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CHAPTER 12

Zoning and Land Use

CHARLES M. HAAR *and* BARBARA HERING

§12.1. **Introduction.** Land use regulation has claimed attention from both legislature and courts during the 1961 SURVEY year. Both have addressed themselves to small aspects of large problems rather than attempting a thoroughgoing overhaul of any branch of land use law. By and large, however, their activity has been in different areas of the subject. The legislature has been concerned primarily with the substantive law, with conferring and limiting rights and powers. The courts have been more occupied with questions of procedure and remedy.

A. LEGISLATION

§12.2. **Subdivision controls.** The subdivision law, which has been the subject of much comment and considerable criticism, was amended several times. The most important of these relates to Section 5A of Chapter 40A of the General Laws.[1] This section deals with the protection afforded by plat approval against changes in the existing zoning law. Under both the old law and the present amendment, the owner of a lot made substandard by an upgrading of area or frontage requirements can build on it only if he satisfies three conditions: the lot must have been laid out on a duly recorded plan; it must have been standard at the time of recordation; and it must have a minimum area of 5000 square feet and frontage of fifty feet. The old law also provided that at the time of the upgrading the adjoining lots must have been in different ownership. The amendment retains this requirement, but in the alternative; under it, if the owner acts within five years from the date of recording of his original plan that has been rendered nonconforming, he may build on the substandard lot notwithstanding his having owned and perhaps still owning the adjoining lot. The amendment also spells out the section's applicability to

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§12.2. [1] Acts of 1961, c. 435. Chapter 40A, although the Zoning Enabling Act, contains several provisions relating directly or indirectly to subdivision control. See, e.g., G.L., c. 40A, §§5A, 7A, 11.

upgrading of width and depth requirements. The older provision quite obviously intended, perhaps for constitutional reasons, to provide an escape valve for the hardship case. The amendment converts this to an absolute right, albeit limited in duration to five years.

Two other changes were made in this section, probably aimed at clarification. One amendment disclaims all intent to prohibit any building permitted by a zoning ordinance or by-law.[2] In Massachusetts, as in many other states, the vesting of any rights against a change of applicable zoning law occurs relatively late. Neither the issuance of a building permit nor the expenditure of substantial sums on such preliminary steps as grading suffices. Many localities nevertheless give as of grace what they could not be required to give as of course by excepting from the applicability of an upzoning ordinance developments that have proceeded to some specified stage. The present amendment aims at dispelling any doubt as to the efficacy of such a locally granted exception.

The other attempt at clarification focuses on the applicability of Section 81T procedure.[3] That section prescribes the route to be followed in obtaining planning commission approval of a subdivision plot in any instance where such approval is required by the statute. The act also provides that approval is not required under certain conditions, and when that is the case the planning commission is required to endorse the plat to that effect. The act failed to say how the subdivider was to go about obtaining such endorsement. This amendment fills the void, making Section 81T procedure expressly applicable to the submission of plans for endorsement.

Despite these efforts at clarification, at least one unnecessary ambiguity in the subdivision control law still remains. It arises out of the language as to time of ownership of adjoining lots, which has been left unchanged. Literally interpreted it withholds statutory hardship relief only when the owner of the substandard lot owned an adjoining lot at the time of the upgrading. Thus construed, the section would be available to the person who, after his lot became substandard, purchased an adjoining lot but resold it before applying for a permit to build.

§12.3. Zoning. The legislature also amended Section 7A of the Zoning Enabling Act to parallel Section 5A.[1] Thus the three-year period of grace commencing with the date of approval of a definitive subdivision plan limited on zoning changes is now five years.

It reflects a legislative mood that the virtues of flexibility in zoning and subdivision administration have far too often been misguided into arbitrary or dilatory channels. Whether the best corrective is the setting of a rigid period and whether the particular period of five years

[2] Acts of 1960, c. 789.

[3] Acts of 1961, c. 332. The amendment is to G.L., c. 41, §81P, requiring the use of the procedure set out in G.L., c. 41, §81T.

§12.3. [1] Acts of 1961, c. 435, amending G.L., c. 40A, §7A.

is not inordinately long are questions that will almost inevitably bring the section into the legislative mill for reconsideration.

The same legislative mood is reflected less controversially in Chapter 276 of the Acts of 1961. The act prohibits any member or associate member of the board that hears appeals in zoning matters and any member of the planning board from representing a party in interest before their respective boards. A general rule such as this section lays down leaves open many of the nicer questions. For example, may a partner of a member appear? In that situation, would it make a difference whether the member partner sits on the matter or disqualifies himself? These are only a small sample of the questions that may arise, as to which the statute will provide at best only a starting point. It remains to be seen what answers the Supreme Judicial Court will extrapolate from the somewhat narrowly stated statutory guide.

§12.4. **Private agreements.** Simultaneously with this enlargement of private rights vis-à-vis public planning officers, the legislature in eight new sections added to Chapters 184 and 184A of the General Laws acted on other private rights, modifying and intending, it has been suggested, to narrow the power of individuals to engage in land planning through conditions and restrictive covenants.[1] Succeeding generations are often critical of the fetters forged by their ancestors curtailing their freedom to deal with land. This amendment has been viewed as an attempt to meet that criticism, and that may have been the purpose of the legislature. The result, however, may well be simply to codify, rather than lessen the hold of the past on the present. The provisions are such that an able and experienced conveyancer will probably be able to achieve the same objectives within the framework of the statute as before its enactment. In fact the net result may be that he not only achieves the same objective, but does so with a degree of certainty not possible under a purely case law regulation — which may prove a virtue where such private restriction serves a public purpose.

The statutory scheme divides restrictions into two categories: (1) those imposed as part of a common scheme, i.e., private planning, and (2) others. The legal life of any restriction agreed upon after December 31, 1961, is limited to thirty years. This period may be extended if the restriction is part of a common scheme, as defined in the act, and if certain other conditions are satisfied. The conditions for extension are that it must have been provided for in the original agreement; it must be recorded before the expiration of the next preceding period; and 50 percent of the owners in the area must agree to the restriction at the time of its extension. Given these necessary circumstances, the restriction may survive to eternity by virtue of successive twenty-year leases-on-life. While recordation of the original restricted agreement is not expressly required, it would seem to be

§12.4. [1] Acts of 1961, c. 448, adding §§26-30 to c. 184 and §§10A-10C to c. 184A. See further comment on this act in §1.2 *supra*.

implicit in the statutory provision making the imposition "of record" integral to the definition of a common scheme restriction.

Agreements antedating January 1, 1962, are all treated alike. Restrictive agreements not part of a common scheme, e.g., one between two individuals restricting the use of one parcel in favor of the other, as well as those that are, may be extended for successive twenty-year periods tacked on to the original statutory period — the later of fifty years or January 1, 1964 — by following a prescribed statutory procedure.

The principal effect of the act will be to clear thousands of titles of defects owing to restrictions that are obsolete in fact, but not sufficiently so to enable titles to be passed. By 1964 a fifty-year search can be relied upon, and by 1984 a thirty-year search will suffice. The life of the statute will probably be in the provisions denying enforcement unless the claimant would benefit actually and substantially by reason of it. The statute goes on to define negatively the legal meaning of "benefit," including, interestingly enough, changes in applicable public controls of land use. The provision, while an innovation to Massachusetts statute law, is not startling. The underlying concept dates back several centuries to a time when common law countries, embarking into an age of commerce and industry, sought to make land freely alienable. More recently, courts of equity in many jurisdictions in this country have refused to enforce specifically restrictive agreements that had outlived the conditions under which they were appropriate.

The long-run effect of this act may be to facilitate a more rational land use pattern. Its more immediate effect is to create an ambiguity as to one class of cases — the situation of urban renewal and redevelopment contracts, in which covenants are required by statute. What, for example, is the status of a covenant in a contract under which one developer acts as middleman between the local government and the ultimate land users? The developer acquires a large tract, renews or redevelops it, and then resells pieces of it to individuals. The community's ethics may differ from those of a particular component group, and since public funds are being used, the community may not unreasonably feel it should be given assurance that its ethical standard, incorporated in covenants, will endure for some period of time. One developer, however, is not a common scheme, even if the developed property is subsequently divided and conveyed to separate ownership. Government authorities, like private conveyancers, can doubtless learn to live with the new law. The authority can impose and enforce standards, even though not part of a common scheme, and continue them by filing. But urban renewal and redevelopment forms and proposed agreements should certainly be reviewed in the light of this new addition to Chapter 184.

§12.5. **Urban renewal.** Urban renewal is more directly affected by two of the most ambitious of the current legislative product. One amends Chapter 121A, which governs urban redevelopment corpora-

executive officer of the authority, until the planning commission was absorbed by it. Following the merger, he was making more money for discharging fewer duties. His grievance was that instead of heading the enlarged organization he headed one of several equal divisions or departments, all of which were under the newly appointed Development Administrator.

Only in the long run will it be known whether the loss of separate identity will carry with it the anticipated detriment to city planning that underlies it. Evaluation of the provision must also be in light of the turnpike authority's past record, and the indication of the deterioration of public confidence afforded by the twice-repeated failure of its recent bond issue. These events suggest that the better part of wisdom might have been to reverse the positions of the two authorities, giving the Boston Redevelopment Authority veto power over the inconsistent proposals of the Massachusetts Turnpike Authority. This conclusion is reinforced by the fact that the old city planning board and its functions are now incorporated into the redevelopment authority.

A novel provision of the redevelopment act directs that, before approving any project which would require the destruction of residential property, the authority is to ascertain the availability of substitute habitation. Disapproval of the project is mandatory unless the authority finds that there are dwellings available, dwellings which are not only safe and sanitary, but within the financial means of the prospective tenant, reasonably convenient to his place of employment, and as desirable as the old quarters in such respect as access to public utilities and public and commercial facilities. Properly administered, this provision could do much to ameliorate the bitterness and ill will toward urban renewal generated by the hardship sometimes imposed in the past on those unhoused by renewal or redevelopment activity.

At the same time, the legislature has taken a constructive step toward assuring the availability of such housing. Chapter 573 of the Acts of 1961 amends Section 26VV of G.L., c. 121, to increase the maximum Commonwealth guarantee for projects to provide low-cost housing for the elderly to $2,625,000 in any year and a total of $105 million. After such housing has been completed, it becomes eligible for an additional subsidy of 1½ percent of completion cost if the extra subsidy is necessary to meet the cost of operation and debt servicing. The total of such extra subsidies is limited to $1,575,000 in any one year. This amount is in addition to the maximum annual basic subsidy of $2,625,000, but, it would seem, subject to the same over-all maximum of $105 million.

Two other acts touch redevelopment. One permits the housing and redevelopment authorities to acquire land which has been determined to meet the statutory jurisdictional definition in advance of the adoption and approval of a land assembly and redevelopment or renewal plan.[6] The other gives the city of Boston carte blanche with respect

[6] Acts of 1961, c. 188, amending G.L., c. 41, §§26P, 26Q.

to conveyances of land to the Boston Redevelopment Authority.[7] There need be neither public auction nor consideration.

§12.6. **Transportation.** The urgency of problems in urban transportation is reflected in the number of acts of the 1961 legislative session dealing with various aspects of the subject. One of them, Chapter 590 of the Acts of 1961, promises some amelioration of a particularly vexing, because needless, situation — the result of inadequate communication and cooperation of various levels of government whose actions necessarily interact. Thus highway construction today is largely the province of federal and state governments, but has a great impact on the nontransportation land uses of municipalities. The difficulty arises because although this activity is unquestionably carried on in accordance with a plan, it is not necessarily the plan approved by the local governments of the municipality affected. The judiciary, not unexpectedly, has refused to protect municipal land use plans from violation by federal or state governments. The only hope of solution, therefore, is through voluntary action, such as Chapter 590. Section 2 of the act directs the Department of Public Works to expend a specified minimum sum out of the amount appropriated in Section 1 in each of four named areas. The significant section, with respect to intergovernmental cooperation, is Section 4. It requires that any public works project within the towns of Brookline and Saugus and the cities of Boston, Cambridge, Lynn, Peabody, Revere, Somerville, or Springfield be approved and accepted by the local government of the municipality affected before any of the authorized sum may be legally expended on it.

The same spirit of cooperation and greater sophistication about the interaction of land uses animates an amendment to Section 10 of Chapter 16 of the General Laws, relating to the study and planning functions of the Mass Transportation Commission.[1] Before the present amendment, the commission's assignment referred exclusively to mass transportation. This is now broadened, horizontally, to take in land use and urban renewal and development, and vertically, to take in federal activity and to require that it cooperate with federal agencies.

Chapter 540 of the Acts of 1961 creates another new agency. This one is assigned the duty of managing the affairs of the Western Suburbs Transportation District, created by the same chapter. Like members of the Mass Transportation Commission and of planning boards generally, the members are to serve without pay; unlike those boards, this one not merely plans or regulates, but operates. Under the act, the board may contract with private corporations to provide the service or may itself do so. It is to be self-sustaining. It is required to keep accounts, to submit to an audit, and to render an annual report. Beyond this, however, the board is unregulated, even as to such an important item as rate fixing.

[7] Acts of 1961, c. 314, amending Acts of 1943, c. 434, §4.

§12.6. [1] Acts of 1960, c. 644.

The last of the important enactments relative to transportation limits the permissible height of structures within a specific distance of an airport runway or landing strip, with certain exceptions.[2] In purporting to act under the police power, the legislature impliedly rejects any necessity to use its power of eminent domain to accomplish its end, a view held in other jurisdictions. In New Jersey, for example, the legislature had enacted a bill similarly invoking police powers to curtail rights in property near airports in the interest of air safety.[3] The New Jersey courts ruled that the purported regulation constituted a "taking" within the meaning of the constitution, and was therefore invalid.[4] The case was not carried higher, and the legislature, apparently acquiescing in the decision, has not adopted new legislation open to the same objection.

The better view would seem to be that of New Jersey. Considerations of air travel safety should certainly be paramount. Perhaps without the intervention of government action this could not be attained, or could be attained only at a prohibitive cost. If so, the use of eminent domain would be justified. But there is no reason why the cost of eliminating a hazard to air travel should be shifted on to some persons, simply because they happen to own land in the neighborhood.

B. Judicial Decisions

§12.7. Eminent domain: Damages. The question of damages, which occupied the legislature in only one act, and there obliquely, loomed large municipally in the court decisions reviewed herein. With the possible exception of *Bennett v. Brookline Redevelopment Authority*,[1] their substance is not particularly remarkable.

Brookline Redevelopment came before the Court on an exception by the authority to the trial court's ruling excluding evidence of assessed valuation of the condemned property. The authority relied on a statute changing the common law rule excluding such evidence as to the value of takings by the state, or any county, city, town, or district.[2] The issue was whether the section was applicable to a taking by a redevelopment authority. After following a tortuous path through the statutory maze, the Supreme Judicial Court, quite correctly it would seem, found that it did.

The very serious need for some measure of value forged away from the heat of litigation is discernible in another of this group of cases. This case, *Aselbekian v. Massachusetts Turnpike Authority*,[3] was begun by a petition to assess damages caused by takings of the authority. The petitioners were awarded $110,000. Both sides offered

[2] Id., c. 756, adding new §§35A-35D to G.L., c. 90.
[3] N.J. Rev. Stat. §40:55-32.
[4] Yara Engineering Co. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

§12.7. [1] 342 Mass. 418, 173 N.E.2d 815 (1961).
[2] G.L., c. 79, §35.
[3] 341 Mass. 398, 169 N.E.2d 863 (1960).

expert testimony in proof of value. One of the petitioner's experts testified that damage to the petitioner was $179,200; one of the authority's experts testified that total damage came to $19,700.

These facts were stated without editorial comment by a Court perhaps inured to such divergences between the opinions of experts. The commonness of the phenomenon, however, does not alter the fact that its effect is to leave the jury, and probably even the more sophisticated judges, without any sound basis for fixing awards. The *Brookline Redevelopment Authority* decision will be very salutary if it succeeds in making available objective evidence which, in addition to bearing directly on value, would furnish some clue as to the credibility of other evidence furnished by experts.[4]

§12.8. **Zoning: Nonconforming uses.** The largest single category of land use cases, however, was not damage cases in connection with eminent domain takings, but zoning cases. Of these, three dealt with nonconforming uses. In all, the Supreme Judicial Court reversed the action reviewed which would have had the effect of extending or perpetuating a nonconforming use. In *Hinves v. Commissioner of Public Works,*[1] the petitioner objected to a catering service, carried on next door to her by the intervener, in a single-residence district. Before the intervener had purchased the property some three years earlier, the premises had been used as a grocery store. This suit was begun after the respondent had refused to proceed because the intervener's operations were, he said, a natural evolution of the nonconforming grocery store use and, therefore, a continuing permitted use. The Court held that naturalness of evolution from a business standpoint was not determinative and that for zoning purposes the two types of businesses were in different categories.

§12.9. **Zoning: Variances and nonconforming uses.** The other two cases deal with nonconforming uses only indirectly. Both involved attempts to obtain variances from the zoning ordinance, with a prior nonconforming use figuring in the background to shore up the grant. In *Shacka v. Board of Appeals of Chelmsford,*[1] the variance was granted to a gas station operator in a general residence district. The antipathy of the Supreme Judicial Court to variances may perhaps be gauged by its reversal of the Superior Court's upholding of the grant, in the face of findings, not rejected, that the applicant had been forced to vacate his former site by a taking for highway purposes, that there

[4] The two other eminent domain cases were McCarthy v. Woburn Housing Authority, 341 Mass. 539, 170 N.E.2d 700 (1960), and DiPerrio v. Town of Holden, 341 Mass. 342, 169 N.E.2d 903 (1960). The McCarthy case holds that a property owner dissatisfied with security furnished for payment of any subsequent award for taking must follow the statutory procedure of petitioning for an increase. G.L., c. 79, §40; c. 121, §26P(b). The DiPerrio case holds that a petitioner is entitled to be told the court's decision as to each of his requests for rulings, however obvious the rule referred to and however correct the final result.

§12.8. [1] 342 Mass. 54, 172 N.E.2d 232 (1961).

§12.9. [1] 341 Mass. 593, 171 N.E.2d 167 (1961).

was a need for the use in the area of the proposed site, and that the area along the subject street had become markedly commercial.

DiRico v. Board of Appeals of Quincy[2] differed in that the variance was sought for the site then used in a nonconforming manner. The existing structure had been used as a tonic bottling factory before the advent of zoning and the classification of the area as residential. Various business enterprises continued the nonconforming use. In 1954 the building was vacated and had become dilapidated. The owner sought and was granted a variance to remodel the building for use as a professional office building. The lower court entered a decree that the board did not exceed its authority in granting the variance. This was reversed. In many jurisdictions the desired use, being "higher" than the existing one, could have been permitted under the legal shelter of the nonconforming factory use. Thus, here, too, was the hard case, evidencing once again the tendency of the Supreme Judicial Court to hew fast to the requirement that substantial and special hardship must be shown to support the granting of a variance.

§12.10. **Zoning: Rezoning.** The Supreme Judicial Court appeared much more kindly disposed to the zoning ordinance amendment brought before it for review in *Elmer v. Board of Zoning Adjustment of Boston.*[1] It was upheld against several strong arguments. The amendment increased the density of the zone which — before and after the amendment — was designed for multiple residential use. The plaintiffs urged invalidity on several grounds: (1) the amendment was deliberated and voted in executive session, contrary to the statute requiring such matters be dealt with in open meetings; (2) it purported to create a new combination of bulk and use of district which was beyond the power of the board; and (3) the amendment constituted spot zoning. The first two arguments were rejected on the strength of the legislative intent inferred by the Court from related sections, and, in the case of the second, from legislative actions and inaction in the face of similar administrative creations in the past. In rejecting the spot zoning charge the Court reaffirmed the board's discretion to determine the boundary of the newly created area provided only there was evidence, not necessarily relied on by the board, distinguishing the rezoned area from that not so rezoned.[2]

In *Doliner v. Town Clerk of Millis*[3] the Supreme Judicial Court

[2] 341 Mass. 607, 171 N.E.2d 144 (1961).

§12.10. [1] 1961 Mass. Adv. Sh. 1063, 176 N.E.2d 16.

[2] Rice v. Board of Appeals of Dennis, 342 Mass. 499, 174 N.E.2d 355 (1961), presented only procedural questions. Building Inspector of Chelmsford v. Belleville, 342 Mass. 216, 172 N.E.2d 695 (1961), was an attack upon the validity of a zoning ordinance on the ground that it specified the permitted uses without prohibiting all others. The argument seems either specious or silly, and even the short discussion the Court gave it appears to have been more than it warranted.

[3] 1961 Mass. Adv. Sh. 1049, 175 N.E.2d 925. See further comment on this case in §18.32 *infra.*

again upheld a rezoning. To reach this result, the Court rejected ex necessitato the plaintiff's contentions that a second public hearing should have been had before the amendment was put to a vote because of changes made after the first hearing; that the classification provided was arbitrary and unreasonable; and, last, that it unconstitutionally prohibited religious and educational structures in industrial zones.

On the same day the Court handed down its decision in another case between essentially the same parties,[4] but one arising under the Subdivision Control Law, which gives the background of the litigation. The plaintiff, a landowner in the area to be rezoned, in order to avoid the impending change, filed a subdivision plan after favorable vote on the amendment but before the formalities necessary to make it law were taken. The plaintiff had prevailed below on the theory that his plan was not subject to the by-law, which was not yet perfected law at the time; that the purported disapproval of the planning board was a nullity because no public hearing had been held; and that retention for sixty days without action was tantamount to approval under the statute.

The Supreme Judicial Court pointed out that a building permit issued during the pendency of action on a zoning by-law to which it did not conform would not be valid if the by-law were subsequently enacted. From this it deduced that there could not have been any legislative intent to require the planning board to disregard by-law proposals further along the path to becoming law.

§12.11. Board of health: Licensing trailer parks. In the course of its opinion in the first *Doliner* case the Court pointed out that to come to a conclusion it had had to reconcile "different statutes, enacted and amended at different times." This statement, although not there made, was equally appropriate to *Cliff v. Board of Health of Amesbury*.[1] The case involved a trailer park, a frequent target of zoning ordinances, but here the target of the local board of health purporting to act pursuant to a delegation of police power by the state. When the trailer park, which was to consist of permanent rather than transient units, was first proposed, the board was not, judging from the reaction of the board member with whom the plaintiff discussed it, opposed to the project. That the board's attitude had changed even before the hearing held on the plaintiff's application may be conjectured from its promulgation of a new regulation, requiring a permit to live in a trailer camp for more than ninety days in any six-month period. The possibility of a water shortage, raised at the hearing, took on the dimensions of a probability in light of a still later study made by a public works department engineer. This alleged shortage was cited as the chief, although not sole, reason for the denial of the plaintiff's application, which followed shortly thereafter.

There is certainly authority for the view that the board acted

[4] Doliner v. Planning Board of Millis, 1961 Mass. Adv. Sh. 1039, 175 N.E.2d 919.

§12.11. [1] 1961 Mass. Adv. Sh. 1101, 175 N.E.2d 489.

unfairly in changing its rules while the plaintiff's application was pending and with it in view. There is, however, authority for the contrary view as well. Persuasive arguments can likewise be marshaled on both sides. More difficult to refute is the argument that the board's action was inconsistent with *Daley Construction Co. v. Planning Board of Randolph.*[2] The facts of the two cases are similar in that in *Daley* approval necessary for execution of the contemplated project was also withheld on the ground that it would aggravate an already existing water shortage. They differed in that in the *Daley* case the approving agency was the planning board, the project was a conventional residential development, and the controlling law was Chapter 41 of the General Laws, Sections 81K to 81GG, particularly Section 81M, upon which the board relied. Section 81M provides, inter alia, that the board should exercise its powers "with due regard for . . . securing adequate provision for water . . ." and, by a subsequent amendment, should approve any plan which conformed to the "recommendations of the board of health" and the planning board's own reasonable rules and regulations.

The comparison is somewhat complicated by the fact that Daley, unlike Cliff, obtained the approval of the local board of health, which apparently saw no reason for perturbation in the joint determination of the water commissions of its town and two neighboring towns that "there was an acute shortage of water and lack of water pressure . . . and that a fire hazard had been created."

The Supreme Judicial Court in *Daley* construed the language of Section 81M quoted above to refer to a system of water pipes rather than to the supply of water that would be available. It was obviously influenced strongly by the legislative intent, indicated in the history of the act, to prevent arbitrary administrative action "[in]consistent with our ideal of constitutional government." But action arbitrary when taken by a planning board is not less arbitrary by reason of being taken by a board of health, when the two actions are taken for the same reason and the reason in both cases has the same factual foundation.

It may be argued that, notwithstanding differences in the tenor of the opinions, they are perfectly consistent because of differences in the respective governing statutes. But even if so, it would absolve the courts but lay open the legislature to the charge of denying even-handed justice. This charge is not proved simply by the conflicting results in the two cases. Rationalizations of that difference may be possible. For example, living quarters may be needed, and conditions, such as a water shortage, may make impossible the provision of a supply sufficiently large to afford a choice to the individual. In such case, if the community is to make the choice, it should opt in favor of all conventional homes if trailer residences would be detrimental to the welfare of the community and of the individuals who would be

[2] 340 Mass. 149, 163 N.E.2d 27 (1959), noted in 1960 Ann. Surv. Mass. Law §13.7.

dwelling in the new accommodations of one kind or the other, while the detriments to the would-be developer of the trailer park are minor. But unless there are some substantial and objective bases,[3] there is no reason to differentiate, which in fact can be done under the existing law, as construed by the Court.

§12.12. **Zoning: Comprehensive plan.** Trailers were again the bête noire in *Town of Granby v. Landry*,[1] which unfortunately adds another footnote to the cliché of the law that hard cases make bad law. This is not the classic case: the "hard" aspect is associated with the defendant, not the plaintiff, and it evokes not sympathy but antipathy. But like the classic case, the response seems emotional rather than intellectual, and as is so often true of such responses, sets a bad precedent for the future. The ordinance upheld by the Supreme Judicial Court prohibited the keeping of more than one house trailer on a parcel of land and the use of any trailer for living quarters outside of a licensed trailer camp. This was the entire scope of the zoning by-law; no zoning plan had been adopted by the community, and there was no division of the town into zones.

The decision emphasizes the omission in the Massachusetts enabling law of the usual requirement of a comprehensive plan. That requirement was a response to early zoning practices that were widely felt to result in unfair and unequal impact of the then infant law of zoning. It, however, gave rise to new difficulties of construction which, doubtless, the Massachusetts legislature sought to avoid by not using the phrase. It would be extraordinary if the legislature intended thereby to invite or sanction zoning such as the present by-law, which represents the very antithesis of "comprehensive" zoning, however defined. It may be that trailers as permanent habitation pose special problems that warrant singling them out for special treatment, regulating the conditions of their use. If, however, it is desired to do more than assure the safe and sanitary condition of house trailers and to exclude them entirely (except for the quite different trailer camp use) from the list of permissible land uses, then it should be done in the context of a general zoning scheme, subject to the usual protections of review for reasonableness of classification, and so forth.

§12.13. **Subdivision control: Default on failure to provide improvements.** The subdivision control law which entered tangentially in the *Doliner*[1] and *Cliff*[2] cases was more directly involved in *Town of*

[3] The writers find it difficult to think of a concrete hypothetical. Generally, it would seem that if trailer residences are harmful they should not be permitted, and if they are not harmful there is no reason to eliminate them from the choices available to the individual because of water shortage.

§12.12. [1] 341 Mass. 443, 170 N.E.2d 364 (1960).

§12.13. [1] Doliner v. Planning Board of Millis, 1961 Mass. Adv. Sh. 1039, 175 N.E.2d 919, noted in §14.10 *supra*.

[2] Cliff v. Board of Health of Amesbury, 1961 Mass. Adv. Sh. 1101, 175 N.E.2d 489, noted in §14.11 *supra*.

Stoneham v. Savelo[3] and *Gordon v. Robinson Homes, Inc.*,[4] which expose some of its more obscure and perplexing aspects. Both actions were brought on performance bonds furnished by developers in order to obtain subdivision plot approval. The controversy in *Savelo* was as to the extent of his obligation to improve that part of a private way which lay between his property and a public way, a distance of some 339 feet. Savelo denied the town's contentions that he had made any undertaking with regard to it; he also contended that if he had it would be illegal and unenforceable. As a matter of contract law, his argument, based on the fact that he had no right to enter onto the land in question, was doomed to failure ever since *Gaston v. Gordon*[5] endorsed in 1911 the proposition laid down some 210 years earlier in *Paradine v. Jane*[6] that subjective "impossibility" does not excuse nonperformance of contractual duties.

The more interesting question relating to land use law was apparently not explored by the parties. Could the planning commission have demanded that Savelo make the same improvements as a condition of approving his plot? An affirmative answer would seem to follow from the Supreme Judicial Court's reading of the statute. This is certainly a reasonable interpretation of the language and, it may be urged, also a correct legislative choice, since it is not unreasonable to require a subdivider to link his development to the outside world, whatever the cost. The counterargument is that this solution either consigns one's property to indefinite idleness or gives the owner of the adjacent land a windfall at his neighbor's expense. Even if a constitutionally permissible choice, alternative solutions might achieve a fairer balancing of public and private interests.

In *Gordon v. Robinson Homes, Inc.*,[7] the developer again defaulted on his obligation to provide improvements. This time it was one of his purchasers in the subdivision, rather than the municipality, who brought action on the performance bond. The result, sustaining a demurrer against the complaint, seems correct. Permitting each individual to recover his proportionate share of damage would tend to frustrate the purposes of the subdivision control law. But it is difficult to see why the Supreme Judicial Court thought it necessary to deduce from the statutory declaration of purpose in Section 81M[8] that the subdivision control law "is thus designed primarily to benefit the inhabitants of cities and towns generally and those who purchase lots in developments only secondarily," in order to support its result. The class to be benefited may be important in some contexts, but on the facts of the *Gordon* case not that, but the benefit to be conferred, is the crux of the matter. That benefit was improved roads and

[3] 341 Mass. 456, 170 N.E.2d 417 (1960).
[4] 342 Mass. 529, 174 N.E.2d 381 (1961).
[5] 208 Mass. 265, 94 N.E. 307 (1911).
[6] Aleyn 26, 82 Eng. Rep. 897 (K.B. 1646).
[7] 342 Mass. 529, 174 N.E.2d 381 (1961).
[8] G.L., c. 41, §81M.

utilities, not a money equivalent of their worth. Permitting individual recovery would mean those amenities could be had by the voluntary cooperative action of the individual lot owners, which is highly unlikely, or through municipal action, whose cost would then be specially assessed against the benefited property owners, which was the very system found wanting and superseded.

§12.14. Redevelopment authorities: Tenure of employees. The land use case decided during the 1961 SURVEY year which may have the furthest-reaching consequences is *Simonian v. Boston Redevelopment Authority*.[1] It holds that the tenure statute does not entitle the plaintiff to be restored to his position as it existed before the merger of the Government agency he headed with another. Under the Massachusetts tenure statute, the plaintiff could not be deprived of rank, compensation, or office except for just cause, proved in hearings held pursuant to notice and subject to judicial review.[2] The Supreme Judicial Court concedes, arguendo at any rate, that the plaintiff's rights under the tenure statute were violated unless just cause existed. It then concludes that just cause existed in the enlarged scope of the authority's jurisdiction after the merger and dispenses with the issue of procedural protections as having been enjoyed in substance if not form in the proceeding at bar. Quite obviously and openly, however, the Court is more influenced to its conclusion by the strong conviction that the protection of tenure statutes is more appropriate for the rank-and-file civil servant than the high-ranking policy-making executive. The natural result, for better or worse, will be to strengthen the influence of the legislature over boards, agencies, and commissions or, stated conversely, to lessen their independence. The corollary of this is the reintroduction of the political element that "independence" was intended to exclude. The legislature, with an able assist from the Court, has thus proved that, however difficult, it is not impossible to run with the hares and hunt with the hounds.

§12.15. Evaluation. From a planning perspective the legislative activity during the 1961 SURVEY year has been more significant than the judicial. But whether the net effect of the legislation furthers or impedes planning is a close question. On the plus side, the way has been cleared for greater renewal and redevelopment activity than may have been possible under the old slum-blight jurisdiction. The importance of plans and planners in the increasingly important renewal and redevelopment picture has been enlarged — outside of Boston. On the other hand the future may show that it suffered a serious setback in Boston by reason of planning activities having been merged with an operating department. Again on the minus side, another ad hoc regional commission has been added to the roster with no clue as to how it is to relate, if at all, to a planning commission or master plan for the area, if or when those should exist. Vested rights are

§12.14. [1] 342 Mass. 573, 174 N.E.2d 429 (1961), noted in another connection in §12.5 *supra*. The case is also commented on in §18.6 *infra*.

[2] G.L., c. 121, §26QQ, as amended by Acts of 1958, c. 299.

created which will have a natural tendency to become a drag on the ability of the law to keep up with changing standards. Straddling the divide, the legislature has limited the enforceability of private restrictive agreements, removing pro tanto potential obstacles to implementation of a comprehensive plan for the area.

Perhaps the greatest contribution of the cases is the implication by Justice Cutter in *Doliner,* substantiated by the statement of facts in cases such as *Cliff,* that the general laws relating to land use are in need of review. Temporary inconsistencies and even conflicts are not surprising in the law. All problems cannot be anticipated in advance; situations change. These and other reasons make amendments from time to time inevitable. When there are piecemeal additions to a complex body of law, inconsistencies and conflicts somehow steal in. Periodically, however, they should also be swept out, and the time would seem ripe for the job. It may be that the time is also ripe for the courts to make an analogous review, and to reconsider particularly whether the scope of judicial review given the grant or denial of a variance is not broader than that given an amendment, and whether there is a basis for any difference. Both a variance and an amendment may be the product of administrative, rather than legislative, action, and today — much more than in the past — both may directly affect the property of only a single owner.