Annual Survey of Massachusetts Law

Volume 1969 Article 17

1-1-1969

# Chapter 14: Land Use Law

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# Land Use Law

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## A. ZONING

**§14.1. "Anti-snob" zoning law.** Zoning, which started out its life under attack as a radical destruction of man's control over his real property, is now much more often attacked as a conservative device used largely to protect land values and a particular way of life. Without indulging in polemics, it is obvious that low density zoning, combined with rapidly increasing land costs and urban population growth, together have prevented the development of low and moderate income housing in many suburban communities. Some commentators have indeed forecast that within the next ten years zoning will cease to exist, just as have the Jim-Crow laws, since present zoning tends to reflect social and economic policies that are already largely history. Everyone clearly recognizes the crisis in our nation's housing and the need to take action to increase substantially the rate of housing construction. Prominent in most such thinking is the need for the building of low and moderate income housing, that is, housing whose construction and operation costs need in some part to be subsidized if rent and other costs are to be kept at the levels required for those groups whom the housing serves. The pressures to require suburban communities to encourage rather than discourage such housing within their borders are continually mounting. During the 1969 SURVEY year the General Court adopted legislation that at least constitutes the beginning of the necessary new look in land use control. Its importance as a model as well as its own specific merits make discussion desirable.

Chapter 774 of the Acts of 1969 added new sections to Chapter 40B of the General Laws.[1] The new law applies solely to low and moderate income housing, built under state or federal programs. Thus only public agencies and nonprofit or limited dividend corporations[2] can use the law. The essence of Section 21 lies in the concept of a comprehensive premit. Under this section a board of appeals will, upon request of a developer of the type described above, conduct a hearing upon an application for a permit. All other local agencies that issue permits or give approvals relating to building of such housing[3] are

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§14.1. [1] The new sections are 20 through 23. In addition, a new Section 5A is added to G.L., c. 23B, setting up the five-man housing appeals committee.
[2] The latter are set up under G.L., c. 121A.
[3] The statute refers to "local boards," which are defined in Section 20 as fol-

notified and asked for their recommendations. A public hearing, to which all boards interested are requested to send representatives, is held within 30 days of the application. The board of appeals can exercise the same powers in respect of the application as all the separate officials and boards could. A board decision, based on a majority vote, must be made within 40 days of the hearing. Failure to conduct the hearing or to render the decision within the allocated time—or time as extended by the board and applicant—will result in an automatic issuance of a comprehensive permit.

If a person is aggrieved by the grant or approval he may appeal directly to the superior court, using the regular appellate procedure for review of decisions of zoning boards of appeals.[4] More interesting and important, however, is the appellate machinery set up for an unsuccessful applicant. A housing appeals committee has been organized under the statute in the Department of Community Affairs, and it can take and decide appeals in relatively short time periods. Its decision, arrived at by majority vote and required to be in written form, can be appealed to the superior court.

If the local decision has denied the permit, the housing appeals committee has jurisdiction to determine if the decision was reasonable and "consistent with local needs." In those situations in which the comprehensive permit was granted but subjected to conditions and requirements, an appeal permits the committee to determine if the conditions make the housing "uneconomic" and are "consistent with local needs."[5] While there has been some criticism of the definition, "uneconomic" is generally defined in terms of imposing financial burdens of the type that will prevent the particular applicant from being able to build the proposed housing successfully.[6] "Consistent with local needs" is a much more detailed and confusing concept in the statute.[7] The term requires consideration of regional as well as local needs for the housing, and local health, safety and general welfare factors. A mathematical formula involving the present dedication of housing units and land area to these types of housing, and the amount of land area to be used for these purposes in any one year, limits the immediate impact of the statute to one apparently thought manageable by the General Court.[8] The committee can, under the standards of its review, direct the issuance of a comprehensive approval or order the removal or modification of conditions. The statute also states that, if a given decision is consis-

lows: " 'Local Board,' any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen."

4 G.L., c. 40A, §21, sets out the procedure.

5 Chapter 30A, the State Administrative Procedure Act, governs this appeal.

6 The full definition is set out in G.L., c. 40B, §20.

7 This, too, is defined in Section 20.

8 Of the communities in the Metropolitan Area Planning Council, only Malden seems to meet the statutory requirements relating to area and number of units and is thus not required to permit an otherwise qualified applicant to build.

tent with local needs under the statute, it shall not be annulled or modified merely because the housing project would be uneconomic.

It would seem that much more heat than light has developed in connection with this statute. Its noteworthy accomplishments are several, but more in the policy area than in the functional. The concept of a comprehensive permit or approval would remove one of the many nightmares for all developers, if applied generally and not just to low and moderate income housing. Probably of even greater importance is the imposition of a regional standard and the review of a local decision by a state board. These two points recognize that purely local decisions are not acceptable in the context, at least, of our housing problems. It seems very appropriate that housing problems of the poor and lower middle income groups should be the ones that break the heavily local nature of most zoning decisions.

Obvious objections to the act also exist. Planners may well object to the use of the board of appeals under the Zoning Enabling Act rather than the municipal planning board as the agent to grant the comprehensive permit. In many communities little love seems to be lost between these two bodies but, beyond this political fact, the planning board is created to develop the background, overview, and plan of the municipality and, theoretically, would be more conscious of the many factors that might properly go into the comprehensive permit or approval decision.

Even more crucially, however, the act fails to vest any authority in the board of appeals to reduce or limit the local zoning ordinance or by-law standards. The name given this act, the anti-snob zoning law, creates the impression that zoning can be varied if the board of appeals so desires. But the statute gives no such power, and the board, under the act, has the same powers as it does generally in the zoning area — it can grant variances, and, when it is the designated body and has been delegated specific power, it can grant special permits for exceptions. Variances, as often noted, are difficult to grant if all legal requirements are precisely followed.[9] The need for the present act, despite publicity through the various media, is not to encourage low and moderate income housing in Dover or Pride's Crossing — or even much such housing in Needham and Wellesley — but to make it possible in those suburbs closest to the center city, such as Cambridge and Brookline. In these communities land prices are scaled to luxury building, and a developer cannot, even with subsidies, build economic housing for low and moderate income families without exemption from some aspects of zoning, generally those relating to density or type of residential building.

The new act does much and evidences the initial commitment of the General Court towards this particular approach to solving our housing problems. Truly effective results will not be obtained, however, until zoning changes can be granted at the time the comprehensive approval

[9] This point is briefly discussed in §14.7 *infra*.

is sought. The problem of housing continues to become ever more urgent, and the General Court can be expected to continue developing the approach of this act until it becomes a fully feasible and much used process.

**§14.2. Nonconforming uses: Effect of nonprocurement of license from local board of health.** Generally speaking, under G.L., c. 40A, §5, all uses of land in existence at the time of the enactment of a zoning law must be allowed to continue even if they do not conform with the new zoning scheme. In *Board of Selectmen of Wrentham v. Monson,*[1] a portion of land in question was, prior to the passing of a zoning ordinance prohibiting the use of mobile homes and trailers in Wrentham, used for trailer storage and short-term mobile home parking in conjunction with adjoining property situated in Foxboro. The property owner had failed, however, to procure a license from the local board of health for this use, a violation of the General Laws.[2]

Bringing a bill in equity, the selectmen, as plaintiffs, requested that the defendant be enjoined from using the Wrentham property for mobile home purposes. They contended that, in order for a nonconforming use to continue validly, it may not be in violation of the law.[3] Under this theory they claimed that, by operating without the required license, the mobile home was illegal and not protected. The issue, as stated by the Court, was "whether the failure to comply with license regulations destroys the right to continue an otherwise valid nonconforming use."[4] The point had not been decided previously in Massachusetts.

The plaintiffs based their claim solely on the principle that for a nonconforming use to be valid and continuing, it must be used in a lawful manner, this lawful use continuing from before the adoption of the zoning law. The authority cited for this principle is Yokley, Zoning Law and Practice.[5] In conjunction with this authority, plaintiffs cited *Eggert v. Board of Appeals of Chicago.*[6]

In *Eggert,* the zoning ordinance[7] was basically the same as that of Massachusetts. The holder of the use, in this case the plaintiff, owned an apartment building consisting of seven apartments. The issue was whether this use was lawful. Prior to the inception of the zoning ordinance, the plaintiff had remodeled his building creating the seven apartments from three. This change was made without a building permit and was in violation of the municipal building code. The plaintiff contended that although the building itself might be illegal, its use,

§14.2. [1] 1969 Mass. Adv. Sh. 679, 247 N.E.2d 364.

[2] G.L., c. 140, §§32A-32L.

[3] E. Yokley, Zoning Law and Practice, c. XVI, §16-2 (3d ed. 1965); Eggert v. Board of Appeals of Chicago, 29 Ill., 2d 591, 195 N.E.2d 164 (1964).

[4] Board of Selectmen of Wrentham v. Monson, 1969 Mass. Adv. Sh. 679, 680, 247 N.E.2d 364, 365.

[5] See text and note 3 *supra.*

[6] 29 Ill. 2d 591, 195 N.E.2d 164 (1964).

[7] Chicago Zoning Ordinance, art. 6, §6.2.

for apartments, was not and therefore a nonconforming use would be proper. The Illinois Supreme Court found that although the building code spoke in terms of construction requirements, the obvious intent was to include the use to which the construction was put. It therefore held that the use of the building, for seven apartments, was illegal and had been illegal at the time the zoning ordinance was passed. It was therefore not a lawful use and thus not entitled to continuance as a nonconforming use.

The *Wrentham* situation, it seems, can be clearly distinguished from *Eggert*. In *Eggert*, the use prior to the zoning ordinance was in itself illegal. In *Wrentham*, the use itself was legal although regulatory provisions had been ignored. If, for example, the trailer park had been used for parking trailers for over 30 continuous days, which was illegal under prior Wrentham zoning, the situations would have been analogous. Under the actual facts, however, all use requirements had been met and the permit was clearly issuable had application been made for it. In *Eggert* the building was illegal. Had a building permit for the change to seven apartments been requested, it would have been refused.

The only other case cited by the plaintiffs in *Wrentham*, concerning the effect of failure to procure a license, was *Arsenault v. Keene*.[8] This case also dealt with a building remodeled so as to house more apartments than previously. Here a two-family house was converted into four apartments. The first floor was converted with a permit. The permit was, however, invalid, having been issued by the wrong party. The second floor was converted with no permit. The plaintiff's claim was that, although the use was illegal, it became legal by the subsequent passing of zoning ordinances exempting buildings and structures already in existence. This, according to the plaintiffs, legalized the previous violations and created a nonconforming use. The New Hampshire Supreme Court employed a different section of the Keene zoning ordinance,[9] which specifically stated that no change in zoning ordinances should be construed as legalizing an existing violation. The use of the property being illegal at the time of the new zoning ordinance, the Court upheld the decision of the superior court and the board of adjustment that there was no continuing nonconforming use.

This case is also distinguishable from the *Wrentham* case for the same reason as was *Eggert*. In *Arsenault*, the use prior to the zoning ordinance was, of itself, illegal, while in *Wrentham* it was not. The question of failure to procure a building license in *Arsenault* was a mere auxiliary issue and not in contention. There is no hint that, had the change to four apartments been legal and the only irregularity a failure to obtain a permit, the result would have been the same. No meaningful correlation between the *Arsenault* and *Wrentham* cases thus really exists.

[8] 104 N.H. 356, 187 A.2d 60 (1962).
[9] Section 23.

The defendant, Monson, based his case solely on the inequity of allowing a failure to obtain a license to negate a valid and legal use prior to the zoning ordinance; he properly cited *Granby v. Landry*[10] for the proposition that the licensing requirements of G.L., c. 140, §§32A-32L, are not zoning requirements. The defendant cited no other authority to show that a failure to procure a license does not make an otherwise legal nonconforming use illegal. The Court, however, provided several cases supporting the defendant.

In *Scavone v. Totowa,*[11] the owner of the use, Sandford, had operated a used car lot before the passing of a zoning ordniance prohibiting such enterprises in his area of location. He continued the occupation. For one year, however, Sandford failed to renew his license while continuing to operate his business. The plaintiff claimed that the operation for one year without a license was illegal, thus destroying the nonconforming use. The New Jersey court, noting that zoning statutes are not enacted as a method of enforcing other statutes and regulations, held that a prior nonconforming use need only not have been violative of a prior zoning ordinance. A failure to procure a license does not go to the use, and thus the failure did not destroy the continuance of the nonconforming use. The parallel to the *Wrentham* case is apparent. As in *Scavone,* the violation was failure to procure a license. The use itself was not violative of prior zoning ordinances and continuance should therefore not have been denied.

*Henning v. Goldman*[12] concerned an open air parking lot which had been permitted under the old zoning ordinance but was prohibited under the new. Here again there was a failure to procure a license to operate. The New York court, in sustaining the continuance of a nonconforming use, held that the failure to procure a license "did not change the character or use of the premises. . . ."[13] The court noted that the owner's failure to acquire a license may have subjected him to penalties provided in the ordinance requiring licensing. The court also noted, in rendering its decision, that the use was open, notorious and continuous. Again the parallel to the *Wrentham* case is striking. The use of the land as a trailer park was open, notorious and continuous, and the lack of a license did not change the character of the use. The *Henning* court's reasoning would apply equally well to *Wrentham.*

The case which the Supreme Judicial Court noted as being persuasive was *Drysdale v. Beachman.*[14] In that case, a garbage dump was operating in violation of sanitary regulations at the time of the passing of a zoning ordinance, which outlawed the operation of garbage dumps at that locale. The plaintiffs claimed that this operation was illegal and thus no nonconforming use could result. The Michigan Supreme Court, in finding otherwise, stated: "We do not believe that a violation

10 341 Mass. 443, 170 N.E.2d 364 (1960).
11 49 N.J. Super. 423, 140 A.2d 238 (1958).
12 8 Misc. 2d 228, 169 N.Y.S.2d 817 (1957).
13 Id. at 229, 169 N.Y.S.2d at 817.
14 359 Mich. 152, 101 N.W.2d 346 (1960).

of a provision of a regulatory ordinance necessarily destroys the lawfulness of the basic use where compliance with the regulation can be had on demand and where such compliance actually follows."[15]

Quoting the above language, the Supreme Judicial Court upheld Monson's nonconforming use in the present case. As in *Drysdale,* compliance with the regulation could be easily obtained. The Court thus held that failure to comply with local or state licensing provisions would not destroy a valid nonconforming use, provided the defect could be easily remedied.[16]

By adopting the Michigan view, the Supreme Judicial Court has followed the apparent intent of G.L., c. 40A, §5. Under Section 5 there is a right to continue prior uses of land as long as those uses remain unchanged. It would indeed seem strange to remove that right for a regulatory infraction which has no effect on the basic use and which can be easily remedied. The result would be particularly inequitable where, as in the *Wrentham* case, there had been no notification of noncompliance with the statutes. Also, since the provisions of G.L., c. 140, §§32A-32L, are not zoning regulations, they should not affect zoning considerations. Failure to secure a license is an independent violation which does not damage the use. By granting the injunction the Court would force the violator to comply with the law. This would mean that by getting the license the defendant would have complied and could continue as before. Without a prior demand that the violator secure a license and a refusal, a court proceeding seems unnecessary. Also, the granting of an injunction prior to a refusal of a demand to acquire a license would appear to be a futile action and not in keeping with the principles of courts of equity.

It might well be interesting to note, in passing, the present Wrentham zoning statute. Under that statute, passed in 1963, no trailer home is permitted in the town of Wrentham unless it is in an enclosed structure or to the rear of a principal building.[17] A permanent mobile home, therefore, may not be used in Wrentham as a principal residence.

Recent national statistics show that annual housing starts are running at the rate of about 1,300,000 each year and, of these, about 300,000 are mobile homes. In the face of such statistics it may well seem strange to outlaw this form of residence. Today's mobile home is a far cry from the cramped trailers of yesteryear, and, similar to motels, their respectability is coming to be accepted. The opinion that they only serve lower class, migratory persons no longer represents fact. To ban a form of residence which accounts for approximately one quarter of the living units being built today may be unwise, particularly in view of the relatively low cost of such units. Mobile homes are well within the price range of the average citizen, can be acquired quickly

[15] Id. at 155, 101 N.W.2d at 347.
[16] 1969 Mass. Adv. Sh. at 681, 247 N.E.2d at 365.
[17] Wrentham Zoning By-Law §3-3 (1963).

with little red tape, can be readily (if fairly expensively) financed, and can permit more people to be private home owners.

**§14.3. Nonconforming use: Alterations.** *Abbott v. Appleton Nursing Home, Inc.*,[1] dealt with a request for a variance to permit structural changes in a nursing home. The defendant desired to change its building, a three-family type, so as to add 12 beds, janitorial and utility closets, and bathrooms. The nursing home was in violation of State Department of Public Health regulations owing to an insufficient number of closets and bathrooms. The space for 12 extra beds was required to make operation of the home economically feasible if it were to comply with the health regulations.

The building was in an area zoned for residential purposes only, with nursing homes specifically disallowed. The home existed as a nonconforming use. The requested changes were to alter the exterior appearance of the structure so that it would cease to look like a dwelling and would take on the appearance of an institution. The defendant claimed that without the addition of the 12 beds there would be substantial economic hardship.

The Medford Board of Appeals granted the variance. Under G.L., c. 40A, §21, Abbott, a neighbor, brought an action against both Appleton and the board of appeals in superior court. Appleton demurred to the complaint in superior court but the demurrer was overruled. On the merits the superior court judge sustained the board of appeals' action. Abbott appealed the final decree, and Appleton appealed the decree overruling the demurrer.

The Supreme Judicial Court sustained the overruling of the demurrer and reversed the granting of the variance. The Court interpreted a section of the Medford zoning ordinance[2] permitting structural expansion for nonconforming industrial and commercial uses until January 1, 1970, as referring only to expansions to meet local structural regulations. The Court held that since the expansion here in question was not to meet requirements, but rather to enlarge the operation, the variance should not have been granted.

The Court also held that economic nonfeasibility in the operation of a nonconforming use is not grounds for a claim of hardship. It found that the property could still be used, either as before with less profit or, since there was no proof to the contrary, in a different manner consistent with the zoning regulations. The disadvantages were not confined to Appleton but were common to all nonconforming uses so situated. The changes required to meet health department standards present a different situation, but such limited changes are not at issue in this case, since the variance granted the right to increase floor space much more than would be required merely to comply with the state department regulations.

The Medford ordinance in question is specifically designed to dis-

§14.3. [1] 1969 Mass. Adv. Sh. 127, 243 N.E.2d 912.
[2] Section 11.2.

courage nonconforming uses. They are to be permitted to continue until they are removed or abandoned, but nonconforming expansion is not provided. This opinion is clearly in keeping with that intent. If the nonconforming use is not profitable, it will perhaps cease to exist. To permit enlargement to make the use profitable would be, in effect, encouraging its existence. Since this is not the desired result, the Court, as is its wont in this area, has interpreted the ordinance strictly. Such interpretation is also consistent with the presumptions involved in zoning ordinances. Zoning, it is presumed, is applied in the best interests of the town at large. The desire is to reserve certain areas for certain types of uses. A continuing nonconforming use is at variance with that purpose and is, indeed, frequently in a monopolistic or otherwise advantageous position to other similar uses since they may not enter the area. Thus, by not allowing enlargements, or other modifications, the special treatment is equalized until such time as the nonconforming use ceases and the zoning goals are met.

Perhaps in the *Abbott* case, while the letter of the law is followed, the result may be undesirable in the special situation of the defendant. It is the zoning ordinance, however, which may be at fault and not the Court. The defendant here was a nursing home. The Court recognizes that there is a shortage of nursing homes in Medford.[3] In this situation it would seem to be in the public interest at least not to unduly restrict expansion of existing nursing homes wherever they might be located. Nursing homes are probably not nuisances as customarily located and are not actually eyesores, even if they do look like institutions.

Although the Supreme Judicial Court reached the proper legal decision under the Medford zoning ordinance and the general rules governing grants of variances, the result appears unfortunate. If the goal of zoning is to do away with all nonconforming uses in a given area, those responsible for creating those goals should be certain that all prohibited uses are expendable. If they are not, as well may be the case here, the result may be beautifully consistent zoning, but with a shortage of vital services and a consequent detriment to the community.

In *Crawford v. Building Inspector of Barnstable,*[4] the Supreme Judicial Court again considered a violation of a nonconforming use. The petitioners requested a writ of mandamus to compel the building inspector to revoke a building permit granted to Harbor View Realty, Inc. The realty company owns property on which is located a hotel or "club." It is located in a residentially zoned area and exists as a prior existing nonconforming use. The construction under attack consisted of blacktopping an area in front of the hotel for parking, enclosing a porch and stair landing at the rear of the building, and

[3] Abbott v. Appleton Nursing Home, Inc., 1969 Mass. Adv. Sh. 127, 128, 243 N.E.2d 912, 914.

[4] 1969 Mass. Adv. Sh. 955, 248 N.E.2d 488.

building a 285-foot pier from the land behind the hotel out into the bay. The plaintiffs contended that each of these "additions" were in violation of the permitted nonconforming use.

On the issue of the enclosed porch, the Court examined the effect the change had on the entire enclosed area of the hotel, the reason for the enclosing of the porch, and the effect of the enclosure on the appearance of the building. The floor space, they found, was not increased at all. The enclosed space of the building was increased by one to two percent. The appearance of the building was improved. The Court, upholding the determination of the lower court, thus held that the porch enclosing came within minimum tolerances allowed to nonconforming uses under the General Laws.[5] The change was not detrimental to the neighborhood in general.

The Court placed some emphasis on the reason for the enclosing of the porch. The repairs had been accomplished in response to dry rotting and to prevent further deterioration of the building from the elements. The purpose was not to enlarge the building or change its use. The Court summed up its reasoning by stating that "the alteration . . . was negligible rather than substantial and was incidental rather than purposeful."[6] Apparently, if the enlargement is for a purpose other than size increase, it is to be permitted if it is not substantial. This seems well in line with the *Abbott* case.[7] There, as noted, the enlargement was not allowed because its purpose was to increase the number of beds in the nursing home. The implication was, however, that if the enlargement were necessitated by structural standards it would have been allowed if it went no further than was necessary to satisfy those standards. Here, in *Crawford,* the danger was deterioration of the building, resulting in either constant repairs or an eventual health and safety hazard. The changes made were minor in overall effect and were what was minimally necessary to accomplish the required end — a termination of the deterioration.

Since the building eventually would have become unavailable for any use if the condition were not allowed to be corrected, that permission to correct was not an encouragement of the continuance of a nonconforming use. On the contrary, it was clearly a mere allowance to continue in the same use and to protect the building itself for any use. In so ruling the Supreme Judicial Court did not take an approach particularly favorable to nonconforming uses. It did not favor the use; it merely allowed it to continue.

Concerning the addition of the pier, the defendant argued that it was a permissible accessory use, customarily incident to the nonconforming use of the land.[8] The Court, reversing the lower court, found

[5] G.L., c. 40A, §5. See Inspector of Buildings of Burlington v. Murphy, 320 Mass. 207, 68 N.E.2d 918 (1946).

[6] Crawford v. Building Inspector of Barnstable, 1969 Mass. Adv. Sh. 955, 958, 248 N.E.2d 488, 490.

[7] See text at notes 1-3 *supra.*

[8] Under the Barnstable Zoning By-Law, pt. E.

that such was not the case. The pier was the largest in the bay, 185 feet larger than the town pier. It was clearly for commercial rather than residential purposes. The hotel did not have a pier previously. Thus the pier was a "new enterprise" and was scarcely a customary incident to a hotel in a residential area operating as a nonconforming use.

The pier was ruled a definite structure, unlike the new blacktopped area created for improved parking. The blacktopping had been accomplished in conjunction with the pier construction. The Court found that no building permit was necessary for the blacktopping since it was not a structure. The blacktopping, in addition, was attractive and cut down on dust raised by cars. The pier, on the other hand, was a structure and also provided a new use for the portion of the premises facing the water. The use was new and thus not allowed to the continuing nonconforming use property.

The pier was constructed under a license from the Department of Public Works of the Commonwealth, the locus being in and upon Cotuit Bay. The license grant provides no special rights, however, since the license is subject to all applicable laws, municipal laws, ordinances, and regulations, including zoning laws. Thus the pier could not be built without a variance since, not being of residential type, it was built in a residential area.

The refusal of the Supreme Judicial Court to allow the existence of the pier in question is quite in keeping with its oft-stated intent not to aid nonconforming uses. The pier was undoubtedly an added business venture, constructed to attract the boating public. This is certainly an expansion of the business and thus something not to be permitted in the continuing nonconforming use situation. To have allowed its construction would have been to permit the hotel to expand its enterprise.

§14.4. **Nonconforming uses: Changes in use.** The question of precisely what changes are permitted to be made to, and in the use of, premises which are nonconforming as to local zoning, but the use of which is permitted because existing prior to the zoning ordinance's enactment,[1] arose in *Jasper v. Michael A. Dolan, Inc.*[2] Under G.L., c. 40A, §5, a nonconforming use continues if in existence before the enactment of the zoning ordinance. However, such premises must remain, both as to structure and use, as they were when the zoning change became effective. As a result, changes in business, expansion, and the like have frequently been the grounds for adjudication in the courts. The importance of the decision to the business owner frequently places the final decision with the Supreme Judicial Court.

In *Jasper,* the business in question was a grocery store. At the time the zoning law became effective, the store sold groceries, beer and wine, and held a beer and wine license. The transfer of an all-liquor

§14.4. [1] G.L., c. 40A, §5.
[2] 1968 Mass. Adv. Sh. 1293, 242 N.E.2d 540.

license from another location to that of the grocery store, and rescission of the beer and wine license, created the question in the case. To comply with the terms of the license transfer, a portion of the grocery store was partitioned off, the sole customer entrance being from the street. In addition to other claims not relevant here, the plaintiffs claimed that the all-liquor license was a change in use from the beer and wine license, as was the partitioning of the store.

The Supreme Judicial Court, in deciding the case, used the three point test[3] of *Town of Bridgewater v. Chuckran.*[4] It determined that both claims were correct: the selling of all types of liquors was a significant change, as was the partitioning of the store. The requested injunction, ordering the grocery to refrain from selling hard liquor, was therefore granted.

The troublesome point of this decision is not the final issuing of the injunction, but the ruling that the addition of hard liquor changed the use. That a change from a simple store selling foodstuffs, including alcoholic beverages to, in effect, two stores, one selling food and the other alcoholic beverages, is a change in use is quite clear. That the change of types of alcoholic beverages sold is a change of use is not so clear.

In *Jasper,* the Court also ruled that the change in types of licenses was legally permissible, and noted that a mere increase in business would not change the use.[5] Thus the only grounds for holding illegal the change from beer and wine to all liquors, relative to use, was the change itself. Such a rationale is troublesome, since, given a proper license change, all that occurs is an addition of products. Conceptually, the same result would be dictated if the grocery store had sold only Coca Cola and Seven-Up at the time of the zoning change but had added a full line of soft beverages later. Both additions would be properly described as an extension of the line, but not a change in products, and therefore not a change in use.

Particularly bothersome is the possibility that this ruling can be applied to other expansions in products such as the above hypothetical example. The effect of such application might well be to force the owner of a nonconforming use out of business. If he could not add new products or expand lines to fill demand he would be hard pressed to remain in business. Such coercion to remove from the premises is not the intent of Chapter 40A, Section 5.[6] This is distinctly

[3] "(1) Whether the use reflects the 'nature and purpose' of the use prevailing when the zoning by-law took effect. . . .

"(2) Whether there is a difference in the quality or character, as well as the degree of use. . . .

"(3) Whether the current use is 'different in kind in its effect on the neighborhood.'"

[4] 351 Mass. 20, 217 N.E.2d 726 (1966), noted in 1966 Ann. Surv. Mass. Law §15.18.

[5] Town of Marblehead v. Rosenthal, 316 Mass. 124, 128, 55 N.E.2d 13, 14 (1944).

[6] The intent is to allow the continuation of the use and nothing more. Expansion is definitely outside the intent. However, to create a condition forcing

not the same as refusing to allow the business to expand as in *Abbott v. Appleton Nursing Home, Inc.*[7] It is a refusal to permit a business a freedom of choice as to how many and what types of given product he will or should carry. If this decision were carried to its extreme, a shoe store, for example, qualifying for a continuance of a nonconforming use in 1942, which carried one brand of men's shoes in the only two styles made at that time, could not, 15 years later, decide to carry other styles of each and perhaps add men's rubber overshoes, men's leather boots and men's sandals, even if the overall volume remained the same. The simple fact is that people's demands change. To allow an expansion of a line of goods within the original framework, is certainly not encouraging the continuance of a nonconforming use, as would be allowing a change in products, such as, for example, if the hypothetical men's store were to add women's shoes and handbags. Allowing an expansion of an already existing line is nothing more than allowing the business to continue. Economic nonfeasibility arising from need to expand, either in amount of products or physical size, is a separate and distinct problem. To allow such expansion would be to favor the nonconforming use. To allow addition of different products of the same species would not.

The Supreme Judicial Court has, in the past, refused to allow a business to take advantage of extensive technological advancements in equipment,[8] and to expand from a part-time business to a full-time business with no appreciable change in the actual use of the land itself.[9] These cases, at least initially, seem to be similar to *Jasper*. Whether the *Jasper* problem actually falls into either of these classes is, however, questionable. It does not seem that new products in a given line would be technological advancements as long as they remain of the same type as the original. In *Town of Seekonk v. Anthony,*[10] the changes found violative were in cement-producing equipment. To be truly analogous to the change in *Jasper,* it would seem that the change would have had to have been in the cement itself, a new type for example, not in the equipment producing it. If, in *Jasper,* new equipment had been added to *produce* hard liquor instead of just beer and wine, the situation would have been comparable to that of *Seekonk*. Likewise, the *Town of Wellesley v. Brossi*[11] case does not really seem to apply, unless "time" can be interchanged with "liquor." A change to full time does not seem to relate well to a change to a full line of liquors.

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the use to terminate through inability to operate a business, within the same physical confines and without an expansion of types of products, would seem to violate what appears to be the legislative intent. See §14.3 supra, at 367.

[7] 1969 Mass. Adv. Sh. 127, 243 N.E.2d 912, noted in §14.3 *supra*.

[8] Town of Seekonk v. Anthony, 339 Mass. 49, 157 N.E.2d 651 (1959), noted in 1959 Ann. Surv. Mass. Law §12.2.

[9] Town of Wellessley v. Brossi, 340 Mass. 456, 164 N.E.2d 883 (1960), noted in 1960 Ann. Surv. Mass. Law §13.2.

[10] 339 Mass. 49, 157 N.E.2d 651 (1959).

[11] 340 Mass. 456, 164 N.E.2d 883 (1960).

The value of *Seekonk* and *Brossi* relative to *Jasper* is, rather, in the Court's clear attempt to apply zoning very strictly, without regard to the economic coercion it might create. In *Seekonk,* by denying the use of technological advancements, Anthony was, for all intents and purposes, forced out of the cement business. In *Brossi* the defendant could no longer ply his trade, masonry, publicly from his home; he was forced to undergo additional expense to house his equipment. Yet in neither case was the change truly substantial. The main basis for the results seem to have been the effect of the changes, in each case, upon the respective neighborhoods. In *Jasper,* however, there seems to be no major effect upon the neighborhood, at least no effect beyond a possible increase in the number of customers. It is submitted that *Seekonk* and *Brossi* cannot be applied to *Jasper* except in end result — the firm attitude of the Court — and it therefore appears that the problem of a change in the line is still there. Such a change does not represent an advancement, and is often a necessity.

On the note of necessity, *Jasper* begins to resemble *Seekonk.* In *Jasper* itself, the inability to sell hard liquor will not, under the evidence, put Dolan, Inc., out of business. However, the possible implications of the result — the inability to expand the line — might well put other types of stores out of business.

It is possible that the Court's refusal to approve the change in *Jasper* is related to the particular product in question — liquor. It may be that the Court considers beer and wine separate and distinct from hard liquor, as evidenced by the two separate and distinct licenses available. However, the Court found that a use holding a beer and wine license by nonconforming use in an area too close to a church could change to a use holding an all-liquor license if the property were zoned for either. Therefore, it would seem that an alcoholic beverage is an alcoholic beverage, be it beer, wine or hard liquor. Nonetheless, liquor being the special, regulated product that it is, it may well be that the *Jasper* result would be different in the men's shoe store hypothetical noted above or in other similar circumstances. Which way the Court would go if the products were meats or dairy products, however, is a closer question, for these too are regulated products.

The basic principle is, however, clear. If the Court determines that a change in products, use or degree of use, has taken place, the nonconforming use will be violated. The result, as here, will be an order to conform. If conforming is not economically feasible the use will cease and the land will thenceforth have to be used in keeping with the new zoning ordinance.

**§14.5. Special permits.** During the 1969 SURVEY year the Supreme Judicial Court decided three cases involving substantive issues concerning special permits. The special permit concept, particularly as expanded in the site plan and development approval, cluster zoning and planned unit development devices, continues to be stressed by those interested in increasing the flexibility of zoning response to

each particular problem before a municipality. Consequently, the attitude of the Court toward the granting of special permits will do much to determine the extent to which these devices can be used effectively under the Commonwealth's constitution and statutes.

In *Moore v. Cataldo*,[1] the Lexington Board of Appeals granted a special permit to build a nursing home in a residential district. Under the Lexington zoning by-law, this use is permitted upon board permission when the public convenience and welfare is served and the use would not tend to impair the status of the neighborhood. The plaintiffs suggested, however, that the nursing home use would not be in harmony with the general purpose and intent of the zoning by-law. The Court noted that the specific statutory conditions applicable to variances are not applicable to special permits, and that the considerably less stringent requirements of G.L., c. 40A, §4, and the Lexington by-law were adequately met on the facts. The point is an important one and not always fully understood. Variances, as the very name suggests, are granted to vary the zoning regulation when particular stringent conditions are met. Special permits, however, are designed to carry out zoning objectives, not vary them. Thus, the essence of the difference can be described in terms of carrying out or modifying the zoning plan of the municipality. Permits, if subject to adequate standards and in accordance with community plans, should thus be supportable under the enabling act and, except possibly in some extreme cases, under the state constitution.

The Supreme Judicial Court has, however, been constrained to point out on occasion that special permits are a permissive device and that, even if conditions for the grant of one are established, the local granting authority need not make the grant. In *Gulf Oil Corp. v. Board of Appeals of Framingham*,[2] the oil company had successfully appealed to the superior court a denial by the board of appeals of the grant of a permit for a service station. This lower court decision was reversed by the Supreme Judicial Court, which stressed the point made above, the discretionary nature of the permit except under the limited exceptions set out in *Pendergast v. Board of Appeals of Barnstable*.[3] Under that case, the board's denial can be annulled only if based on a legally untenable ground or if unreasonable, whimsical, capricious and arbitrary. The Court found neither defect in this case.

Of considerable additional interest in the *Gulf Oil* case was the Court's acceptance of the board's consideration of the possible future effects of the grant of the exception on the area, as long as such consideration remained within reasonable limits. This is, in a sense, an acceptance of the rationale in *Arverne Bay Construction Co. v. Thatcher*,[4] which held that reasonable, although not overly lengthy,

§14.5. [1] 1969 Mass. Adv. Sh. 1129, 249 N.E.2d 578.
[2] 1969 Mass. Adv. Sh. 193, 244 N.E.2d 311.
[3] 331 Mass. 555, 120 N.E.2d 916 (1954), noted in 1954 Ann. Surv. Mass. Law §§1.3, 2.10, 14.25, 20.2.
[4] 278 N.Y. 222, 15 N.E.2d 587 (1938).

forecasts of future development can authorize the application of zoning regulations that freeze the zoned land in an uneconomic status. This concept of the "permissible period of prediction" governs in various zoning areas, and it is apparent that the Court considers, quite correctly, that it should be applied in the special permit area.

*Harrison v. Town of Braintree*[5] arose from the earlier decision of *Harrison v. Building Inspector of Braintree*.[6] In the earlier case it was held that using residentially-zoned land abutting industrially-zoned land for access purposes was an illegal industrial use. The town amended the by-law so that the board of appeals could grant access or egress ways to or from land in another district across residentially zoned land. The Court found the provision itself valid, as it was not necessarily inconsistent with the dominant residential purpose to permit such very limited commercial or industrial uses. Nevertheless, the Court found that the amendment here had been adopted, as the planning board report had so stated, to permit this use of these parcels because the access use over them already existed, and that the residential areas near these parcels, which were in illegal use, were therefore treated differently than other residential areas otherwise similar. This lack of equality of treatment made the amendment invalid. The Court also found unreasonable, as a matter of law, the extent of the access use on both sides of the property of the plaintiffs. The Court also suggested other ways in which the town could reach the desired result of giving access to otherwise landlocked industrial land. This case suggests, of course, the care that must properly be taken when zoning amendments affect only special interests or small parcels within a town.

**§14.6. Amendments.** All those experienced with zoning fully realize that changed conditions and circumstancees often create the need for changes in zoning patterns. Zoning changes, however, should be reasoned and planned responses, and not ad hoc, variable reactions to the requests of particular landowners. The obvious facts are, of course, that most zoning amendments are sought by an individual or group of individuals who generally, if not always, see an economic advantage to a more permissive zoning pattern. Thus, unplanned and uncoordinated response is not unknown, and, when it does occur, the resulting amendment can often be attacked as spot zoning. Three such cases were decided by the Supreme Judicial Court during the 1969 SURVEY year and deserve brief attention.

*Rosko v. City of Marlborough*[1] involved an attack on a rezoning resulting from the recommendation of a city planner on the basis of a study of how the town should react to the new Route 495's passage through the town. He recommended that the locus and nearby prop-

[5] 1969 Mass. Adv. Sh. 607, 247 N.E.2d 356.
[6] 350 Mass. 559, 215 N.E.2d 773 (1966), noted in 1966 Ann. Surv. Mass. Law §15.3.

§14.6. [1] 1968 Mass. Adv. Sh. 1329, 242 N.E.2d 857.

erty be zoned for a limited industrial district, which was done. Petitioner argued that the inclusion of the particular locus occurred because the owners had an industrial purchaser for the property. The Supreme Judicial Court held that the lower court had been correct in denying petitioners relief and in upholding the zoning. The land rezoned was sufficiently differentiated from adjoining residential land to permit its inclusion in a different district. The Court also stressed that the town could consider the good of the whole town and its future prospects as well as present uses in zoning. The Court rejected out of hand the argument that there was no change of significance in the area since the original rezoning, noting that this information although relevant, is not controlling.[2]

In *Hines v. City of Attleboro*,[3] the facts clearly showed that the tract rezoned from residential to business was surrounded by other residentially zoned land, and was generally occupied by residences. Even a portion of the locus was so used. The Supreme Judicial Court found no difficulty in sustaining the lower court determination that this was spot zoning.

As communities age, and become more a part of the central city rather than suburban area, the needs for types of housing tend to change from single-family residence to multi-family or apartment uses. Even the most elementary application of the von Thunen curves indicates that, as urban areas increase in size and population, land near the center tends to increase substantially in price, and probably even in value. Thus, even if a demand continues for single-family housing, such housing is out of the economic reach of an ever-higher percentage of the citizens of such a community. The obvious answer lies in the change of zoning from single-family to apartment uses, and this created the issue in *Vagts v. Superintendent and Inspector of Buildings of Cambridge*.[4] The locus was changed from a less to more dense zone under Cambridge's floor area–lot area density control ratio. The petitioners live on a nearby quiet street of single-family homes. The Supreme Judicial Court sustained the lower court's finding that the zone change did not constitute spot zoning. It noted that the area rezoned already had a number of uses permitted only in the new, more dense zone, and was basically similar to such zoned land across the street it faced, thus making it substantially dissimilar to abutting land to the west. The Court, while commenting that the evidence of damage to the petitioner's property was unconvincing, noted that the fact of damage alone, even if proved, would not render the ordinance invalid.

Also in issue was the adverse recommendation of the planning board concerning the amendment. The Court noted that this report was only advisory in nature[5] and that evidence offered by other qual-

[2] This point is discussed in 1967 Ann. Surv. Mass. Law §11.4.

[3] 1969 Mass. Adv. Sh. 259, 244 N.E.2d 316.

[4] 1969 Mass. Adv. Sh. 675, 247 N.E.2d 366.

[5] The Court cited Noonan v. Moulton, 348 Mass. 633, 204 N.E.2d 897 (1965), noted in 1965 Ann. Surv. Mass. Law §§14.1, 14.13.

ified planners, as well as the planning director of the city, favored this amendment, which increased intensity of use so as to provide an adequate, continuing supply of housing of the type the city needs.

None of these cases makes new law, but each effectively illustrates the application of established theory to the new problems confronting our increasingly urbanized society. The *Vagts* case is particularly important to the extent that it reflects court support for the type of rezoning soon to be expected in our close-in suburbs and core cities.

**§14.7. Variances.** The history of variances in Massachusetts has been, in terms of the pronouncements of the Supreme Judicial Court, one of the review and, generally, reversal of a large number of such cases, with a gradual reduction in the number of such cases reaching the Court. No doubt the admonitory decisions of the Court have had their effect, but there is also reason to believe the variance is still commonly utilized when assent of neighbors and the community boards and officials can be obtained, even if the legality of the variance as granted is questionable under G.L., c. 40A, §15(3). One may argue that this course can involve risks under the doctrine of *Brady v. Board of Appeals of Westport.*[1]

In *Planning Board of Springfield v. Board of Appeals of Springfield,*[2] the applicant for the variance and the zoning board, had quite obviously not obtained the planning board's assent to the variance. In the particular zone, three-vehicle garages are permitted, but only one of the vehicles may be used for commercial purposes. The applicant in this case had conducted a landscaping business for some 50 years at the locus and sought a variance permitting the building of a garage for three commercial vehicles used in the business. The variance was granted, subject to conditions that tended not only to limit the effect of the storage but also to impose some limitations upon the entire business. The Supreme Judicial Court reversed the superior court decree upholding the variance. Neither the board nor the lower court had made the required findings that the variance could be granted without substantial detriment to the public good and without substantially derogating from the intent or purpose of the ordinance. Since there was thus no finding that all the requirements of Section 15(3) were met, the grant was fatally defective.

An interesting side issue involved the claim that the variance was of such small consequence as to be disregarded. The Court found it was not of an inconsequential nature, but the idea is nevertheless an interesting one for statutory development. Prerequisites for variances as presently set out in the enabling act are rigid; variations in conditions, until they meet the strict and heavy standards of Section 15(3), cannot be reflected in decisions denying or granting the variance. In the present case the variation sought was certainly slight, but, even if

§14.7. [1] 348 Mass. 515, 205 N.E.2d 515 (1965), noted in 1965 Ann. Surv. Mass Law §14.15. Attack on a previously granted variance or special permit on the occasion of the issuance of a building permit may well be permitted under this case.

[2] 1969 Mass. Adv. Sh. 401, 245 N.E.2d 454.

the variance could have been granted on the particular grounds used to deny it, one cannot imagine the Supreme Judicial Court on this record finding the type of hardship necessary for a variance. The use of several types of variances — at least to the extent of differentiating major use changes from minor ones, and major density and locational factors from minor ones — has been suggested by a number of planners. On the facts of the present case, of course, it would seem that the use of a special permit device to solve this particular type of problem would be both valid and most satisfactory as providing a means of imposing conditions protecting nearby property. The Court, however, faced with the statute, could only find that the variance had been improperly granted on these facts.

*Barbato v. Board of Appeal of Chelsea*[3] involved the use of an earlier granted variance for the purpose of "a mechanical shop." The new owner sought a permit to build a concrete garage for five large units of construction equipment. The Supreme Judicial Court summarily rejected the contention that the garage use was within the variance. Barbato entered into the contract to buy this land in 1966, and the variance had been granted some 17 years earlier. Although there is no certainty Barbato depended upon the variance in his purchase of the land, the warning to conveyancers whose clients wish to use a prior granted variance is obvious: Be certain the variance includes the proposed use.

**§14.8. Meaning of words: Municipal use.** In *Ouellet v. Board of Appeals of Dover*[1] the plaintiffs owned land in Dover zoned for residential purposes but, in the zone, a special permit for a "municipal use" could be granted by the board of appeals. The plaintiffs sought to lease a building, which they would construct on the land, to the United States for a post office. The board held the proposed use was not "municipal," a determination which therefore made it unable to act on the plaintiffs' request. The Supreme Judicial Court, examining various statutes that make a distinction between "municipal" and "public," and the use of the two words in judicial opinions, came to the conclusion that "municipal" under this by-law should be given the narrow meaning of local, as opposed to state or federal, activity. The decision seems sensible in context since, as the Court noted, the use of the word "public" would have been very easy and natural to describe governmental uses of a nonlocal nature.

**§14.9. Density controls: Yards and structures.** Along with other devices, yard requirements are a means of controlling density and intensity of development in a given area. Yard requirements also relate to safety (particularly in case of fire), and in some extreme cases to health, although modern building is seldom so ill-planned that yards are inadequate for health reasons. Front yard requirements also relate

[3] 1969 Mass. Adv. Sh. 181, 244 N.E.2d 308.

§14.8. [1] 1968 Mass. Adv. Sh. 1359, 242 N.E.2d 759.

closely to set-back requirements, although technically the front yard requirement is a zoning device and the set back a means of assuring health, safety and welfare in connection with the laying out and widening of roads and streets. In all yard requirements beyond the minimal, aesthetics as well as density and intensity control undoubtedly plays a part.

*Scott v. Board of Appeals of Wellesley*[1] raised the question of whether the Wellesley front-yard requirements of 30 feet were violated by a swimming pool which was some 25 feet from the street and whose fencing (required under the Wellesley by-laws) was about 12 feet from the street. The Supreme Judicial Court, remarking upon the substantial and permanent nature of the pool and its equipment, as well as the fact that some of it was above ground level, held the pool to be a structure and thus in violation of the Wellesley by-law.

Although the point was not argued, the Court further noted the fact that side-yard requirements were not met, and that a hard question exists as to whether the pool, which is possibly an "accessory building" under the by-law, would be exempt from side-yard requirements as such an accessory use. The Court suggested clarifying amendments, a point well worth making at a time when pools are becoming an ever more popular and common addition to homes in a number of the suburbs.

The Court noted that the purpose of the Wellesley by-law provisions on yard and setback were not clear. As stated above, it appears fairly unlikely that health, safety or density factors were involved, the removal of which essentially leaves aesthetic as the main purpose of the application of these requirements to swimming pools. One might even question the substantiality of the public benefit obtained by such requirements to counter-balance the private loss, and thus raise constitutional issues.[2] Although it would seem that, in the abstract, little private loss is suffered in moving or reducing the size of a pool, or even when its actual construction is prevented, regulations of municipalities in which pools are being built should, at the minimum, certainly clarify the effect of yard requirements on what are becoming fairly common accessory uses in many areas.

**§14.10. Accessory uses.** In the preceding section it was noted that the Supreme Judicial Court did not need to decide if a swimming pool was, under the particular by-law, an accessory use in a residential district.[1] It would not be difficult to find, in Massachusetts suburban areas, that these pools are becoming a sufficiently common feature of

§14.9. [1] 1969 Mass. Adv. Sh. 939, 248 N.E.2d 281.

[2] See, e.g., Jenckes v. Building Commissioner of Brookline, 341 Mass. 163, 167 N.E.2d 757 (1960); Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964). The cases are noted in 1960 Ann. Surv. Mass. Law §13.3 and 1964 Ann. Surv. Mass. Law §14.1.

§14.10. [1] Scott v. Board of Appeals of Wellesley, 1969 Mass. Adv. Sh. 939, 248 N.E.2d 281.

residential building to be appropriately found to be accessory to the basic use. Other uses, however, even if occasionally found to exist in residential districts, are so uncommon that they can hardly be treated as subsumed under the term "accessory" and thus are permissible only if specifically so designated.[2] How far the concept of "accessory use" properly extends was the basic problem in *Hume v. Building Inspector of Westford.*[3] One Rice maintained two kennels in eight rooms in his garage and, outside the garage, three runways and a large exercise yard. A total of 14 dogs were in the facilities at the time of the trial, and up to 23 had been there. The Court noted that the maintenance of a kennel of this size was not specifically listed as a permitted accessory to residential use under the town's by-law. The general accessory clause relates to uses customarily incident to and not detrimental to a residential neighborhood. The Court reversed the finding of the lower court in this context and held that the kennel was not a permissible accessory or incidental use.

**§14.11. Declaratory relief: Land court jurisdiction.** General Laws, c. 240, §14A, provides that the land court shall have jurisdiction to hear certain cases involving the validity of a zoning regulation, including those that purport "to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof. . . ."[1] It has been understood from the beginning that the primary purpose of this statute was to permit a person to obtain an adjudication concerning his use of his own land under a zoning regulation, particularly when there is no basis for other declaratory relief.[2] In *Rosko v. City of Marlborough,*[3] the Supreme Judicial Court found that it was perfectly permissible for petitioners whose land was within the rezoned area to petition the land court under this statute for relief from a rezoning which they deemed adversely affected their property by its reclassification and by the use of other property in the area for the rezoned purposes.

During the 1969 SURVEY year the Supreme Judicial Court was faced for the first time with the question of whether an owner of land outside the rezoned area but adversely affected by the rezoning could maintain a declaratory action under this section. In *Harrison v. Town of Braintree,*[4] the Court found such a petition could properly be

2 Building Inspector of Falmouth v. Gingrass, 338 Mass. 274, 154 N.E.2d 896 (1959) ("garage" does not include storage of seaplane as accessory to residential use), noted in 1959 Ann. Surv. Mass. Law §12.7.

3 1969 Mass. Adv. Sh. 85, 243 N.E.2d 189.

§14.11. 1 The section also includes provisions for declaratory relief when the regulation restricts or limits present or future structures, including alterations or repairs; and provisions for the determination of the extent to which the regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon.

2 See Pitman v. City of Medford, 312 Mass. 618, 45 N.E.2d 973 (1942); Addison-Wesley Publishing Co. v. Town of Reading, 354 Mass. 181, 236 N.E.2d 188 (1968).

3 1968 Mass. Adv. Sh. 1329, 242 N.E.2d 857. See §14.6 *supra.*

4 1969 Mass. Adv. Sh. 607, 247 N.E.2d 356. See also §14.5 *supra.*

brought before the land court. The Court felt that a broader construction of the statute was appropriate, particularly in this period of overcrowded dockets, and that attention to nonsubstantive details should be minimized. As a result of these determinations, the Court held that, so long as the petitioner's land was directly affected under the zoning regulation by the permitted use of other land, jurisdiction for this declaratory action lies in the land court.

The result is sensible and fully justified under the language of the statute. Readily accessible channels of relief, freed of technicalities, should be the goal in all procedures, but the achievement of such a goal is particularly important in zoning cases in which land uses have to be frozen awaiting the making of the decisions.

**§14.12. Appeal: Filing of copy of board decision.** General Laws, c. 40A, §21, governs appeals to the Supreme Judicial Court from decisions of a board of appeals. The section includes the statement: "There shall be attached to the bill 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." In *Healy v. Board of Appeals of Watertown*,[1] the Court held that failure to file a copy of the decision with the notices of the bill in equity served on the defendants was not a jurisdictional defect.[2] Since the defendant would be unlikely not to have a copy of the decision, the failure to file under these circumstances would not remotely affect the notice required for adequate due process. To hold such a defect jurisdictional would be to ignore the real substance of the statutory requirement. Obviously, however, not to file is to invite litigation, and the requirement should not be ignored. It is at least remotely possible, also, that a given party might not have a copy of the decision, and a serious jurisdictional issue might then arise.

**§14.13. Notice of public hearing: Special permits and variances.** A public notice by the board of appeals of a hearing of issues before it is required to include "the subject matter, sufficient for identification."[1] The requirements concerning notice are jurisdictional, and failure to satisfy them ordinarily will make the board's action invalid and thus ineffective.[2] In *Moore v. Cataldo*,[3] the notice indicated that a permit was being sought for a nursing home but did not indicate the size of the proposed building and the number of beds to be located therein. The plaintiffs cited *Kane v. Board of Appeals of Medford*,[4] wherein it had been held that notice not indicating the use to which the proposed building was to be put was fatally defective. In *Moore*,

§14.12. [1] 1969 Mass. Adv. Sh. 921, 248 N.E.2d 1.
[2] The Court cited, for its holding, Opie v. Board of Appeals of Groton, 349 Mass. 730, 212 N.E.2d 477 (1965).

§14.13. [1] G.L., c. 40A, §17.
[2] Rousseau v. Building Inspector of Framingham, 349 Mass. 31, 206 N.E.2d 399 (1965), noted in 1965 Ann. Surv. Mass. Law §14.17.
[3] 1969 Mass. Adv. Sh. 1129, 249 N.E.2d 578.
[4] 273 Mass. 97, 173 N.E. 1 (1930).

the Court noted, however, that a description of the use had been included in the notice. The case was thus similar to *Carson v. Board of Appeals of Lexington*,[5] in which the notice under consideration merely referred to the erection of a garage, although the actual garage planned was designed to hold 16 buses. Certainly, if *Carson* is correct, the much less likely to mislead notice in *Moore* must be sustained as adequate. In practice, of course, a fairly complete notice is desirable merely to avoid arguments such as had to be litigated in *Moore*. Attempts to hide or disguise the nature of a variance or special permit seldom are effective and, even if somehow they might occasionally work, they stir up the types of persistent animosity that make future operations under the grant difficult. The Court is clearly correct, however, refusing to impose an obligation to describe the subject matter in considerable detail, since the main purpose is to give a general notice sufficient to caution those who may be interested.

In *Healy v. Board of Appeals of Watertown*,[6] the notice stated that both a special permit and variance were being sought, although no power to grant a special permit of the type involved existed under the by-law. The essence of the notice, however, in the opinion of the Court, was that a new nursing home was sought for the location. Thus the notice was sufficiently descriptive.

§14.14. **Appeal: Notice of filing of bill with clerk.** General Laws, c. 40A, §21, governing the appeal authorized to the superior court from action by a board of appeals, states in part: "Notice of the filing [of the bill] with a copy of the bill in equity shall be given to such city or town clerk so as to be received within such twenty days."[1] The Supreme Judicial Court has construed this requirement as jurisdictional and has not granted relief from strict compliance. Thus, in a rescript opinion, *Bjornlund v. Zoning Board of Appeals of Marshfield*,[2] the Court held that mailed notice, which should have arrived within 20 days but did not because of mail service failure, did not meet the plain words of the statute, and that consequently the appeal failed.

In *Garfield v. Board of Appeals of Rockport*,[3] the notice, to be received within 20 days, had to be received by August 1. The town clerk's office closed at 4 P.M., but the copy of the bill was delivered to the clerk at her home at 6:35 P.M. The defendant claimed that, since the purpose of this section was "to give interested persons 'at least constructive notice of the appeal,' "[4] the notice should be determined from the state of the record at the clerk's office at its close on the pre-

5 321 Mass. 649, 75 N.E.2d 116 (1947).
6 1969 Mass. Adv. Sh. 921, 248 N.E.2d 1.

§14.14. 1 G.L., c. 40A, §21, was amended by Acts of 1969, c. 706, which changed the reading of this section. See §14.17 *infra*.
2 353 Mass. 757, 231 N.E.2d 365 (1967).
3 1969 Mass. Adv. Sh. 807, 247 N.E.2d 720.
4 1969 Mass. Adv. Sh. at 808, 247 N.E.2d at 721, citing Carey v. Planning Board of Revere, 335 Mass. 740, 745, 139 N.E.2d 920, 923 (1957).

scribed date. The Court, recognizing the cogency of the argument, still noted that the statute required filing with the clerk, not in the clerk's office, as is required under Sections 18 and 21 for the filing of the board's decision. The Court pointed out, however, that filing in the clerk's office during normal working hours, even in the absence of the clerk, would be seasonable. The Court's reading of the statute is a precise one, but considering the purpose of the notice as the Court construed that purpose, one may wonder if the legislative intent was not to require filing at the clerk's office during regular working hours. The present result, although statutorily sound — if not mandatory — seems to call for legislative reconsideration of the statutory provisions so that they will at least achieve consistency.

§14.15. **Amendments: Planning board approval and warrant notice.** In *Johnson v. Town of Framingham*,[1] the warrant for the town meeting included a proposal for the adoption of an additional use in a residential district — private and public golf clubs and tennis courts. The planning board, after hearing upon adequate notice, recommended postponing enactment of the warrant. At the town meeting it was voted to add an exception to the special permit section, allowing the grant of a permit for private and public golf clubs of at least 50 acres, whereupon a bill in equity was brought to determine the validity of the amendment.

The Supreme Judicial Court rejected the contention that the warrant did not give adequate notice of the action of the meeting. Under G.L., c. 39, §10, the warrant is required to state the subjects acted upon; and actions, to be valid, must relate to the subject matter contained in the warrant. The Court rejected the contentions that shifting from the permitted uses section to the special permit section, removing tennis courts from the final adopted section, and adding restrictions which the planning board had no opportunity to consider, made the notice inadequate. It quoted from the opinion in *Town of Burlington v. Dunn*,[2] in which the Court held that the statute only required statements of sufficient detail to apprise voters of the nature of the matters with which the meeting can deal. No forecast of the precise action of the meeting is required. The warrant in the present case clearly met these rather general requirements.

The Court felt constrained also to answer the contention that the planning board had had no opportunity to consider the extensive amendments to the warrant, and that therefore a new notice, hearing and recommendation of the planning board should have been required. Under G.L., c. 40A, §6, zoning regulations cannot be amended without a hearing before, and recommendations of, the planning board. On this issue the Court again cited *Town of Burlington v. Dunn*[3] as controlling. The procedure had been followed and the town

§14.15. [1] 1968 Mass. Adv. Sh. 1271, 242 N.E.2d 420.
[2] 318 Mass. 216, 61 N.E.2d 243 (1945).
[3] Ibid.

meeting could enact a modified version of the proposal before the board. Only a radically different amendment would require a rehearing.[4] As the Court noted, acceptance of the plaintiff's views would tend to prevent the legislative process from operating freely and effectively.

§14.16. **Mandamus: Exhaustion of administrative remedies.** It is a truism that mandamus is an extraordinary remedy, reviewable according to the principles of equity, and granted only when there exists no available administrative remedy for the petitioner.[1] In *Iverson v. Building Inspector of Dedham,*[2] the exhaustion of administrative remedy rule was applied in an interesting fact situation. Iverson had received approval of a definitive subdivision plan, which he later wished to alter in some respects. He claimed he was entitled to make the proposed changes without any further approval by the planning board and applied for building permits. The building inspector advised Iverson that he would not issue the permits, and, further, that it would be useless to apply. For this reason, Iverson did not file formal written applications for the permits and instead sought mandamus against the inspector. The Supreme Judicial Court noted that Iverson failed to submit the applications for permits and that, had they been refused, he had an administrative right of appeal to the local board of appeals. Iverson had an adequate administrative remedy that he did not pursue. The statement by the inspector that it was useless to apply did not prevent him from applying and following the local procedures. In mandamus, a court's task is to review the action of local authorities who have had the opportunity to act in an official manner. The particular use of mandamus as set out in *Brady v. Board of Appeals of Westport,*[3] which involved enforcement of zoning regulations against a third party, does not apply in situations that are essentially a review of local action relative to the petitioners.

§14.17. **Legislation.** Several amendments to Chapter 40A, the Zoning Enabling Act, were enacted during the 1969 SURVEY year, the most important of which relate to appeal procedures. Attorneys in some communities at times have apparently found it inconvenient to use the superior court appeal procedure under Section 21, since the judge who sat on the case has moved on and is not readily available when any papers or other items have to be brought before him. Ostensibly largely because of the inconvenience factor, a second appellate

[4] The Court noted Fish v. Town of Canton, 322 Mass. 219, 77 N.E.2d 231 (1948), in which the original warrant called for repeal of the entire zoning by-law. On consideration it was voted to amend the requirements of two districts and shift some land from one district to another. This was held to be "a radically different amendment" and thus invalid because inadequate notice had been given.

§14.16. [1] Church v. Building Inspector of Natick, 343 Mass. 266, 178 N.E.2d 272 (1961), noted in 1962 Ann. Surv. Mass. Law §§12.6, 13.10.

[2] 1968 Mass. Adv. Sh. 1199, 241 N.E.2d 817.

[3] 348 Mass. 515, 204 N.E.2d 513 (1965), noted in 1965 Ann. Surv. Mass. Law §14.15.

procedure was adopted in which the district court of the district in which the land is situated may hear the appeal.[1] Within 21 days after the filing of the decision of the board of appeals with the city or town clerk, a petition for review can be brought in the district court, which shall determine whether the decision exceeds the authority of the board. Those aggrieved by a decision of the board of appeals may still appeal directly to the superior court under the procedures that have been a part of Section 21 since its adoption. If a district court appeal is taken under the new procedures, that decision is also reviewable in the superior court under Section 21 by filing of a bill in equity. This new act, although it may be helpful in some situations, does tend to drag out the appellate procedure by inserting an additional step in some cases, since there is no indication that a direct appeal from the district court to the Supreme Judicial Court is possible. Ordinarily, in land use matters even more than in other cases, time is money, and the addition of another review step may create undue pressures for compromise of issues. The new review forum provision also has the effect of imposing upon the district court, at this point a judiciary untrained in land use matters, the necessity of deciding complicated issues that have taken the judges of the superior court some time to master. It will be interesting to observe the extent to which the procedure is used and the types of decisions made.

Section 20 of Chapter 40A was twice amended during the 1969 SURVEY year. Acts of 1969, c. 610, changed the wording so that a variance or special permit denied by the board of appeals shall not be reconsidered by the board within two years of the unfavorable action, except by consent of all but one of the members of the planning board. Prior to this amendment all members of the planning board had to assent to a recommendation within the two-year period. The amendment apparently retains the requirement of unanimity in those towns in which the selectmen act as the planning board. Acts of 1969, c. 870, also clarified the meaning of "unfavorable action" to state clearly what had been the generally, although not universally, accepted interpretation. The new phrase at the end of the section states that annulment of a favorable board decision by a court acting under Section 21 will not be interpreted as unfavorable action under the two-year rule. Since the purpose of the rule is to avoid overly frequent local reconsideration upon changes in board membership or in response to particular pressures, it would seem this clarification is fully appropriate. It is also particularly important in those situations in which the annulment is more on technical and procedural than major substantive grounds.

Acts of 1969, c. 870, also amended Section 18 of Chapter 40A, by changing to 60 days the date upon which the board of appeals' decision must be made after the filing of an appeal, application or petition. This reduces the period from 90 days. The change certainly

§14.17. [1] Acts of 1969, c. 706, amending G.L., c. 40A, §21.

imposes no undue burdens on boards of appeals, which could generally act very promptly on all but exceedingly complicated cases. The desirability of accelerating the land use control devices also supports the reduction of this time period.

Section 5 of Chapter 40A governs the applicability of zoning to existing structures and uses and has included within its terms some rather special rights for agricultural and similar land uses. Thus, zoning regulations can regulate the non-use of nonconforming buildings and structures so as not to prolong their life unduly; but an exception was made allowing for alteration, rebuilding and expansion of buildings used primarily for agriculture, horticulture or floriculture. An exception to this exception, that of greenhouses located in residential districts, was deleted in the 1969 SURVEY year.[2] The purpose of the amendment, as a matter of zoning theory, escapes ready detection, although one can assume, as a practical matter, that the owners of certain nonconforming greenhouses in residential areas are now sleeping better.

## B. SUBDIVISION CONTROL

**§14.18. Freeze of zoning law upon approval of plan.** G.L., c. 40A, §7A, protects land in approved subdivisions from changed zoning requirements for a period of seven years in certain circumstances. When zoning in a community is relatively unsophisticated, the results can be at the minimum very surprising for the municipality. In *McCarthy v. Board of Appeals of Ashland*,[1] the zoning law in effect when the subdivision was approved permitted any residential use. Several years later residential uses were divided and the locus was placed in "Residence A," for single-family residences. Within the five-year period then applicable,[2] a new owner requested a permit for an apartment building to be located on one of the lots in the approved subdivision.

Denial of the permit by the building inspector, citing the new zoning law, was affirmed by the local board of appeals. The Supreme Judicial Court, however, upheld the superior court's determination that the denial of the permit be annulled.

The language of Section 7A specifically states that the zoning regulation in effect shall govern the land shown on the subdivision. The town pointed out, however, that the planning board expected, when it approved the plan, that the subdivision would be used for single-family residences. The Court's opinion correctly points out that such implied conditions cannot exist under the subdivision control law.[3] Section 81Q of Chapter 41 forbids express, much less implied, condi-

[2] Acts of 1969, c. 572, amending G.L., c. 40A, §5.

§14.18. [1] 1968 Mass. Adv. Sh. 1165, 241 N.E.2d 840.

[2] The period of freeze was changed to seven years in 1965, but the five-year period was applicable to the plan, which was approved in December 1962.

[3] G.L., c. 41, §§81K-81GG.

tions in the planning board's rules and regulations relating to placement and use of lots and buildings, except to permit its requiring compliance with the zoning regulations. Thus, the planning board could not have conditioned their approval on a specific requirement that the land be used for single-family dwellings, since the zoning in effect permitted any residential use. The remedy for this problem, of course, does not lie in the powers and obligations of the planning board under subdivision control but in appropriate, well-planned zoning regulations. If they represent farseeing and well-thought-out plans of the municipality about future development, even the seven-year freeze will not be likely to present the town with unpleasant and unexpected surprises.

**§14.19. Approval of plan: Planning board failure to act.** The subdivision control law requires prompt action on plan submissions by planning boards, and failure to act within the prescribed time and failure to notify concerning this action can result in the automatic approval of the plan. Under Section 81U of Chapter 41, failure of the board either to take final action or to file with the municipal clerk a certificate of such action will result in constructive approval of a definitive plan.[1] In *Kay-Vee Realty Co. v. Town Clerk of Ludlow*,[2] the failure of the planning board to exercise care in a somewhat confusing situation resulted in an approval of the plan by default.

The petitioner, after submission of his plan, obtained permission for extensions of time, the last to extend to May 23, 1966, the board stating that no final action would be taken by it before that date. On May 12, 1966, however, the board notified the applicant by letter that, if nothing further was received from him by May 23, "we will have to disapprove" the subdivision because of sanitary conditions noted by the local board of health. On May 13, 1966, the planning board filed a carbon of this latter letter with the town clerk.

The Supreme Judicial Court first noted that the board did not take any "final action." The May 12th letter might be arguably so but in connection with the earlier letter indicating no final action would be taken until May 23, ambiguity existed where certainty is required. Even if this were final action, however, the board failed to file a certificate of this action with the town clerk. The carbon copy was not a certificate, since, at the minimum, a certificate must be a written statement that some act has or has not been done. The certificate requirement was statutorily imposed so that all interested parties could rely upon the recorded action or its absence. Anyone reading the May 12th letter would have no way of determining if approval was or was not finally given.

§14.19. [1] Other automatic provisions include a 14-day period to determine if a plan submitted as not requiring approval does require it, G.L., c. 41, §81P; and approval by default of the sanitary conditions of the plan by the board of health if no report is submitted by that board and the planning board within 45 days of filing, G.L., c. 41, 81U.

[2] 1969 Mass. Adv. Sh. 71, 243 N.E.2d 813.

The Court distinguished cases in which the certificate was not filed but in which the applicant had, by appealing under Section 81BB of Chapter 41, treated the planning board's action as final.[3] By so doing, since no one other than the applicant was affected, the Court did not require strict compliance with the statute. But, in the *Kay-Vee Realty Co.* case, the applicant did not treat the board action as final and the case was thus controlled by the holding of *Selectmen of Pembroke v. R. & P. Realty Corp.*[4] In this latter case constructive approval was found even when the applicant received a letter during the 60-day period stating the plan was approved subject to eight conditions, but no certificate was filed with the town clerk. The applicant did not treat the action as final and, again, no one would know if the approval was final when conditions, not indicated as accepted, were imposed. The Court thus found in *Kay-Vee Realty Co.* that the petitioner was entitled to a certificate that the plan was constructively approved.

Subdivision control could not exist without being unduly rigid if provision did not exist for altering, modifying and even rescinding approved plans, and Section 81W gives that power to the planning board, acting on its own motion or that of any interested party. In the present case, faced with the fact that approval was obviously not intended — and, if the board of health report was correct, even somewhat dangerous on health matters — the Court modified the judgment below by giving the planning board, if it wished, 60 days to take action under Section 81W.[5] This result is clearly reasonable but one may well wonder at the effectiveness of a plan approved constructively if the courts are going to give planning boards a second chance before the applicant has taken the type of action under Section 81W that would protect his buyers and mortgagees. The Court's interpretation may well reflect its own doubts as to the real advantages, considering the purposes of the subdivision control law,[6] of constructive approval of plans. The layout of a subdivision will generally impress upon the land a pattern, both of ways and in health matters, that is basically permanent. To permit such a far-reaching result to be reached by default can hardly be encouraged. The result of the present case may present an at least acceptable compromise of the policies — considering the statutory limitations — by giving the planning board a second chance but only if it is willing to litigate the issue with the developer.

[3] The Court discussed Pieper v. Planning Board of Southborough, 340 Mass. 157, 163 N.E.2d 14 (1959), noted in 1960 Ann. Surv. Mass. Law §13.7. See also Doliner v. Planning Board of Millis, 343 Mass. 1, 175 N.E.2d 919 (1961).

[4] 348 Mass. 120, 202 N.E.2d 409 (1964), noted in 1965 Ann. Surv. Mass. Law §14.20.

[5] Section 81W limits the planning boards' power to amend, modify or rescind as to lots sold or mortgaged in good faith after the original approval. But see Section 81DD, which provides for damages under Chapter 79, the basic eminent domain statute, which may possibly give a planning board, at some cost to the municipality, some powers of change even as to protected lots.

[6] G.L., c. 41, §81M, sets out the purposes for which subdivision powers are to be exercised.

One might suggest, however, that this type of case would be well served by the application of the Section 81BB provision that would assess costs against the board if it acted in bad faith or with gross negligence. If this failure to act is not gross negligence under the Massachusetts law, as it appears not to be, an amendment to 81BB to cover this particular case would be appropriate.

**§14.20. Approval not required plan: Effect of prior unapproved plan.** In *Waldor Realty Corp. v. Planning Board of Westborough*,[1] Waldor had submitted a subdivision plan that was disapproved. It later submitted a plan for a portion of the original tract, seeking endorsement of this plan as one not requiring approval.[2] The defendant planning board sought to amend its answer to indicate that the plan covered part of a disapproved subdivision plan that was on appeal to the superior court, but the lower court refused to accept the amendment and ordered that the planning board decision to deny endorsement be annulled.

The lower court decision was affirmed by the Supreme Judicial Court. Even if the planning board's amended answer had been received, the subdivision control law includes no provisions preventing the filing of the second plan. Under Section 81L of Chapter 41, the plan covered a division of a tract that does not meet the definition of subdivision, as do those divisions requiring approval, since all lots of the present plans had frontage on a public way and the lots met zoning requirements. Thus Waldor was entitled to its endorsement. The case seems fully correct on its facts, even if the planning board must have experienced some frustration with the result. If health problems are involved — access is established by the public way — it might not be unwise to amend the statute to prevent this automatic approval under undesirable conditions. It is difficult to believe, however, that other health regulations cannot prevent the creation of dangerous conditions on the locus.

**§14.21. Ways: Change in grade.** In *Crowley v. J. C. Ryan Construction Co.*,[1] the petitioner had purchased a lot in 1962 and had built upon it. Bordering the lot was a private way, a dirt roadway. In 1964 a subdivision plan, properly approved, included the lot essentially across the private way. In developing this lot, the defendant Ryan raised the level of the roadway two and a half feet and paved it. The petitioner's lot thus was placed at a level substantially below the roadway and other built-up lots on the area. The lower court granted a mandatory injunction to the Crowleys, requiring Ryan to lower the grade of the way as it abuts the Crowley dwelling.

The Court rejected analogies to *Guillet v. Livernois*,[2] where an abutter was permitted to put a private way, presently unusable, into

§14.20. [1] 1968 Mass. Adv. Sh. 1139, 241 N.E.2d 843.
[2] G.L., c. 41, §81P.

§14.21. [1] 1969 Mass. Adv. Sh. 801, 247 N.E.2d 714.
[2] 297 Mass. 337, 8 N.E.2d 921 (1937).

satisfactory condition throughout both its length and width. The Court noted that even in this case it was necessary that the rights and interests of others be preserved in establishing the grade of the way. The Court pointed out that the *Livernois* case itself discussed *Killion v. Kelley*,[3] which it felt was controlling. The *Killion* case established the rule that the co-owner of a private way could not make any change that would make the way less convenient and useful, in an appreciable extent, to those who also have a right to use the way.

The fact that Ryan's subdivision plan was approved by the planning board gave no rights that could be exercised to deprive the Crowleys of their rights. The Court cited *Toothaker v. Planning Board of Billerica*,[4] which had noted that separate lots in an early subdivision plan, that had been sold off to individual owners, were protected from change or modification by later planning board conditions imposed on the remaining unsold section of the subdivision.[5] The same principle can fairly be applied to the very similar facts of the present case, so that mere planning board approval could not bar rights appurtenant to a lot abutting on the subdivision.

**§14.22. Underground wiring in subdivisions.** In *Sansoucy v. Planning Board of Worcester*,[1] the Supreme Judicial Court upheld a rule of the board that underground wiring would be required in new subdivisions. The Court had some minor difficulty with Section 81Q of Chapter 41, which speaks in terms of rules and regulations governing the installation of municipal services, whereas the telephone, electrical and other wiring placed underground are usually installed by regulated utilities. Any possible residual doubt was removed by Acts of 1969, c. 884, which amended Section 81Q to insert a sentence specifically authorizing rules and regulations requiring underground wiring. Section 81M, setting forth the purposes for which the subdivision control law was enacted, also was amended to refer specifically to underground wiring. Any lingering doubts that this type of regulation is adopted solely for aesthetic reasons, and thus constitutionally doubtful, were removed.[2]

Chapter 884 also amended Chapter 166 of the General Laws extensively in order to set up a scheme by which municipalities can, under certain circumstances, require the installation of underground wiring or, at the expense of the utility, directly install a limited amount of underground utilities. The statute is too detailed for full discussion but it will have considerable importance in many communities.

[3] 120 Mass. 47 (1876).
[4] 346 Mass. 436, 193 N.E.2d 582 (1963), noted in 1964 Ann. Surv. Mass. Law §14.15.
[5] G.L., c. 41, §81FF, applied.

§14.22. [1] 1969 Mass. Adv. Sh. 603, 246 N.E.2d 811.
[2] But see Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955), in which historic district zoning was sustained.

## C. Eminent Domain

**§14.23. Evidence of land value: Basis for expert opinion.** During the 1969 Survey year, the Supreme Judicial Court had occasion to consider the problem of exclusion of evidence concerning the value of property being taken by eminent domain. The question concerned the opinion of expert appraisers who had, or had possibly, formed their opinions using improper methods, considering improper factors, or taking into account improper conditions. The Court determined that, where such opinions were founded improperly, they could be excluded in the discretion of the trial judge. It further determined that oral examination should be permitted to determine upon what basis and under what conditions the expert formed his opinion.

The case under consideration was *Lipinski v. Lynn Redevelopment Authority*.[1] The petitioner owned a building in an area of Lynn zoned for businesses. The building housed two stores, a business office, and a dance hall. In contention was the value of the property. No other comparable property existed in Lynn. Part of the opinion considered the method of assessing value. That portion will not be discussed here.[2]

In the *Lipinski* case the superior court judge refused to allow an expert to give his opinion as to the effect of an impending taking of property by eminent domain on the market value of real estate in the area of the taking. The petitioner was trying to show that the values were for this reason depressed, which would affect the actual amount that should be paid as just compensation. The Supreme Judicial Court upheld the judge's refusal on the grounds that the question had been phrased too broadly. The question was general in nature and not related to the specific taking in question. The Court said that it was within the discretion of the judge to exclude a question on grounds of its being overbroad.

Essentially the same issue was the basis of another point of appeal, which concerned another excluded question that pertained to the effect upon rental value of the authority's appraiser coming to the property a year before the taking. Since the authority's appraiser had based his valuation of the property partially upon the rental income of the property, a decreased rental value caused by such a visit could decrease the fair market value determined by the appraisal.

Under G.L., c. 79, §12, a landowner whose land is taken by eminent domain is entitled to damages equal to the value of the property "before the recording of the order of taking." This has been interpreted as meaning before any of the public work requiring the taking has commenced.[3] Thus if a visit by an appraiser a year before the

§14.23. [1] 1969 Mass. Adv. Sh. 505, 246 N.E.2d 429.

[2] For a full discussion of the determination of the value of the property taken by eminent domain, see 1967 Ann. Surv. Mass. Law, c. 19.

[3] Alden v. Commonwealth, 351 Mass. 83, 217 N.E.2d 743 (1966), noted in 1966

taking depressed the value of the land, an appraisal made after that visit would be an improper basis for the awarding of damages. Any awarding of damages would have to be at a value *before* the initial visit of the appraiser in order to conform with the mandate of G.L., c. 79, §12.

According to the Court, *Lipinski* is the first Massachusetts case to broach the question of depressed value after news of a forthcoming eminent domain taking. There have, however, been cases which considered inflated values caused by knowledge of taking.[4] Those cases held that the landowner was not allowed the advantage of the value increase caused by the very improvement for which the land was being taken. The Court determined in the present case that a decrease in value was exactly the same as an increase in its effect upon the amount owed the landowner. Just as no advantage could come from knowledge of an upcoming eminent domain taking, likewise no disadvantage can be justified.

The Court thus ruled that the excluded question, intended to determine whether the appraisal proffered by the city was based on rental values already depressed by knowledge of the taking, should have been allowed. As a result, a new trial was in order. At the new trial it would be proper to determine if Lynn's appraisal was made under depressed rental conditions. If such were the case the opinions of value offered by the authority's appraisers would have to be excluded. Reliance would have to be placed either on values prior to the initial visit of the authority's appraiser or upon other means of value determination.

The interpretation by the Supreme Judicial Court in *Lipinski* relative to G.L., c. 79, §12, is undoubtedly proper. The correlation between increased value and decreased value is clear. If the owner of land may not gain from knowledge of an imminent eminent domain taking, certainly the taking agency should not gain if, instead of increasing, the values drop. It therefore seems completely reasonable and proper that values to be used in establishing damages be those existing before any public action is taken, where such action should conceivably inform the public of the forthcoming taking and affect the land values. For the city's interests, this may necessitate a change in appraisal procedure, but it is clear that any other rule would be inequitable and not in keeping with statutory requirements.

§14.24. **Intergovernmental takings and transfers.** The Supreme Judicial Court has firmly established the rule that public lands cannot be diverted from one public use to another inconsistent use without express authorization by the General Court.[1] *Robbins v. De-*

Ann. Surv. Mass. Law §§15.27, 25.2; 1967 Ann. Surv. Mass. Law §19.2. Connor v. Metropolitan District Water Supply Commn., 314 Mass. 33, 49 N.E.2d 593 (1943).

[4] Cole v. Boston Edison Co., 338 Mass. 661, 157 N.E.2d 209 (1959); Smith v. Commonwealth, 210 Mass. 259, 96 N.E. 666 (1911).

§14.24. [1] Sacco v. Department of Public Works, 352 Mass. 670, 227 N.E.2d 478

*partment of Public Works*[2] well indicates just how plain and express the legislative authorization must be. Land owned by the Metropolitan District Commission and used for park land was included in an order of taking by the Department of Public Works. The relevant statute states that any commissioner having control of any land of the Commonwealth may, with the consent of the Governor and Executive Council, transfer to another state department land that may be necessary for the laying out or relocation of a highway.[3] The language seems to fit the facts of the present case very closely but the Court found the language inadequate to authorize the particular taking. The statute did not identify the land to be taken so there was no specific legislative recognition of the existing public use. To satisfy the standard the legislation must clearly express not only the public will for the new use but also the public willingness to surrender the present specific use. Identification of the lands involved, a clear indication of the existence of the present use, and an intent to surrender the land to the inconsistent other use are required if legislation is to be effective under this doctrine.

§14.25. **Comparable sales.** The issue of admissibility of comparable sales in eminent domain proceedings has been discussed by the Supreme Judicial Court over a number of years, but problems in the application of doctrine still exist.[1] In *Nonni v. Commonwealth*[2] the question of admissibility of certain comparables was again the issue. The trial judge had admitted as a comparable evidence of the price of certain land that did not have sand or gravel thereon or a possible permit or nonconforming use in connection therewith. In turn, the judge refused to admit evidence as to other land presently in use for a sand and gravel business, with substantial deposits thereon. The taking involved a 300-foot strip containing some 10 acres of an original tract of about 130 acres, bisecting the property nearly in half, to be used as a non-access highway. The petitioners had done some intermittent mining and sale of sand and gravel, which was a nonconforming use after adoption of a zoning by-law in 1958. In 1960 the local board of appeals voted to grant petitioners a variance for a gravel plant operation. Plans were filed but no plant had been built at the time of taking. The record book of permits in the town manager's office contained ink records of the permits, with undated pencil notations that they were voided because they were issued in error and the petitioners failed to make use of the variance in time.[3]

The Court, on the issue of comparables, again stressed the wide range of discretion given to the trial judge. Thus, the refusal to admit evidence as to the other sand and gravel business property was sus-

(1967), noted in 1967 Ann. Surv. Mass. Law §11.3; Commonwealth v. Massachusetts Turnpike Authority, 346 Mass. 250, 191 N.E.2d 481 (1963), noted in 1963 Ann. Surv. Mass. Law §13.15. Both cases discuss this issue in some detail.

2 1969 Mass. Adv. Sh. 249, 244 N.E.2d 577.

3 G.L., c. 30, §44A.

tained, although the Court noted it would also not have disagreed had it been admitted. Objections to the charges by the petitioner were rejected, either as requiring a particular finding on conflicting evidence or as being adequately covered in other instructions given by the judge.

The comparability of similar property and the method of determining its value involve complex problems of fact resolution. The rule of the Court that leaves the admissibility of evidence of comparables to the trial judge, except in extraordinary cases, constitutes the only really feasible method of assuring that full consideration can be given to all evidence offered or presented in the court room. The Court on appeal will not, except in very unusual cases, have an equal opportunity with the trial judge of evaluating the offered evidence in the context of the case. Parties will naturally disagree with the rulings of the trial judge as to a number of specific offers of evidence of comparables, but not alternative system seems likely in the usual case to produce better or even equal results.

## D. Urban Renewal and Housing

**§14.26. Legislation.** The housing and urban renewal legislation of the Commonwealth was adopted piece-meal over a number of years, with the result that contradictions of policies and rules existed, and a lawyer or anyone working with legislation had a difficult time even comprehending the complexities, many of which were unnecessary. During the 1969 legislative session the General Court adopted Chapter 751 of the Acts of 1969, which recodified the housing and urban renewal law of the Commonwealth into a new Chapter 121B of the General Laws.[1] Some six years of work, with continual redrafting and sharpening, has produced an integrated, comprehensible code that will facilitate the work of all involved in these fields. The goal was not to make more than the relatively minor changes necessary for efficiency, updating and the resolution of policy conflicts. The new code is, of course, lengthy, and, by the nature of the subject matter,

§14.25. [1] An extensive review of the Massachusetts law is contained in 1967 Ann. Surv. Mass. Law, c. 19. See especially §19.2 for a discussion of comparable sales.

[2] 1969 Mass. Adv. Sh. 1069, 249 N.E.2d 644.

[3] The evidentiary issue on the pencilled notations was settled in favor of admission of all of the record, including the pencil notations.

§14.26. [1] The subheadings of the chapter give an excellent indication of the full coverage. After a long definitional section and a typical severability section as to unconstitutionality and severability, the headings are Operating Agencies, Powers and Liabilities of Operating Agencies, Municipal Powers and Liabilities, Housing Programs, Veterans and Relocation Housing, Housing for the Elderly, Rental Assistance Program, Urban Renewal Programs, State Aid for Urban Renewal, and Other Programs (Rehabilitation and Conservation).

still complex, so no attempt will be made here to summarize its provisions. Initial impressions are that the new code is working well. Certainly it provides a meaningful, sensible base and, when necessary change must be made, it can be done with some assurance of consistency and comprehensibility.