <p>The court shall require nonmunicipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such costs in appeals of decisions approving subdivision plans.</p> <p>All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.</p> | <p><i>City or town may provide officer or board with independent legal counsel to appeal decision</i></p> <p><i>Costs shall not be allowed against the board whose decision is being appealed unless the board acted with gross negligence, in bad faith, or with malice</i></p> <p><i>Costs shall not be allowed against the appellant unless the appellant acted in bad faith or with malice in filing the appeal</i></p> <p><i>The court shall require nonmunicipal plaintiffs to post a surety or cash bond between \$2000 - \$15,000</i></p> <p><i>Zoning appeals shall have precedence over civil actions</i></p> |
|--|---|

### **LEGISLATIVE HISTORY**

Added by St. 1975, c. 808, § 3. Amended by St. 1978, c. 478, § 32; St. 1982, c. 533, § 1; St. 1985, c. 492, § 1; St. 1987, c. 498, § 4; St. 1989, c. 649, § 2.

### **PERMISSIBLE/REQUIRED ACTIONS**

➤ An appeal may be filed in court concerning the following:

- a special permit decision
- a variance decision
- a decision on an administrative appeal
- a decision on an appeal of a zoning administrator's decision

- constructive grant (failure of the board to act in a timely manner) of a special permit, variance, or appeal
- The following have standing to file an appeal with court:
  - an aggrieved party defined as:
    - a "party in interest" who received notice of the hearing on the matter being appealed is presumed to be aggrieved, but such presumption is rebuttable
    - a party is aggrieved if the party can demonstrate specific and personal harm or substantiated violation of a private right, property interest, or legal interest.
  - any municipal officer
    - the officer does not have to be aggrieved, but should have an interest in or duties to perform concerning zoning or related land use subjects
      - A member of a board will usually not have standing to appeal unless that person otherwise qualifies under one of the other categories.
  - any municipal board
    - the board does not have to be aggrieved, but should have an interest in or duties to perform concerning zoning or related land use subjects
      - A planning board, despite the fact that it is a "party in interest" entitled to notice of a hearing and decision on a zoning matter in an abutting community, has no right to appeal the decision of such municipality unless it can show it has duties concerning zoning in such abutting city or town.
- Appeals may be filed in the following courts:
  - land court department
  - superior court department with jurisdiction over the land at issue
  - housing court department if the land is located in a county, region, or area served by a division of said housing court department
  - district court department, except for Hampden county, with jurisdiction over the land at issue
    - within 25 days after completion of service of the appeal, any party may remove the appeal to the superior court department
- An appeal must be filed
  - within 20 days after the decision being appealed is filed in the office of the city or town clerk.
  - within 20 days after the date the city or town clerk received a written notice from the applicant, petitioner, or appellant that the special permit or permit granting authority failed to act within the time prescribed, if the appeal concerns a constructive grant.
- The process for filing an appeal is as follows:
  - The parties to be named in the appeal are the following:

Massachusetts Federation of Planning and Appeals Board 1960  
(Revised 1969, 1973, 1977, 1988, 1997, 2004)

- The plaintiff(s) (at least one of the parties who may file an appeal as specified above)
- The defendant(s), including the following:
  - All members of the board making the decision
  - The applicant, petitioner, or administrative appellant, if one of these parties is not filing the appeal
- The appeal (complaint), including a copy of the decision being appealed, must be filed with the court within 20 days after the decision or notice of failure to take timely action was filed with the city/town clerk
  - The copy of the decision (or notice, if the appeal is based on a constructive grant) that must be attached to the appeal shall
    - bear the date the decision (or notice) was filed with the city/town clerk
    - be certified by the city/town clerk with whom the decision or notice was filed
- A notice of appeal, accompanied by a copy of the complaint, must be filed with the city/town clerk within 20 days after the decision or notice of failure to take timely action was filed with the city/town clerk.
- The complaint must
  - include any facts pertinent to the appeal
  - allege that the board issuing the decision exceeded its authority
  - pray that the decision be annulled
- The plaintiff must use the below expedited service of process by
  - transmitting a notice of appeal, accompanied by a copy of the complaint, to all defendants within 14 days after filing the appeal (complaint)
    - The transmission must be by delivery or certified mail
  - filing an affidavit that notice has been given with the clerk of court within 21 days after entry of the complaint at the court
- Failure of the plaintiff to comply with the expedited service of process requirements will result in dismissal of the complaint.
- No answer is required to the complaint, but if an answer is filed with the court a notice of such filing, accompanied by the answer, shall be transmitted to all parties to the action.
  - An affidavit of the notice to all parties must be filed with the clerk of court within 7 days after filing the answer with the court.
- Any interested party may file a Motion to Intervene in the case.
- A trial on a zoning matter is before a judge, not a jury.
  - The clerk of court is required to give notice of the hearing on the matter to all parties, even if a party has not filed an appearance with the court, in the manner for giving notice in a non-jury case
  - The court (judge) will hold the hearing *de novo* (anew) and is required to:
    - find or determine the facts in the case

- annul the decision if it is found to exceed the board's authority
  - A decision is in excess of authority if it is
    - based on legally untenable grounds
    - unreasonable, whimsical, capricious, or arbitrary
  - make such other decree as justice and equity may require
- ☛ The remedy provided by this section is exclusive, in other words any appeal of a zoning decision must be processed as specified above.
  - There is one exception to this exclusive remedy provision, as appeals concerning defect of notice with respect to publication, mailing, or posting as required by The Zoning Act may be filed within 90 days after the decision is filed in the office of the city/town clerk.
- ☛ A municipality may provide an officer or board of the city or town with an independent legal counsel for purposes of filing an appeal of a decision as set forth under this section.
- ☛ The court may allow costs against the board that made the decision, if the court determines that the board acted with gross negligence, in bad faith, or with malice.
- ☛ The court may allow costs against the appellant(s), if the court determines that the appellant(s) acted in bad faith or with malice in filing the appeal.
- ☛ The court shall require nonmunicipal plaintiffs to post a surety or cash bond for purposes of paying costs of the appeal.
  - The amount of the bond is to be not less than \$2,000 and not more than \$15,000

**NOTE:** The language of the general law under this provision provides: "to secure the payment of such costs in appeals of decisions approving subdivision plans." At the time this amendment was made to section 17, a similar amendment was made to section 81BB of The Subdivision Control Law. The language adopted for this section was probably in error, and the intent was to require posting of a bond by a nonmunicipal appellant filing an appeal pertaining to the zoning matters which can be the subject of appeal under this section.

☛ Zoning appeals are to have precedence over all other civil actions.

### **INVERSE CONDEMNATION CLAIMS**

Another available avenue of relief on appeal would be a claim that the zoning requirements have resulted in a regulatory taking of real property to serve a public purpose. This type of action is known as an "inverse condemnation" claim. These claims are rarely successful in Massachusetts, but such claims have been successful in other state jurisdictions and the U.S. Supreme Court has endorsed such claims under the right circumstances.

An inverse condemnation claim is brought under the 5<sup>th</sup> and 14<sup>th</sup> amendments to the U.S. Constitution and under similar provisions of state constitutions. The claim basically alleges that the municipality's regulation has resulted in the inability to make practical use of real property, as would be the case if there had been an eminent domain taking to serve a public purpose. Thus, if the land use regulation prohibits any practical use, the municipality must provide just compensation as required by the 5<sup>th</sup> amendment of the U.S. Constitution (or comparable state provision).

Courts have held that there are the following two types of inverse condemnation:

- A temporary taking, in which the municipality repeals the offending regulation, but is still required to provide just compensation for the period of time the regulation was in effect and caused a taking of real property.
- A permanent taking, in which case the municipality intends to maintain the regulation and thus must pay just compensation similar to what it would pay if there had been an actual eminent domain taking.

The tests developed by the courts for determining whether there has been a taking are not uniform, but basically they include the following:

- Does the regulation substantially advance a legitimate state interest
  - Is there a practical use available for the property (a test adopted by the Massachusetts courts)
- or
- Is there an economically viable use for the property (a test adopted by the U.S. Supreme Court)

Some of the cases in which the courts have considered a taking include the following:

- *Nollan v. California Coastal Comm'n*, 483 U.S. 835 (1987) (lack of connection between requiring conveyance of a public easement across a beach in exchange for approval to demolish and rebuild house constituted a taking)
- *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (there is a taking where land use regulation deprives owner of all economically beneficial use of private property, unless use would otherwise be barred as a nuisance).
- *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (discussing temporary takings).
- *Moskow v. Commissioner of Environmental Management*, 427 N.E.2d 750 (1981) (practical use of property remained, so no taking found).
- *Lopes v. City of Peabody*, 417 Mass. 299 (1994) (remanding case that eventually resulted in Land Court finding a temporary regulatory taking).

## **RELATED CASE LAW**

📖 *ACW Realty Management, Inc. v. Planning Bd. of Westfield*, 40 Mass. App. Ct. 242, 662 N.E.2d 1051 (1996) (board's decision may not be disturbed unless it is based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary).

📖 *Addison-Wesley Pub. Co. v. Town of Reading*, 354 Mass. 181, 236 N.E.2d 188 (1968) (in appropriate case, party may make a claim of invalidity of a zoning provision to the Land Court, as provided by M.G.L., ch. 240, § 14A).

📖 *Anderson v. Planning Bd. of Norton*, 56 Mass. App. Ct. 904, 776 N.E.2d 1022 (2002) (court did not order approval of special permit on remand, as board can maintain its denial as long as it provides adequate evidence to support its conclusions).

📖 *APT Asset Management, Inc. v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133 (2000) (court will give some measure of deference to board's decision).

📖 *Banquer Realty Co. v. Acting Build. Comm'r of Boston*, 389 Mass. 565 (1983) (in case filed under ch. 240, § 14A, plaintiff may question validity of zoning and extent to which it directly affects person's property).

📖 *Barron Chevrolet, Inc. v. Danvers*, 419 Mass. 404, 646 N.E.2d 89 (1995) (in appropriate case, party may make a claim of invalidity of a zoning provision to the Land Court, as provided by M.G.L., ch. 240, § 14A).

📖 *Barvenik v. Alderman of Newton*, 33 Mass. App. Ct. 129 (1992) (a person must first be aggrieved before the court has jurisdiction over the appeal and must suffer some infringement of a legal right or personal injury).

📖 *Baxter v. Board of Appeals of Barnstable*, 29 Mass. App. Ct. 993, 562 N.E.2d 841 (1990) (presumption that persons were aggrieved was rebutted where only concerns were license that had yet to be issued, possible smells from a fish store, and dislike of the plan which otherwise complied with requirements).

📖 *Bedford v. Trustees of Boston Univ.*, 25 Mass. App. Ct. 372 (1988) (increased traffic concerns may support standing to appeal).

📖 *Beeler v. Downey*, 387 Mass. 609, 442 N.E.2d 19 (1982) (same words using in different section of a statute should be given the same meaning).

📖 *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 709 N.E.2d 815 (1999) (appeal of comprehensive permit subject to section 17 requirements and must be aggrieved party to have standing to appeal; appellant's concerns that use of property was not highest and best use was community concern and not personal concern and thus appellant was not aggrieved party).

📖 *Bellows Farm, Inc. v. Building Inspect. of Acton*, 364 Mass. 253, 303 N.E.2d 728 (1973) (a dimensional regulation becomes a de facto use regulation if its impact eliminates virtually all protected and permitted uses).

☞ *Bertrand v. Board of Appeals of Bourne*, 58 Mass. App. Ct. 912, 790 N.E.2d 704 (2003) (an abutter is aggrieved if concerned about impact of density increase by variance to permit construction on two undersized lots).

☞ *Bingham v. City Council of Fitchburg*, 52 Mass. App. Ct. 566, 754 N.E.2d 1078 (2001) (notice of appeal was not filed with the town clerk by 4:30 PM, the time of closing, and thus appeal was barred as clerk had no knowledge that appeal had been filed within requisite 20 day appeal period).

☞ *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32, 574 N.E.2d 424, *rev. denied*, 411 Mass. 1101, 579 N.E.2d 1360 (1991) (court must determine whether board has chosen proper criteria and standards upon which to base decision).

☞ *Board of Selectmen of Tewksbury v. Granfield*, 17 Mass. App. Ct. 1011, 460 N.E.2d 199 (1984) (appellant must first exhaust administrative remedies by appealing to board of appeals before court appeal can be sought).

☞ *Bonfatti v. Zoning Bd. of Appeals of Holliston*, 48 Mass. App. Ct. 46, 716 N.E.2d 1063 (1999) (plaintiff who did not appeal special permit decision, but instead applied for a building permit which was denied and appealed to the ZBA and then to court, was denied appeal for failure to appeal original special permit within the 20 day appeal period).

☞ *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 794 N.E.2d 1198 (2003) (court must determine whether board has chosen proper criteria and standards upon which to base decision).

☞ *Cameron v. Board of Appeals of Yarmouth*, 23 Mass. App. Ct. 144, 499 N.E.2d 847 (1986) (court conducts *de novo* review on section 17 appeal).

☞ *Cape Ann Land Dev. v. Gloucester*, 371 Mass. 19, 353 N.E.2d 645 (1976) (a dimensional regulation becomes a *de facto* use regulation if its impact eliminates virtually all protected and permitted uses).

☞ *Capone v. Zoning Bd. of Appeals of Fitchburg*, 389 Mass. 617 (1983) (city or town clerk sets beginning of 20 days appeal period).

☞ *Cappuccio v. Zoning Bd. of Appeals of Spencer*, 398 Mass. 304, 496 N.E.2d 646 (1986) (appeal must be filed within 20 days of decision, even though abutter given no notice of decision; 90 days appeal period applies to defects in giving notice for public hearing and not defects in giving notice of decision).

☞ *Cardone v. Boston Regional Med. Center, Inc.*, 60 Mass. App. Ct. 179 (2003) (court should not grant summary judgment on grounds not raised by parties, unless parties have opportunity to address issue).

☞ *Carr v. Board of Appeals of Medford*, 334 Mass. 77, 134 N.E.2d 10 (1956) (zoning appeals limited to municipal officers or boards that have duties to perform in relation to zoning or building code, and individual member of city council has no such duty and cannot file an appeal).

☞ *Chiuccariello v. Building Comm'r of Boston*, 29 Mass. App. Ct. 482, 562 N.E.2d 96 (1990) (in interpreting Boston Zoning Ordinance court ruled that board of appeals did not lack jurisdiction to hear case for failure to give notice to abutters,

and that abutters must seek judicial relief under the 90-day appeal process for defective hearing notice).

☞ *Circle Lounge & Grille v. Board of Appeal of Boston*, 324 Mass. 427, 86 N.E.2d 920 (1949) (an "aggrieved person" must be able to demonstrate, and not simply speculate, that there is infringement of a legal right; a person is not aggrieved simply because they are a competitor).

☞ *City of Worcester v. Bonaventura*, 56 Mass. App. Ct. 166, 775 N.E.2d 795 (2002) (zoning must be interpreted based on its ordinary meaning in the context of the entire zoning ordinance).

☞ *Commonwealth v. Jaffe*, 398 Mass. 50, 494 N.E.2d 1342 (1986) (courts should be wary of declaring zoning unconstitutional and vague, as ordinances are entitled to a strong presumption of validity).

☞ *Copley v. Board of Appeals of Canton*, 1 Mass. App. Ct. 821, 296 N.E.2d 716 (1973) (board's evaluation of seriousness, not judge's controls).

☞ *County of Norfolk v. Zoning Bd. of Appeals of Walpole*, 16 Mass. App. Ct. 930, 450 N.E.2d 628 (1983) (telephone notice of appeal to town clerk is insufficient to comply with requirements for commencing appeal, which requires written notice within 20 days of decision being appealed).

☞ *Cox v. Board of Appeals of Carver*, 42 Mass. App. Ct. 422, 677 N.E.2d 697 (1997) (court allowed amendment to appeal in order to add party who had received special permit to extend nonconforming mobile home park; abutters were aggrieved as demonstrated potential injury from increased pedestrian traffic).

☞ *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124, 807 N.E.2d 245 (2004) (must exhaust administrative remedies before filing appeal with court; board's decision given deference when reasonable).

☞ *D'Ambra v. Zoning Bd. of Appeal of Attleboro*, 324 Mass. 61, 84 N.E.2d 456 (1949) (board must supply rational view to support decision).

☞ *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 754 N.E.2d 101 (2001) (deference must be given to board's decision, but rational view must support decision; board's decision must be sustained if there is any rational basis for it).

☞ *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (1997) (there is no error where the judge's conclusions are based on reasonable inferences from the evidence).

☞ *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 794 N.E.2d 1269 (2003) (to be aggrieved must make claims that are more than those of a general nature).

☞ *Federman v. Board of Appeals of Marblehead*, 35 Mass. App. Ct. 727 (1994) (when remand allows for only one action can be considered final judgment ripe for appeal to higher court).

☞ *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962) (board must rationally support decision).

- 📖 *Fitch v. Board of Appeals of Concord*, 55 Mass. App. Ct. 748, 774 N.E.2d 1107 (2002) (person may file declaratory judgment action when there is an actual controversy).
- 📖 *Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass. App. Ct. 53, 484 N.E.2d 113 (1985) (court must determine whether board has chosen proper criteria and standards upon which to base decision).
- 📖 *Gamache v. Mayor of N. Adams*, 17 Mass. App. Ct. 291 (1983) (court should not grant summary judgment on grounds not raised by parties, unless parties have opportunity to address issue).
- 📖 *Geryk v. Zoning Appeals Bd. of Eastampton*, 8 Mass. App. Ct. 683 (1979) (remand required board to approve permit).
- 📖 *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 536 N.E.2d 584 (1989) (same words using in different section of a statute should be given the same meaning).
- 📖 *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962) (board must rationally support decision).
- 📖 *Gulf Oil Corp. v. Board of Appeals of Framingham*, 355 Mass. 275, 244 N.E.2d 311 (1969) (may not base decision on future fear).
- 📖 *Hall v. Zoning Bd. of Appeals of Edgartown*, 28 Mass. App. Ct. 249, 549 N.E.2d 433 (1990) (terms in a zoning ordinance should be interpreted in the context of the ordinance as a whole and should be given their ordinary meaning to the extent this is consistent with common sense and practicality).
- 📖 *Hanna v. Town of Framingham*, 60 Mass. App. Ct. 420, 802 N.E.2d 1061 (2004) (in an action for land court declaration of validity under ch. 240, § 14A abutter does not need to show special harm in order to file claim, must simply be land owner directly affected).
- 📖 *Hansen & Donahue, Inc. v. Town of Norwood*, 61 Mass. App. Ct. 292, 809 N.E.2d 1079 (2004) (abutters may file complaint under M.G.L., ch. 240, § 14A to determine validity of zoning and direct effect of zoning on their property).
- 📖 *Harrison v. Braintree*, 355 Mass. 651, 247 N.E.2d 356 (1969) (in appropriate case, party who is directly affected may make a claim of invalidity of a zoning provision to the Land Court, as provided by M.G.L., ch. 240, § 14A).
- 📖 *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 540 N.E.2d 182 (1989) (persons who have only general public or civic concern lack standing as aggrieved persons and may not file appeal; aggrieved parties are those who assert a substantiated violation of private rights, property, or legal interests).
- 📖 *Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne*, 14 Mass. App. Ct. 76, 436 N.E.2d 978 (1982) (board's decision must be rational).
- 📖 *Iodice v. Newton*, 397 Mass. 329 (1986) (discussing use of declaratory judgment under ch. 231A concerning order of municipal official).
- 📖 *J. & C. Homes, Inc. v. Planning Bd. of Groton*, 8 Mass. App. Ct. 123 (1979) (when order of remand is interlocutory lower court maintains control over case).

and has not rendered final judgment, so matter is not yet ripe for appeal to higher court).

📖 *Jordan v. City Clerk of Northampton*, 14 Mass. App. Ct. 916 (1982) (decision of special permit granting authority is not subject to administrative appeal process and must appeal to court).

📖 *Klein v. Planning Bd. of Wrentham*, 31 Mass. App. Ct. 777, 583 N.E.2d 892, rev. denied, 413 Mass. 1103, 598 N.E.2d 1133 (1992) (must appeal conditions of special permit at time decision made and not at a later date).

📖 *Knott v. Zoning Bd. of Appeals of Natick*, 12 Mass. App. Ct. 1002 (1981) (burden of proof rests on party seeking to establish validity of variance or special permit).

📖 *Konover Management Corp.*, 32 Mass. App. Ct. 319, 588 N.E.2d 1365 (1992) (sufficient notice to clerk is based on state of clerk's knowledge and not physical location of papers which control the appeal; discussing instances in which notice of an appeal to the town clerk that did not strictly follow the statute and were deemed satisfactory include: filing notice without complaint attached, filing complaint without separate notice, delivery of notice and complaint to clerk's house after close of clerk's office on 20<sup>th</sup> day, and filing notice and complaint with planning board agent and clerk was aware of filing; telephone notice was deemed insufficient).

📖 *Lane v. Board of Selectmen of Great Barrington*, 352 Mass. 523, 226 N.E.2d 238 (1967) (decision of special permit granting authority is not subject to administrative appeal process and must appeal to court).

📖 *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635 (1970) (court must affirm board's decision to deny unless finds denial is based on legally untenable grounds or was unreasonable, whimsical, capricious, or arbitrary; court must determine whether board has chosen proper criteria and standards upon which to base decision).

📖 *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719 (1996) (a person is aggrieved if can show definite violations of private rights, private property interests, or private legal interests).















📖 *Marinelli v. Board of Appeals of Stoughton*, 440 Mass. 255, 797 N.E.2d 893 (2003) (purchaser of lot who was also petitioner on appeal to the ZBA is a party of interest and is presumed to be an aggrieved party).

📖 *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 143 N.E.2d 270 (1957) (should not construe term "person aggrieved" narrowly).

📖 *Mastriani v. Building Inspector of Monson*, 19 Mass. App. Ct. 989, 475 N.E.2d 408 (1985) (discussing action of abutter to determine validity of zoning change from residential to commercial to allow medical office building filed in accordance with ch. 240, § 14A and not as declaratory judgment because of lack of controversy).

📖 *McDonald's Corp. v. Seekonk*, 12 Mass. App. Ct. 351, 424 N.E.2d 1136 (1981) (must exhaust administrative remedies before filing appeal with court).

- 📖 *Monks v. Zoning Bd. of Appeals of Plymouth*, 37 Mass. App. Ct. 685 (1994) (evidence to prove person is aggrieved must be more than unsubstantiated claims or speculative personal opinions).
- 📖 *Nickerson v. Zoning Bd. of Appeals of Raynham*, 53 Mass. App. Ct. 680, 761 N.E.2d 544 (2002) (person who lives one mile from site and has concerns about traffic from Wal-Mart is not aggrieved and has no standing to appeal unless can show particularized injury or harm that is different from the rest of the community).
- 📖 *Noe v. Board of Appeals of Hingham*, 13 Mass. App. Ct. 103 (1982) (city or town clerk sets beginning of 20 days appeal period).
- 📖 *Noonan v. Moulton*, 348 Mass. 633, 204 N.E.2d 897 (1965) (person may file declaratory judgment action when there is an actual controversy).
- 📖 *O'Blenes v. Zoning Bd. of Appeals of Lynn*, 397 Mass. 555, 491 N.E.2d 354 (1986) (appellant required to determine date decision was filed and cannot rely on word of municipal officials).
- 📖 *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555 (1954) (court conducts *de novo* review on section 17 appeal).
- 📖 *Planning Bd. of Marshfield v. Zoning Bd. of Pembroke*, 427 Mass. 699, 695 N.E.2d 650 (1998) (planning board of abutting municipality may not file appeal of board's decision in adjacent community unless has duties related to zoning in the adjacent community).
- 📖 *Planning Bd. of Springfield v. Board of Appeals of Springfield*, 338 Mass. 160, 154 N.E.2d 349 (1958) (planning has duties related to zoning and may file zoning appeal).
- 📖 *Plymouth County Nuclear Info. Comm., Inc. v. Energy Facilities Siting Council*, 374 Mass. 236, 372 N.E.2d 229 (1978) (same words using in different section of a statute should be given the same meaning).
- 📖 *Quimby v. Zoning Bd. of Appeals of Arlington*, 19 Mass. App. Ct. 1005, 476 N.E.2d 241 (1986) (tenant or long-time resident may have power to appeal as aggrieved party).
- 📖 *Quincy v. Planning Bd. of Tewksbury*, 39 Mass. App. Ct. 17 (1995) (site plan approval tied to a special permit is appealed directly to court).
- 📖 *Parseghian v. Board of Zoning Appeal of Cambridge*, 7 Mass. App. Ct. 879 (1979) (court must determine whether board has chosen proper criteria and standards upon which to base decision).
- 📖 *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555 (1954) (must support reasons for decision with evidence or case may be remanded by court).
- 📖 *Redstone v. Board of Appeals of Chelmsford*, 11 Mass. App. Ct. 383, 416 N.E.2d 543 (1981) (owner of property near applicant's property, who was aggrieved by competition that new use could bring, is not aggrieved party who can file appeal).
- 📖 *Reeves v. Board of Zoning Appeal of Cambridge*, 16 Mass. App. Ct. 1011, 455 N.E.2d 447 (1983) (tenant is not aggrieved party who could file appeal).

-  *Riley v. Janco Cent., Inc.*, 38 Mass. App. Ct. 984 (1985) (person is not aggrieved because want to preserve integrity of zoning district, especially when not even located in district).
-  *Rinaldi v. Board of Appeals of Boston*, 50 Mass. App. Ct. 657, 741 N.E.2d 77 (2001) (violation of building code and safety concerns cannot be used to substantiate standing under zoning and building code and zoning laws carry out different purposes).
-  *Roberts-Haverhill Assocs. V. City Council of Haverhill*, 2 Mass. App. Ct. 715 (1974) (court may remand case to board to correct de minimus error; when order of remand is interlocutory lower court maintains control over case and has not rendered final judgment, so matter is not yet ripe for appeal to higher court).
-  *Rudders v. Building Comm'r of Barnstable*, 51 Mass. App. Ct. 108, 774 N.E.2d 83 (2001) (historic committee has right to appeal lifting of stop work order by lower court when person is not complying with certificate of appropriateness from committee).
-  *S. Volpe & Co. v. Board of Appeals of Wareham*, 4 Mass. App. Ct. 357, 348 N.E.2d 807 (1976) (board's decision must be sustained if there is any rational basis for it).
-  *Sacco v. Inspector of Bldgs. of Brockton*, 3 Mass. App. Ct. 749 (1975) (building inspector given difference on issues of local enforcement where the question is one of a factual determination).
-  *Sherrill House, Inc. v. Board of Appeals of Boston*, 19 Mass. App. Ct. 274 (1985) (person is not aggrieved because want to preserve integrity of zoning district, especially when operating as a nonconforming use).
-  *Stow v. Pugley*, 349 Mass. 329, 207 N.E.2d 908 (1965) (person may file declaratory judgment action when there is an actual controversy).
-  *Sturges v. Chilmark*, 380 Mass. 246, 402 N.E.2d 1346 (1980) (in appropriate case, party may make a claim of invalidity of a zoning provision to the Land Court, as provided by M.G.L., ch. 240, § 14A).
-  *Subaru of New England, Inc. v. Board of Appeals of Canton*, 8 Mass. App. Ct. 483, 488, 395 N.E.2d 880 (1979) (deference must be given to board's decision; board's evaluation of seriousness, not judge's controls).
-  *Tambone v. Board of Appeal of Stoneham*, 348 Mass. 359 (1965) (court must determine whether board has chosen proper criteria and standards upon which to base decision).
-  *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, N.E.2d (1993) (an "aggrieved person" must be able to demonstrate, and not simply speculate, that there is infringement of a legal right).
-  *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 718 N.E.2d 389 (1999) (injury suffered by "aggrieved person" must be personal and cannot be merely reflective of concerns of the community).
-  *Van Renselaar v. Springfield*, 58 Mass. App. Ct. 104, 787 N.E.2d 1148 (2003) (person petitioning for declaratory judgment under ch. 240, but not filing appeal

under ch. 40A, need not demonstrate personal injury, as can show injury that might be experienced by general community and still have standing).

📖 *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210 (1975) (person is not aggrieved based on interest to preserve integrity of zoning district, especially when such person is operating under a variance).

📖 *Watros v. Grater Lynn Mental Health and Retardation Assoc.*, 421 Mass. 106, 653 N.E.2d 589 (1995) (rebuttable presumption that parties in interest are "persons aggrieved").

📖 *Woods v. Newton*, 349 Mass. 373, 208 N.E.2d 508 (1965) (person may file declaratory judgment action when there is an actual controversy).

📖 *Zuckerman Zoning Bd. of Appeals of Greenfield*, 394 Mass. 663, 477 N.E.2d 132 (1985) (applicant's attorney of record does not receive decision, as decision must be mailed to applicant/owner).

### **CAUTIONARY NOTES**

⚡ A case filed by a party who is not aggrieved, as the courts have interpreted such term, will be dismissed.

⚡ Failure to follow the specific appeal process or expedited service of process requirements, especially the tight time limits, will be fatal and the case will be dismissed.

- Any attempt to correct a flawed appeal or service of process by filing an appeal based on a procedural defect in notice under the 90 day provision is rarely successful.

⚡ Boards should take care that decisions are not made with gross negligence, in bad faith, or with malice, as the board could be subject to payment of costs. For example, you cannot deny an application simply because you don't like the applicant.

⚡ A party that files a frivolous appeal could be subject to payment of costs.

### **LINKS**

🔗 <http://www.landlaw.com> (lower court cases available from landlaw)

🔗 <http://www.sociallaw.com/appslip/appslip.html> (appellate and supreme court decisions available from the social law library)

### **REFERENCES**

📁 Mass. Fed. Plan. & Appeals Bds. Zoning Guidebook, §§ 5 (case references on takings), 8, 9, 10, 11, & 15 (2004).

## INDEX

| <u>TOPIC</u>  | <u>SECTION</u> |
|---|----------------|
| Abandonment of use.....   | 6              |
| Accessory use to scientific development.....  | 9              |
| Administrative appeal.....  | 8              |
| Administrative appeal, decision.....  | 15             |
| Administrative appeal, filing.....  | 15             |
| Administrative appeal, process.....   | 15             |
| Administrative appeal, time for filing.....   | 15             |
| Adoption of zoning.....   | 5              |
| Adult bookstores.....   | 9A             |
| Adult motion picture theaters.....  | 9A             |
| Adult paraphernalia store.....  | 9A             |
| Adult video store.....  | 9A             |
| Aggrieved parties, administrative appeal.....   | 8              |
| Aggrieved parties, court appeal.....  | 17             |
| Agriculture.....  | 3              |
| Alteration of nonconformity.....  | 6              |
| Amendment of zoning.....  | 5              |
| Antenna structures for amateur radio operation, exemption.....                        | 3              |
| Appeal.....   | 17             |
| Appeal, process.....  | 17             |
| Appeal, time for filing.....  | 17             |
| Approval not required plan, exemption from zoning.....                                | 6              |
| Attorney general approval.....  | 5              |
| Board of appeals actions – administrative appeals, special permits,<br>variances..... | 15             |
| Board of appeals, appointment .....   | 12             |
| Board of appeals, associate members .....   | 12             |
| Board of appeals, authority.....  | 14             |
| Board of appeals, rules and regulations.....  | 12             |
| Board of appeals, vacancies.....  | 12             |
| Board of appeals, zoning administrator appointment.....                               | 12             |
| Bonus zoning.....   | 9              |
| Building materials and method of construction, may not regulate.....                  | 3              |
| Building permit to conform to zoning change.....                                      | 6              |
| Change of nonconformity.....  | 6              |
| Child care facility, exempted and defined.....  | 3              |
| Child care facility, defined.....   | 9C             |
| Child care facilities, regulation of.....   | 9C             |
| City council hearing, zoning proposal.....  | 5              |
| Cluster development, definition.....  | 9              |
| Cluster development, process.....   | 9              |
| Common ownership, zoning exemption.....   | 6              |
| Conditions on special permits.....  | 9              |
| Conditions on variances.....  | 10             |
| Congregate living, no discrimination of.....  | 3              |
| Constructive grant, administrative appeal.....  | 15             |

| TOPIC   | SECTION |
|---|---------|
| Constructive grant, special permit.....                             | 9       |
| Constructive grant, variance.....                                   | 15      |
| Costs, on appeal.....   | 17      |
| Decision, recording of.....   | 11      |
| Department of Telecommunications and energy, exemption.....         | 3       |
| Department of Telecommunications and energy, notice and hearing.... | 3       |
| Detailed record, administrative appeal and variance.....            | 15      |
| Detailed record, special permit.....                                | 9       |
| Disabled person, no discrimination of.....                          | 3       |
| Discontinued use.....   | 6       |
| District boundary lines, change of.....                             | 3       |
| Education uses.....   | 3       |
| Effective date of zoning.....                                       | 5       |
| Effective date, decision.....                                       | 11      |
| Elderly, shared housing.....  | 9       |
| Election day, no hearing.....                                       | 11      |
| Enforcement action.....   | 7       |
| Establishment which displays live nudity.....                       | 9A      |
| Extension of time to act, administrative appeal.....                | 15      |
| Extension of time to act, special permit.....                       | 9       |
| Extension of time to act, variance.....                             | 15      |
| Facilities for sale of agricultural and related products.....       | 3       |
| Facility, hazardous waste.....                                      | 9       |
| Facility, solid waste, with site assignment.....                    | 9       |
| Family day care home, exemption.....                                | 3       |
| Findings, accessory use to scientific develop.....                  | 9       |
| Findings, multi-family use in non-residential district.....         | 9       |
| Findings, special permit.....                                       | 9       |
| Findings, to extend, alter, or change nonconformity.....            | 6       |
| Findings, variance.....   | 10      |
| Fines for zoning violations.....                                    | 7       |
| Floating zone.....  | 3       |
| Flood plain or wetlands regulations, no exemption permitted.....    | 3       |
| Floriculture.....   | 3       |
| Handicapped ramps, exemption.....                                   | 3       |
| Hazardous waste facility.....                                       | 9       |
| Horticulture.....   | 3       |
| Increases in density by special permit.....                         | 9       |
| Interior of single family residence, no restriction on.....         | 3       |
| Lapse, special permit.....  | 9       |
| Lapse, variance.....  | 10      |
| Map, zoning.....  | 4       |
| Manufactured house, one year exemption.....                         | 3       |
| Nonconforming lots.....   | 6       |
| Nonconforming uses, buildings, and structures.....                  | 6       |
| Notice of decision, administrative appeal.....                      | 15      |

| TOPIC  | SECTION |
|--|---------|
| Notice of decision, special permit.....  | 9       |
| Notice of decision, variance.....  | 15      |
| Notice of public hearing to non-resident taxpayers.....  | 5       |
| Notice of public hearing, zoning proposal.....   | 5       |
| Notice, contents, special permit, variance administrative appeal.....                          | 11      |
| Notice, contents, zoning proposal.....   | 5       |
| Notice, time for giving, special permit, variance, administrative appeal.....                  | 11      |
| Notice, time for giving, zoning proposal.....  | 5       |
| Notice, waiver.....  | 9       |
| Notice to parties in interest.....   | 11      |
| Notice, zoning adoption, who must receive.....   | 5       |
| Parties in interest, definition.....   | 11      |
| Permit granting authority, definition.....   | 1A      |
| Planned unit development, requirements.....  | 9       |
| Planning board hearing, zoning proposal.....   | 5       |
| Planning board report, zoning proposal.....  | 5       |
| Pre-existing nonconforming uses, buildings, and structures.....                                | 6       |
| Procedural defect, appeal notice.....  | 17      |
| Procedural defect, zoning adoption.....  | 5       |
| Protest petition, how filed.....   | 5       |
| Protest petition, required vote.....   | 5       |
| Public hearing.....  | 11      |
| Public utility.....  | 3       |
| Reconsideration, failed zoning.....  | 5       |
| Reconsideration, unfavorable action on special permit, variance,<br>administrative appeal..... | 16      |
| Reconstruction of nonconformity.....   | 6       |
| Regulation of interior area of single-family dwelling.....                                     | 3       |
| Regulation of materials or methods of construction.....  | 3       |
| Religious uses.....  | 3       |
| Repetition, zoning proposal.....   | 5       |
| Rules and regulations, board of appeals.....   | 12      |
| Rules and regulations, special permit granting authority.....                                  | 9       |
| Shared elderly housing, defined.....   | 9       |
| Shared elderly housing, special permit.....  | 9       |
| Single lot exemption.....  | 6       |
| Solar access, definition.....  | 1A      |
| Solar access, special permit.....  | 9       |
| Solar energy system, definition.....   | 1A      |
| Solar energy systems, exemption.....   | 3       |
| Solar energy systems, how to encourage.....  | 9       |
| Solar energy, access exemption.....  | 9       |
| Solid waste facility.....  | 9       |
| Special permit application, filing.....  | 9       |
| Special permit granting authority, appointment of.....   | 9       |
| Special permit granting authority, definition.....   | 1A      |

| <b>TOPIC</b>  | <b>SECTION</b> |
|---|----------------|
| Special permit to conform to zoning proposal.....                   | 6              |
| Special permit, decision.....                                       | 9              |
| Special permit, issued by more than one board.....                  | 9              |
| Special permit, process.....  | 9              |
| Special permit, time for final action.....                          | 9              |
| Statute of limitation on enforcement, buildings and structures..... | 7              |
| Statute of limitations on enforcement, use.....                     | 7              |
| Temporary mobile home, exemption.....                               | 3              |
| Three lot exemption, common ownership.....                          | 6              |
| Undersized lots.....  | 6              |
| Uniform regulations.....  | 4              |
| Use variance.....   | 10             |
| Variance petition, filing.....                                      | 10             |
| Variance, decision.....   | 10             |
| Variance, extension of.....   | 10             |
| Variance, time for action.....                                      | 10             |
| Viticulture.....  | 3              |
| Voting, administrative appeal.....                                  | 15             |
| Voting, special permit.....   | 9              |
| Voting, variance.....   | 15             |
| Voting, zoning adoption in city.....                                | 5              |
| Voting, zoning adoption in town.....                                | 5              |
| Waiver, provisions of section 6.....                                | 6              |
| Withdrawal, with prejudice.....                                     | 16             |
| Withdrawal, without prejudice.....                                  | 16             |
| Zoning administrator, authority.....                                | 13             |
| Zoning administrator, definition.....                               | 1A             |
| Zoning administrator, establishment of.....                         | 13             |
| Zoning administrator, making decisions.....                         | 13             |
| Zoning board of appeals, powers.....                                | 13             |
| Zoning district boundary lines.....                                 | 4              |
| Zoning exemption, approval not required plan.....                   | 6              |
| Zoning exemption, definitive plan.....                              | 6              |
| Zoning exemption, in general.....                                   | 6              |
| Zoning proposal, initiation.....                                    | 5              |
| Zoning proposal, required vote.....                                 | 5              |
| Zoning proposal, time for vote.....                                 | 5              |
| Zoning to provide for special permit.....                           | 9              |
| Zoning, definition.....   | 1A             |