Annual Survey of Massachusetts Law

Volume 1958 Article 18

1-1-1958

Chapter 14: Zoning and Land Use

Richard G. Huber

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Land Use Planning Commons

Recommended Citation

Huber, Richard G. (2012) "Chapter 14: Zoning and Land Use," *Annual Survey of Massachusetts Law*: Vol. 1958, Article 18.

CHAPTER 14

Zoning and Land Use

RICHARD G. HUBER

A. Decisions

§14.1. **Zoning: Variances.** Previous volumes of the ANNUAL SURVEY have commented on the requirement of the Supreme Judicial Court that boards of appeal comply strictly with the statute[1] in granting variances.[2] This strict attitude is essential if zoning is to be an effective means of land use planning. Local boards, because of pressure, competing policy, and perhaps occasionally inexperience, often grant variances readily without fully realizing that the confidence of landowners and land-users in the integrity of zoning is a first concomitant to the development of land use in a certain area in accordance with the land use plan of the community. The Court's strict insistence on full statutory compliance is important not so much to rectify errors of the boards and trial courts but particularly to furnish a guide to boards and courts in the many variance cases in which there is no appeal taken to the Supreme Judicial Court.

The Supreme Judicial Court decided four variance cases during the 1958 SURVEY year. In two of the cases the Court upheld the granting of variances on facts that are nearly classic examples of situations which the power to grant variances is meant to cover. *Rodenstein v. Board*

RICHARD G. HUBER is Associate Professor of Law at Boston College Law School and Editor in Chief of the ANNUAL SURVEY. He was formerly editor of the Iowa Law Review and the Tulane Law Review.

The author wishes to acknowledge the research assistance furnished him by Francis J. Pavetti, Allan B. Soloman and William A. Cotter, Jr. of the Board of Student Editors of the ANNUAL SURVEY.

§14.1. [1] General Laws, c. 40A, §15(3), before the 1958 amendment, stated: "To authorize upon appeal, or upon petition in cases where a particular use is sought for which no permit is required, with respect to a particular parcel of land or to an existing building thereon a variance from the terms of the applicable zoning ordinance or by-law where, owing to conditions especially affecting such parcel or such building but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law, but not otherwise." For a discussion of the amendment to this section by Acts of 1958, c. 381, see §14.9 *infra*.

[2] 1957 Ann. Surv. Mass. Law §§11.2, 29.6; 1956 Ann. Surv. Mass. Law §1.2.

of Appeal of Boston[3] permitted the use of part of a lot in a residential district [4] for parking for hire, subject to a number of conditions.[5] The greater part of the entire lot had been the subject of two earlier variances which permitted its use for a gasoline filling station and allowed the parking of vehicles on which work was being done at the station. There was evidence that the entire lot had heavy rock formations immediately under the topsoil and for that reason an apartment building could not now be built economically on the land. The lot faced two heavily traveled thoroughfares and there were a number of apartment houses in the vicinity that had no garages or other parking facilities. The Court accepted the trial court's determinations that this land could not be used for purposes permitted in the zone in which it was located and that the use of the land for parking would be a benefit to nearby residents without injuriously affecting the residential character of the neighborhood. In the words of the Court, "the use sought in the instant case was of small consequence," because it only slightly altered the previous use of the land under the earlier variances.

On the facts of this case we might object to the granting of the earlier variances permitting the filling station and attendant parking. At the time the original variance was granted in 1944, or as soon thereafter as wartime building restrictions were removed, it may well have been economically feasible to build an apartment house on this lot. The original variances, however, were subject to restrictions that tended to prevent the variances from detracting from the neighborhood as a residential area, and certainly the presence of heavy rock formations immediately under the topsoil would at least discourage any building; the lot in 1944 was, in fact, an unsightly vacant lot. But the earlier variances were established at the time this case came before the Court and thus the additional variance made only an apparent, not a real, change in the use of the land, and at the same time provided for parking in a congested residential area where such parking was at least desirable.

Kairis v. Board of Appeal of Cambridge[6] was the second case in which the Supreme Judicial Court approved the granting of a variance. The owner of the lot involved sought permission to use the property for a filling station. The property was zoned for business but the zone excluded filling stations, although it permitted the closely akin use of garages. The building on the property had room for businesses on the ground floor and "cold water flats" on the second and third floors. The building was found to be structurally unsound and over half of

[3] 1958 Mass. Adv. Sh. 599, 149 N.E.2d 382. For a discussion of the review procedure aspects of this case, see §13.5 *supra*.

[4] The district was zoned for general residential use with a 65 foot height limitation. Record, p. 2.

[5] The conditions are set out in the Opinion of the Court at 1958 Mass. Adv. Sh. 599, 601, 149 N.E.2d 382, 384.

[6] 1958 Mass. Adv. Sh. 813, 150 N.E.2d 278.

the flats were vacant. Two filling stations were already in operation as non-conforming uses in the near vicinity of this property and a number of other non-conforming uses existed nearby. There was also evidence that the present building constituted a "blind corner" at a busy intersection and that it may, at least in part, have been a hazard accounting for traffic accidents at this corner. The Court also accepted the lower court's determination that this area was largely commercial with a distinct trend toward becoming completely commercial.

The variance granted in the *Kairis* case permitted a use only slightly different from that permitted by the zoning by-law and also removed a traffic hazard. The result is certainly supportable on the facts as found by the Superior Court. Testimony in the case indicated, however, that there are a number of non-conforming uses in this vicinity and at least one variance had been granted recently that extended a non-conforming use. There is an uncontroverted finding of fact that the zoned area is shifting from partly to completely commercial, and evidence was adduced that very little residential use of property exists in this area any longer. Under these circumstances the city should consider an amendment to its zoning by-laws to make this district more unrestrictedly commercial, if that is considered the best use of the land. If the city desires to retain its present zoning, every effort should be made to reduce non-conforming uses and to prevent the granting of any variances. Certainly at present it is unlikely that anyone owning land in this district would consider constructing new buildings or even substantially improving older buildings for any other purposes than commercial ones, since the area is more extensively commercial in nature than the present zoning law permits.

In the other two variance cases decided by the Supreme Judicial Court during the 1958 SURVEY year, the Court refused to uphold decisions of boards of appeal granting variances. *Todd v. Board of Appeals of Yarmouth* [7] involved a variance to use land in a residential district for boat rentals, sales, service and storage. Prior to the adoption of the zoning ordinance the land had been used for some types of boat rentals and the sale of fish. In 1954 and 1955 the board of appeals of the town had granted the then owner "permits" [8] to run a boat rental service and to repair his own boats, and provided that these permits would run only to the applicant and not with the property. The present owner, after purchase of the land, sought what he designated as a "permit," which the Superior Court and the Supreme Judicial Court found to be more extensive than the permit given to the previous owner. The Court found that the present owner was really seeking a variance and held that the facts as found by the Superior Court did not permit the granting of the variance requested.

The decision of the board of appeals and the briefs of the parties

[7] 1958 Mass. Adv. Sh. 411, 148 N.E.2d 380.

[8] The Court decided that the action of the board of appeals in 1955 was the grant of a "permit" and not a "variance," despite conflicting wording. 1958 Mass. Adv. Sh. at 415, 148 N.E.2d at 384-385.

indicate that considerable confusion existed as to exactly what section of the zoning law applied, i.e., whether what was sought by the landowner was a mere change in non-conforming use, a permit under a permissible exception, or a variance. Substantially different standards apply in each situation[9] and the result in this case depended on which type of use was involved. The board apparently decided the case as a non-conforming use situation,[10] but the Supreme Judicial Court rather summarily disposed of this argument since it appeared that no commercial use of the land at the time of the adoption of the zoning ordinance was permissible under the zoning by-law. It was argued, however, that the use of the previous landowner under the 1954 and 1955 action of the board would run with the land and was the same as here sought by the present owner. The Court found these actions were no more than the granting of a personal permit to the previous landowner as a permissible exception. But the present case was held to involve a variance, not a permit, since the use sought, being somewhat more extensively commercial than that covered by the previous permits, was clearly not a permissible exception under the zoning ordinance. The present case points out that the distinctions among permissible changes in non-conforming uses, permits for exceptions, and variances are often close and difficult to determine. The decision will provide some aid to boards of appeals and attorneys for landowners in analyzing these close situations.

In *Vainas v. Board of Appeals of Lynn*,[11] a variance was granted by the board to permit the landowner to construct a dormer on one-half of the third floor of a two and one-half story building located in an apartment zone. This change would permit an additional bedroom and closets in the third floor apartment. An earlier variance in 1950 had permitted, among other items, a dormer on the other one-half of the building which had first made it possible to use the third floor for an apartment. The use and condition of the building was non-conforming in a number of respects. There were a number of three-story multiple-family dwellings in the vicinity and much of the property, including that of the plaintiff here suing as a party aggrieved, was non-conforming in one or more ways.[12] The Superior Court reversed the board on the ground that the owner would suffer no "substantial hardship" within the meaning of the variance statutory provisions, since he would only gain an apartment that would be somewhat easier to rent and would rent at a higher price. This finding was held by the Supreme Judicial Court to be fatal to the landowner's case.

The *Vainas* case illustrates one of the more difficult problems facing

[9] G.L., c. 40A, §§4, 15(2) (permits); id. §§5, 11 (changes in non-conforming use).

[10] 1958 Mass. Adv. Sh. 411, 415, 148 N.E.2d 380, 383.

[11] 1958 Mass. Adv. Sh. 895, 150 N.E.2d 721.

[12] The Court held that a non-conforming user can be a person aggrieved under G.L., c. 40A, §21, citing Reynolds v. Board of Appeals of Springfield, 335 Mass. 464, 470, 140 N.E.2d 491, 496 (1957), discussed in 1957 Ann. Surv. Mass. Law §11.2. 1958 Mass. Adv. Sh. 895, 897, 150 N.E.2d 721, 722-723.

boards of appeals. It can be gathered from the record and briefs that this neighborhood was partly depressed and blighted and that the earlier variance on this property was granted because the building was old and dilapidated and the owner, who had just purchased it, intended to improve it substantially if he could get adequate income from it.[13] Many sections of Massachusetts cities consist of older rundown buildings that would be repaired if an adequate income were assured, whereas it is unlikely that any individual owner would consider constructing new buildings in the area because of the general character of the neighborhood. The pressure on zoning boards, as is illustrated in the *Vainas* case, to go along with any repairs and improvements is great, even if it requires the granting of a variance or the expansion of a non-conforming use. But the easy granting of these requests by boards destroys the effectiveness of zoning systems. The Lynn zoning ordinance was adopted over thirty years ago and, at least in the neighborhood in which the building here involved is located, there seems to be no substantial decrease in non-conforming uses and variances have been given relatively readily. Thus it would appear that this area is now less close to the zoning ordinance ideal than it was thirty years ago. In time, of course, the area might be a proper subject for an urban redevelopment project, but in the meantime the board must try to balance two opposing factors, the zoning plan on the one hand and the need for repair and improvement on the other. As the opinion in the *Vainas* case illustrates, the best ways to balance these conflicting interests are either by strict application of the statutory standards for variations or, if change in the neighborhood requires it, by amending the zoning ordinance to place this area in a zone in which it more properly belongs.

§14.2. **Zoning: Amendment to zoning by-laws.** The Supreme Judicial Court has always given more deference to local determination in cases of amendments to zoning by-laws and ordinances than it has in cases of variances.[1] Some amendments have, of course, been rejected as spot zoning or because the statutory authority of the municipal body extending or changing zoning districts was exceeded. Despite this attitude of judicial deference, the Supreme Judicial Court denied the validity of changes in zoning districts and uses in two of the three such cases that came before it during the 1958 SURVEY year. The cases are, however, routine in nature and in the two cases wherein zoning changes were not approved, the changes involved spot zoning.

In 1956 the Supreme Judicial Court, in *Atherton v. Board of Appeals of Bourne,*[2] annulled a variance granted by the board to one Bigelow to permit his using certain property for the building, repair and

[13] Record, pp. 10, 20; Defendant's Brief, p. 1.

§14.2. [1] Compare Cohen v. Lynn, 333 Mass. 699, 705, 132 N.E.2d 664, 668 (1956), with Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 449-450, 136 N.E.2d 198, 200 (1956). See comment in 1956 Ann. Surv. Mass. Law §1.2.

[2] 334 Mass. 451, 136 N.E.2d 201 (1956), commented on in 1956 Ann. Surv. Mass. Law §§1.2, 13.2.

storage of boats. The town then amended its zoning by-law to change the Bigelow property and six contiguous parcels from residential district to general use district. In *Atherton v. Selectmen of Bourne*,[3] mandamus was brought by various owners of near-by land, including three of the owners of parcels that had been rezoned, to require the town authorities to enforce the zoning law as it existed prior to the amendment. The Supreme Judicial Court concurred in the finding of the Superior Court that the amendment was invalid. The Zoning Enabling Act requires that areas of substantially the same character must have the same zoning regulations and that the purpose of zoning includes conservation of the value of property and the encouragement of the most appropriate use of the land.[4] The entire tract of land here involved, of which the rezoned area was a relatively small part, was basically similar in character and nature.[5] The rezoning was also held to lessen land values and to discourage the most appropriate use, which was residential. Clearly the rezoning of the Bigelow land alone would have been spot zoning and the Court held that the mere inclusion of six additional lots in the rezoned area did not remove the case from one of spot zoning. While the area rezoned was fairly large geographically, being in the vicinity of six or seven acres, the Court is certainly correct in designating this spot zoning; the area rezoned was clearly a part of a larger tract with the same general characteristics.[6]

In *Pierce v. Town of Wellesley*,[7] the Supreme Judicial Court was more sympathetic to an amendment of a zoning by-law. The Wellesley by-law had contained a provision that land in single residence districts could be used for "public school or other public use." In the case of *Berger v. Wellesley*[8] the Superior Court had held that "other public use" did not include a municipally operated parking lot; the Supreme Judicial Court did not decide this point since the case was dismissed as moot because of the adoption of the amendment now presented in the *Pierce* case. The amendment inserted the additional phrase "municipally owned or operated parking lot" as a permissible use. The two cases and the activities related primarily to one plot of land, owned by a Mrs. Fraser, who also owned substantial business property in the Wellesley Square area. At least one of Mrs. Fraser's business tenants had indicated that it might not renew its lease because of inadequate nearby parking facilities. Mrs. Fraser's husband was a member of the Wellesley planning board and was largely instrumental in arranging the original lease, declared not permissible by the Superior

[3] 1958 Mass. Adv. Sh. 511, 149 N.E.2d 232. See further comment on this case in §19.1 *infra*.

[4] G.L., c. 40A, §§2-3.

[5] In Atherton v. Board of Appeals of Bourne, 334 Mass. 451, 454, 136 N.E.2d 201, 203 (1956), the Court had described this entire area as "a homogeneous unit for zoning purposes. Indeed, it would be difficult to conceive of one that was more so."

[6] Atherton v. Selectmen of Bourne also decided that mandamus would lie. This point is discussed in §14.5 *infra*.

[7] 336 Mass. 517, 146 N.E.2d 666 (1957). This case is also discussed in §19.1 *infra*.

[8] 334 Mass. 193, 134 N.E.2d 436 (1956).

Court in the *Berger* case, and the subsequent amendment which is before the Supreme Judicial Court in the present case. Much of the present controversy relates to the Fraser parking lot proposal but the attack was necessarily that the amendment was generally invalid. As the Court states, this requires that persons attacking the amendment show that it conflicts either with the provisions of the enabling act or with constitutional provisions on the grounds that there is no substantial relation between the amendment and the furtherance of any of the general objects of the zoning law.[9] The Court sustained the Land Court's determination that these burdens had not been met. It was a reasonable conclusion of the town meeting that parking and traffic problems could be solved by way of the amendment. Since off-street parking is a public purpose, a generally applicable, non-discriminatory zoning by-law is valid although it may be detrimental to some property.

One point of basically novel impression in the Commonwealth was decided in the *Pierce* case. The amendment limits parking lots in single residence zones to those that are municipally operated or owned. It was argued that this special exception for the town violated the general principle that a municipality must comply with its own zoning laws. The simple answer, of course, is that the amendment itself permits the town to do this and, while alternative methods of controlling the development of parking lots in single residence districts might have been used by the town, the present method requiring town operation was a permissible control provision. The Court suggests that, had the provision for parking lots been a purely private business venture of the town, the result might have been different. But provisions for parking lots to relieve public needs are not private business ventures of a town and thus the town may permit itself to use land in certain ways that it need not permit private citizens to do. The mere fact that the town may lease and operate the lot, rather than own it outright, does not change this result; the town as lessee may well have rights in performing a quasi-governmental activity that the lessor would not have.

McHugh v. Board of Zoning Adjustment of Boston[10] arose under the zoning law for the city of Boston[11] rather than the general zoning law of the Commonwealth.[12] Under this law the board of zoning adjustment has the power to change the boundaries of zoning districts if certain criteria are met.[13] The property involved was contiguous to a

[9] 336 Mass. 517, 521, 146 N.E.2d 666, 669 (1957).

[10] 336 Mass. 682, 147 N.E.2d 761 (1958).

[11] Acts of 1924, c. 488. This zoning law is in the process of being replaced by Acts of 1956, c. 665. See §14.12 *infra*, note 2.

[12] G.L., c. 40A.

[13] Acts of 1924, c. 488, §20 states the criteria as follows: "Either upon petition or otherwise, the board may, subject to the following conditions, change the boundaries of districts . . . [1] to meet altered needs of a locality, [2] to avoid undue concentration of population, [3] to provide adequate light and air, [4] to lessen congestion in streets, [5] to secure safety from fire, panic and other dangers, [6] to facilitate

general business district but was zoned for general residence. The board changed the zoning to general business which had the effect of increasing the depth of the zone, which was established at one hundred feet on the streets involved, to one hundred and seventy feet on one street and one hundred and fifty feet on the other. The purpose was to permit the use of the land as a truck terminal in connection with the business conducted on the adjoining part of the owner's property that was already zoned for business. The Court held this was spot zoning on its face and reversed the board and the Superior Court. The board had found that the rezoning met two of the criteria of the statute under which it operates, i.e., it met altered needs of the locality and it promoted the health, safety, convenience and welfare of the inhabitants of Boston. The Supreme Judicial Court did not necessarily dispute the findings of fact by the board which caused it to find these two criteria were met but did find that the findings were, even if correct, generally applicable to all of the surrounding land, not just to this one small area.[14] Although the Boston zoning law does not expressly forbid spot zoning, as does the general zoning law, the Court held that uniformity of classification is essential to prevent arbitrary action in zoning. And, as the Court states, "There can be no presumption of the validity of legislative action which is expressly predicated only on facts which if true establish the invalidity of what is done." [15]

§14.3. Zoning: Accessory and non-conforming uses. Three decisions of the Supreme Judicial Court during the 1958 SURVEY year dealt with problems of accessory and non-conforming uses. In *Todd v. Board of Appeals of Yarmouth*[1] the board of appeals decided the case as a non-conforming use but the Supreme Judicial Court held that it was a variance case. This case is discussed elsewhere in this chapter.[2] In the other two cases the Court decided that the uses sought to be made of the property were neither permissible non-conforming uses nor proper accessory uses.

---

the adequate provision of transportation, water, sewerage and other public requirements and [7] to promote the health, safety, convenience and welfare of the inhabitants of the city of Boston. Such changes shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land . . ." The criteria to be applied by the new zoning law of the city of Boston are set out in Acts of 1956, c. 665, §2. They include criteria [2]-[5] of the 1924 criteria, add "schools and parks" to criteria number [6], and add the following additional criteria: "to conserve health; . . . to prevent overcrowding of land; . . . to conserve the value of land and buildings; to encourage the most appropriate use of land throughout the city; and to preserve and increase its amenities."

[14] 336 Mass. 682, 688, 147 N.E.2d 761, 765.

[15] 336 Mass. at 690, 147 N.E.2d at 767. The petitioners in this case also argued that the decision of the Board of Zoning Adjustment was invalid for lack of participation of the requisite number of its members. The part of the opinion of the Court rejecting this contention is discussed in §14.7 *infra*.

§14.3. [1] 1958 Mass. Adv. Sh. 411, 148 N.E.2d 380.

[2] See §14.1 *supra*.

City of Haverhill v. DiBurro[3] involved the use of a dining room of a boarding house property for large banquets and parties. The city had adopted a new zoning ordinance in 1956 which would make this use of the property invalid unless "such use was not in violation of the zoning regulation in effect at the time of the effective date" of the ordinance.[4] The 1941 zoning law therefore controlled and, under it, the property was partly in "A" residential district and partly in "C" residential district. "A" district permitted board and room establishments and hotels, clubs, and other public buildings except those conducted as a business. "C" district permitted commercial operation of hotels and apartment buildings "and provided that a public restaurant or dining room shall be allowed only as an accessory use in such building."[5] The master decided that the building could not be considered as two separate units and that therefore the conducting of the banquet business violated the "A" district requirements; he also found, however, that the banquet business was not such an accessory use as would be permitted in a "C" district.[6] The Superior Court decree enjoined the use of the part of the building in "A" district for the commercial banquet business and that part in "C" district for the banquet business except as it was an accessory use in a three room tourist home.[7] The Supreme Judicial Court essentially rejected the theory of both the master and Superior Court and enjoined any use of the property for the banquet and party business, whether or not refreshments were served, as it held as a matter of law that none of the dining uses made of the property were proper accessory uses under the zoning ordinance.[8]

In *Mioduszewski v. Town of Saugus*[9] certain landowners sought a determination of the validity and effect of the town zoning by-law as applied to certain property. This property was zoned residential under the 1929 zoning by-law, which permitted as uses farms and truck gardens and such accessory uses as are customarily incidental to the activity permitted as long as they do not injure the neighborhood and alter the character of the premises. The owners were conducting a dairy business on the land at the time the zoning by-law was adopted and in conjunction therewith also bred five beagles and two other dogs and sold or gave away the puppies. The dog breeding apparently stopped in 1941, although the land was used to raise dairy cattle until 1947. Between 1947 and 1952 a dairy business was conducted on the premises but milk was brought in from other sources. Starting in 1945 a greyhound racing stable was started on the premises and from 1952 until the present that was the only use made of the land. The owner claimed that zoning all of his property in a residential district was illegal spot zoning since it could not be satisfactorily cut up into

[3] 1958 Mass. Adv. Sh. 481, 148 N.E.2d 642.
[4] Record, p. 14.
[5] Id., p. 10.
[6] Id., pp. 13-14.
[7] Id., p. 23.
[8] The Court also discussed the status of aggrieved landowners as intervenors in this case. This point is discussed in §14.6 *infra*.
[9] 1958 Mass. Adv. Sh. 385, 148 N.E.2d 655.

residential lots of the usual size.[10] The Court, however, found that the premises could as presently constituted still be used for the permitted use of a farm and also accepted the finding of the Land Court that the surrounding area was residential in character and all of the rear of the property here involved could be used as accessory to dwellings.

The Supreme Judicial Court had to decide a narrow point of novel impression in the Commonwealth in determining if a greyhound racing stable could properly be considered a farm under the by-law. The by-law itself did not define the term. But *Lincoln v. Murphy*[11] had held that a commercial piggery not connected with other farming operations was not a farm under the zoning by-law, and the Court cited several cases from other jurisdictions supporting its view that this was not a farm.[12] It is interesting to note, in relation to this argument of the Court, that it did not even mention the argument of the landowner in this case that the conducting of a dairy business at the time of the adoption of the zoning by-law was a non-conforming use because it could not properly be considered to be farming.[13] The Court did hold, however, that the use of this land for a greyhound racing stable was not a permissible non-conforming use since it was a radically different use from the simple, casual breeding of a few farm dogs. It is clear, therefore, that even if the conduct of a dairy was a non-conforming use in 1929, it was equally one radically different in nature from a greyhound racing stable.

The landowner also contended that the racing stable was an accessory use to the farm. The Court rejected this argument since a racing stable is not an ordinary farm activity. This point was, however, only dictum since the farm had ceased to exist at least as early as 1947 when the raising of dairy cattle was discontinued, and even had the stable been an accessory use up to that time, it could not now be accessory to a non-existent activity.

§14.4. **Zoning: Delegation of discretionary power.** In the last few years, several cases have come before the Supreme Judicial Court that have involved the question of what body has the power to perform certain acts under the zoning laws. In *Colabufalo v. Board of Appeal of Newton*,[1] discussed in the 1957 ANNUAL SURVEY,[2] the Court held

[10] The property had a frontage on the street of approximately 150 feet and the depth varied from 310 to 405 feet; the total area was approximately 110,000 square feet. The minimum residential lot permitted in the area was 5000 square feet. Record, p. 12; Petitioner's Brief, p. 18.

[11] 314 Mass. 16, 20, 49 N.E.2d 453, 455-456 (1943).

[12] 1958 Mass. Adv. Sh. 385, 388, 148 N.E.2d 655, 658, citing the following cases: Dunkly v. Erich, 158 F.2d 1 (9th Cir. 1946); Omaha v. Gsantner, 162 Neb. 839, 77 N.W.2d 663 (1956); Berry v. Recorder's Court of West Orange, 124 N.J.L. 385, 11 A.2d 743 (1940); Eberlein v. Industrial Commission, 237 Wis. 555, 297 N.W. 429 (1941). The landowners cited several cases which could have led the Court to the opposite conclusion. See Petitioner's Brief, p. 16.

[13] Id., pp. 11-13.

§14.4. [1] 336 Mass. 213, 143 N.E.2d 536 (1957).

[2] 1957 Ann. Surv. Mass. Law §29.6.

that, under the enabling statute,[3] only boards of appeals are given the authority to grant variances and thus the act of aldermen in attempting to grant a variance was invalid. In *Pendergast v. Board of Appeals of Barnstable*[4] the Supreme Judicial Court held that a Superior Court cannot, except in unusual circumstances, grant a variance although the facts as found would justify it, if the board of appeals has denied it.[5] During the 1958 SURVEY year the Court decided that only the legislative body of a municipality or its board of appeals can grant a permit for an exception. The zoning by-law involved in *Coolidge v. Planning Board of North Andover*[6] permitted motels in any zoning district after public hearing and approval by the city planning board. The by-law included many provisions strictly governing the planning board action and it was contended, and the Superior Court accepted,[7] that these provisions made the board action ministerial and administrative, rather than discretionary. The Supreme Judicial Court found, however, that the planning board was given substantial discretion to determine if it would permit the motel to be built and had the power to impose appropriate conditions. The by-laws thus involved the granting of a permit for an exception under the terms of the enabling act,[8] which limits the power to grant permits for exceptions to boards of appeals, city councilmen and selectmen.

In the *Coolidge* case the defendant town and its planning board relied upon the rather similar case of *Building Commissioner of Medford v. C. & H. Company*,[9] in which the Court had upheld a zoning ordinance that required that the building commissioner not issue a permit for a dump until the petition was approved by the board of aldermen. But the Court in *Coolidge* points out that the *C. & H. Company* decision stands not for the delegation of zoning power to municipal boards but for the retention of the power in the legislative body of the municipality. Further, the *C. & H. Company* decision is now controlled by the 1954 amendments to the zoning laws,[10] which states that the legislative body of the municipality can retain the power to grant permits for exceptions, but that if this power is delegated, it can only be delegated to the board of appeals. This case illustrates the necessity for careful compliance with the enabling act by municipali-

[3] G.L., c. 40A, §15.

[4] 331 Mass. 555, 120 N.E.2d 916 (1954).

[5] See discussion of the Pendergast case in 1954 Ann. Surv. Mass. Law §§1.3, 14.25, 20.2, and subsequent cases applying the doctrine in 1955 Ann. Surv. Mass. Law §13.2; 1956 Ann. Surv. Mass. Law §13.2. The Supreme Judicial Court briefly discussed the Pendergast case in dictum during the 1958 SURVEY year in McHugh v. Board of Zoning Adjustment of Boston, 336 Mass. 682, 690, 147 N.E.2d 761, 766 (1958).

[6] 1958 Mass. Adv. Sh. 959, 151 N.E.2d 51. For further discussion of the delegation aspects of this case, see §13.4 *supra*.

[7] Record, pp. 12-13.

[8] G.L., c. 40A, §4. The Court pointed out that the action to be taken by the planning board under the zoning by-law is substantially the same as that held to be the power to grant an exception in Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 128 N.E.2d 772 (1955).

[9] 319 Mass. 273, 65 N.E.2d 537 (1946).

[10] Inserted as chapter 40A by Acts of 1954, c. 368.

ties if they are not to have some portions of their zoning plans made at least temporarily ineffective.

§14.5. Zoning procedure: Availability of writ of mandamus. Practitioners have found that many of the most troublesome zoning problems relate to procedural questions. This is unfortunate since the purpose of procedure is to aid, not hinder, one seeking to enforce his substantive rights. A fair degree of certainty is obtainable under carefully drafted statutes and ordinances, but no matter how great the certainty attempted by legislation there will always be unanswered procedural questions. Three cases decided by the Supreme Judicial Court during the 1958 SURVEY year have settled several unresolved procedural questions, and will be discussed in the next sections of this chapter.[1]

One of the major problems facing parties aggrieved in some way by action of zoning authorities is what procedure the parties must follow to enforce their rights. In 1955 the General Court amended G.L., c. 40A, §13,[2] to cover certain zoning appeal situations. The amended section reads as follows:

> An appeal to the board of appeals established under section fourteen may be taken by any person aggrieved by reason of his inability to obtain a permit from any administrative official under the provisions of this chapter, or by any officer or board of the city or town, or by any persons aggrieved by any order or decision of the inspector of buildings or other administrative official in violation of any provision of this chapter, or any ordinance or by-law adopted thereunder.[3]

This marked a change from previous procedure, whereby only applicants for a permit had a right to appeal in these situations to the local board of appeals; aggrieved persons other than applicants for permits did not have this right unless the local ordinance or by-law gave it to them.[4] Thus these persons aggrieved, prior to the 1955 amendment, sought mandamus to enforce their rights when the local law did not provide for appeal.[5] The question of to what extent these persons aggrieved may still bring mandamus rather than appeal to the board of appeals arose during the 1958 SURVEY year in *Atherton v. Selectmen of Bourne*.[6] Petitioners brought a writ of mandamus seeking to have an amendment to the town zoning by-law declared invalid. In a prior

§14.5. [1] See, in addition to the present section, §§14.6-14.7 *infra*.

[2] Acts of 1955, c. 325, §1, discussed in 1955 Ann. Surv. Mass. Law §§13.3, 18.6.

[3] G.L., c. 40A, §13.

[4] See discussion in Atherton v. Selectmen of Bourne, 1958 Mass. Adv. Sh. 511, 517-518, 149 N.E.2d 232, 236, and the opinion of the Superior Court in Record, pp. 114-118. See 1954 Ann. Surv. Mass. Law §20.1 for a special case in which the Court held that the writ of certiorari was the only permissible form of judicial review.

[5] See cases collected in 1958 Mass. Adv. Sh. 511, 517, 149 N.E.2d 232, 236.

[6] 1958 Mass. Adv. Sh. 511, 149 N.E.2d 232. The substantive zoning law aspects of this case are discussed in §14.2 *supra*.

case the Supreme Judicial Court had reversed the granting of a variance covering the property,[7] the rezoning of which is in dispute in the present case. A stop work order was then issued by the town. The act of the building inspector complained of was his notification, after the adoption of the zoning amendment, that the stop work order was no longer in effect.[8] The Superior Court ruled that the appropriate remedy was an appeal to the board of appeals, under G.L., c. 40A, §13, quoted above. The bases of the decision were that mandamus was an extraordinary remedy that will only lie if another remedy is not available and that the zoning enabling act, being intended to cover the entire subject completely and containing a remedy for violations, supersedes other remedies.[9] The Supreme Judicial Court reversed, holding that mandamus would lie. It found that there was no "order or decision" of the building inspector from which the statutory appeal would lie. The Court did not believe that a right of appeal, which was subject to reasonable time limitations under the statute,[10] could depend on the fortuitous discovery by adjacent landowners that work had recommenced on the building.[11]

The analysis of the history and purpose of Section 13 by the Superior Court is a very commendable one and is basically unobjectionable except as applied to rather special facts, such as were present in the *Atherton* case. Unfortunately there is no recording or other notification of some actions of inspectors of buildings[12] and, as the Supreme Judicial Court points out, rights to appeal could well be lost without any laches on the part of adjacent landowners. The Superior Court is probably right, however, in its theory that the provisions of the zoning enabling act should cover the entire field. This will not be possible, however, until some reasonable means of notification of interested parties of every action for which appeal is provided is required by the enabling act or local ordinance. It is also possible that it would not be constitutionally possible to provide that boards of appeals determine the validity of zoning by-laws, which is what the *Atherton* case involved. This point did not have to be decided by the Supreme Judicial Court, since mandamus was held to be a proper remedy, but the Court cites cases from other jurisdictions in which it was held that

[7] Atherton v. Board of Appeals of Bourne, 334 Mass. 451, 136 N.E.2d 201 (1956).

[8] The evidence does not make certain whether the removal of the stop work order was done by a physical removal of the order from the premises or by a personal notification to the landowner.

[9] Record, pp. 119-121.

[10] General Laws, c. 40A, §13, provides, in addition to the material quoted in the text, that "A zoning ordinance or by-law may prescribe a reasonable time within which appeals under this section may be taken." The town of Bourne apparently had not prescribed any time for appeals under this section.

[11] In the present case most of the adjacent landowners were summer residents and the stop work order was removed in November, when they would ordinarily not find out about it.

[12] This point and the problems it raises are discussed in 1955 Ann. Surv. Mass. Law §18.6.

boards of appeals could not perform the purely, rather than quasi, judicial function of determining the validity of a legislative enactment.[13]

The Supreme Judicial Court's opinion in the *Atherton* case still leaves unresolved the procedural questions of whether an amendment to a zoning by-law or ordinance can be constitutionally reviewed by a board of appeals and what actually, under the statute, constitutes an appealable "order or decision" of an inspector of buildings. It is perhaps unfortunate that the Court did not at least give a guide to its probable answers to these questions, since as long as they remain unanswered, there will be procedural confusion. The Court should not, as a general practice, bind itself by attempting to suggest its solutions to problems not actually before it, but there is considerable merit in a judicial policy of settling, to the extent dictum can do so, procedural questions as completely as possible when the time of the Court permits it to do so.

§14.6. **Zoning procedure: Aggrieved landowners as intervenors.** Aggrieved landowners are not permitted to enforce zoning ordinances and by-laws by direct suit against the violator[1] but they can bring mandamus against the enforcing authority to require that it act to enforce the ordinance or by-law.[2] They have also been permitted to maintain a petition for contempt against a landowner who failed to comply with the order of a court.[3] A rather special situation, however, which arose during the 1958 SURVEY year, involves the rights of aggrieved adjacent landowners to intervene in a suit in which the municipality seeks enforcement of the zoning law against the user of certain property. In *City of Haverhill v. DiBurro*[4] the city, on May 25, 1956, brought a bill in equity to enjoin the defendant from using certain premises in violation of the zoning ordinance. The attorneys for the defendant and the city, on September 10, 1956, signed a form of final decree which recited that the bill of complaint was dismissed but the trial court did not act on this draft decree. The master, before whom the case was being heard, suspended the hearings on September 17, 1956, upon orders of the court. The court, however, on September 28, 1956, allowed a motion by certain adjacent landowners to intervene and recommitted the case to the master. On December 3, 1956, the city filed a paper stating that it withdrew from the decree dis-

[13] 1958 Mass. Adv. Sh. 511, 519, 149 N.E.2d 232, 237.

§14.6. [1] Old Colony Trust Co. v. Merchant Enterprises, Inc., 332 Mass. 484, 488, 126 N.E.2d 112, 115 (1955).

[2] Colabufalo v. Public Buildings Commissioner of Newton, 332 Mass. 748, 127 N.E.2d 564 (1955). The persons whose acts are complained of are allowed to intervene or they may be ordered into the case. City of Haverhill v. DiBurro, 1958 Mass. Adv. Sh. 481, 485, 148 N.E.2d 642, 645.

[3] Colabufalo v. Public Buildings Commissioner of Newton, 332 Mass. 748, 127 N.E.2d 564 (1955), and 336 Mass. 205, 143 N.E.2d 477 (1957).

[4] 1958 Mass. Adv. Sh. 481, 148 N.E.2d 642. The substantive zoning law of this case is discussed in §14.3 *supra*.

missing the complaint.[5] The intervenors presented all of the evidence heard by the master after the master was again ordered to proceed with the case. The Superior Court dismissed the bill of complaint of the intervenors but enjoined the defendant on the basis of the relief sought in the original complaint of the city. The Supreme Judicial Court held that the bill of the intervenors was improperly dismissed although it added that it was making "no suggestion as to their standing in respect of pressing for enforcement of the final decree." [6]

The decision is completely sound because of the special circumstances of this case wherein, at the time intervention was permitted, the enforcing authority had indicated it would not proceed with the case. The intervenors had a substantial interest in the dispute, since there is no question but that they could have brought a separate mandamus action to require the enforcing authority to act. The Supreme Judicial Court thus found that the trial court was within its discretion in admitting the adjacent landowners as intervenors, although had the city been actively proceeding with the case it was questionable if intervention would be permissible. The "substantial interest" [7] required for intervention by the adjacent landowners, therefore, is not that they have any direct right in seeing that the land was used in accordance with the zoning ordinance but that they have a right to require the enforcing authority to act. Permitting intervention in the present case did not therefore substitute the private intervenors for the public authority but merely was a means of accomplishing in the one action both the enforcement of the right of the intervenors to have the public authority act to enforce the ordinance, and the public right of the enforcing authority to require compliance with the ordinance.

The Court showed considerable wisdom in permitting this petition to intervene, as it at least assured that rights would be enforced in only one suit rather than in at least two and possibly three separate actions. The solution reached by the Court suggests that consideration might be given to legislation permitting adjacent landowners, who are aggrieved by the failure to enforce a zoning ordinance or by-law, to start proceedings directly against the offender, with the enforcing authority being given proper notice and the absolute right to intervene. The proceedings might very properly be initiated before the board of appeals[8] after notification of intent to the enforcing authority and a delay, perhaps of thirty days, to permit the enforcing authority to act first and separately if it so desired.

[5] This date was considerably after the testimony before the master was completed. Hearing on the master's draft report was held on November 29, 1956, and the final report was dated December 14, 1956. Record, pp. 15, 21.

[6] 1958 Mass. Adv. Sh. 481, 488, 148 N.E.2d 642, 647.

[7] See Check v. Kaplan, 280 Mass. 170, 178, 182 N.E. 305, 308 (1932), wherein it is stated that the intervenor must have "a substantial interest in the subject matter of the original litigation."

[8] General Laws, c. 40A, §13, permits the taking of an appeal to the board of appeals "by any person aggrieved by any order or decision of the inspector of build-

§14.7. Zoning procedure: Participation of members required for valid decision. *McHugh v. Board of Zoning Adjustment of Boston*[1] arose under the Boston zoning statute.[2] The question involved the extent of required participation by members of the board in the hearing and decision on an adjustment of zoning boundaries. The application for change in zoning boundaries was heard before nine members of the twelve-man board. The written record of the decision was signed by ten members, two of whom had not attended the hearing. The statute requires that at least four-fifths of the members of the board qualified to act sign a decision for changing zoning boundaries, but also states that "A majority of the board shall constitute a quorum for all public hearings . . ."[3] The Supreme Judicial Court decided[4] that the action of the members of the board was valid under the precise terms of the statute although, in the absence of such precise terminology, the Court has in the past required that all who signed decisions must have also attended the hearing on which the decision was based.[5] Considering the difficulty experienced in obtaining legislation from the General Court reducing the number of situations in which unanimity is required for valid decisions of boards of appeals acting under the zoning enabling act,[6] this particular statutory provision initially seems to be surprisingly lenient. The Board of Zoning Adjustment of Boston, however, is a creature of the General Court rather than the city, and members are selected from organizations whose individual members have a particular interest and knowledge of the use

---

ings or other administrative official in violation of any provision of this chapter, or any ordinance or by-law adopted thereunder." Thus, if legislation were enacted requiring the enforcing authority of a city or town to bring suit for enforcement at the instance of an aggrieved adjacent landowner, its decision not to do so would be an appealable decision under this section of the zoning enabling act.

§14.7. [1] 336 Mass. 682, 147 N.E.2d 761 (1958). The substantive zoning law aspects of this case are discussed in §14.2 *supra.*

[2] Acts of 1924, c. 488. This act is in the process of being replaced by a new zoning statute for Boston, enacted as Acts of 1956, c. 665, and amended by Acts of 1958, c. 77. See discussion of the 1958 amendments in §14.12 *infra.*

[3] Acts of 1924, c. 488, §20, as amended.

[4] Although the Court decided that the requisite numbers of members participated in the decision, it reversed the granting of the change in zoning boundaries, so that a determination on the point of participation by the members was not required to obtain the actual decision in the case. Even if viewed as dictum, however, the discussion of this procedural point will aid the board and parties appearing before it, until it is replaced by the new zoning commission. As indicated in the text supported by note 9 *infra,* the same policy exists in the new zoning law for the city. See the suggestion made in §14.5 *supra* that discussion of proper procedure, even if not a holding of the Court, would be desirable in certain cases.

[5] For a discussion of this point by the Court, see 336 Mass. 682, 684-685, 147 N.E.2d 761, 763 (1958).

[6] Acts of 1955, c. 349, relieved boards of appeals of more than four members from the requirement of unanimous agreement in certain types of cases. The statute, and the difficulties over the years in obtaining its passage, are discussed in 1955 Ann. Surv. Mass. Law §§13.3, 18.7.

of land within the city.[7] The function of the Board of Zoning Adjustment is also not that of a board of appeals, since it acts in the first instance, as a quasi-legislative body, to change the zoning regulations of the city.[8] It may thus be assumed that the General Court felt that, even in the absence of attendance at the public hearing, a reading of the record of the testimony at the hearing by members absent therefrom would insure an intelligent and informed vote, since all members are particularly qualified for their position on the board.

The new zoning law of the city of Boston provides that six commissioners constitute a quorum for public hearings relating to adoption, amendment and repeal of zoning regulations, but that at least seven commissioners must concur on the adoption, amendment or repeal of a zoning regulation and further, that concurrence by at least nine commissioners is required to override the mayor's veto.[9] The General Court has thus continued the same policy as to participation of commissioners as the *McHugh* case finds was permissible under the 1924 act, as amended. Again, not all commissioners who vote on a zoning regulation need attend the public hearing on this regulation to have their votes considered valid.

§14.8. Mill Act: Damages for flowing land. General Laws, c. 253, the Mill Act, permits certain dams to be built within the Commonwealth and prescribes the procedure to be used to assess damages to those whose land is injured by the building and use of these permitted dams. *Lombardi v. Bailey*,[1] decided during the 1958 SURVEY year, was an action under the act to recover for the flowing of plaintiffs' land caused by the dam that defendants had erected to flow their adjoining cranberry bog. Section 3 of the act provides: "The height to which the water may be raised . . . may be determined by the jury."[2] Prior to the *Lombardi* case the Supreme Judicial Court had not decided if this section required or merely allowed a finding on the permitted height of the water.[3] The Court determined that this finding was, in ordinary cases, a mandatory one, since the height of the water above the dam had to be found before the damages for flowing land could be determined. This height would also be necessary if a tort

[7] Acts of 1924, c. 488, §20, as amended by Acts of 1952, c. 109, §1. Members are representatives of such organizations as the Boston Central Labor Union, Greater Boston Chamber of Commerce and the Boston Real Estate Board. It is probable that the Board of Zoning Adjustment will be replaced by the new Zoning Commission by the time this article is published. This commission is created by Acts of 1956, c. 665, §1, as amended by Acts of 1958, c. 77, §1, and the larger part of the membership of this commission also will represent substantially the same organizations that are now represented on the Board of Zoning Adjustment under the 1924 Act.

[8] See Acts of 1924, c. 488, §§19-20, as amended.

[9] Acts of 1956, c. 665, §3, as amended by Acts of 1958, c. 77, §2.

§14.8. [1] 336 Mass. 587, 147 N.E.2d 169 (1958).

[2] Similarly, Section 9 of the act permits the jury to determine the height of the dam.

[3] The Court has collected the cases at 336 Mass. 587, 592, 147 N.E.2d 169, 173 (1958).

action was later brought for flowing beyond the height set or if the height was properly increased at a later time, since the original permitted height would be required to determine the damages. The Court recognized, however, that a finding of the height of the water might not be mandatory in cases in which there are other ready means of determining water height. On the facts of the present case the Court found that the auditor, who was the fact finder, had to make this finding and returned the case to the Superior Court for that purpose.

Damages granted under the act include past damages and damages for future injury.[4] The jury is required to assess damages "taking into consideration any damage caused by the dam to other land of the petitioner as well as the damage caused thereby to the land overflowed; and they shall also allow by way of set-off any benefit caused thereby to petitioner's land." [5] In the *Lombardi* case the auditor, acting as fact finder, accepted testimony of the net annual loss to the petitioners, without requiring testimony of gross damage and benefits resulting from the flooding. There was, however, considerable testimony as to the type of damage suffered by the property and the auditor also had the benefit of a view of the land. The Supreme Judicial Court held that there was no abuse of Superior Court discretion in accepting the auditor's finding of annual net loss, although the loss should properly be adduced by questions relating to rental values of the land before and after flowing.[6] It was suggested, however, that the Superior Court could, in its discretion, direct the auditor to show that he used the correct measure of damages, since the report had to be recommitted to permit the auditor to determine the height of the water.

B. LEGISLATION

§14.9. **Zoning Enabling Act.** Section 15(3) of the Zoning Enabling Act states the criteria that boards of appeals must find in order to grant a valid variance.[1] One of the criteria has been that "owing to conditions especially affecting such parcel or such building but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship to the appellant." A question has always existed as to what type of hardship constitutes "substantial hardship" under this criterion. The early Massachusetts zoning cases established the doctrine that the financial situation of the landowner will not alone con-

[4] G.L., c. 253, §§8, 10.

[5] Id. §8.

[6] See Howe v. Ray, 113 Mass. 88 (1873); Palmer Co. v. Ferrill, 17 Pick. 58 (Mass. 1835). The test of damages is the same as that applied in eminent domain cases. G.L., c. 79, §12.

§14.9. [1] G.L., c. 40A, §15(3). The criteria established by this section have been substantially in effect since the initial adoption of a zoning enabling act in 1920. Acts of 1920, c. 601, §§2, 9. The full statement of the present criteria, however, was not adopted until Acts of 1933, c. 269, §1.

stitute sufficient grounds for granting a variance.[2] Without question this is sound since, as the Court has stated [3] and the statute specifically requires,[4] the variance power must be exercised to preserve the public good and it is only when the public good will not be harmed that a variance can be granted upon the statutorily required further showing of "substantial hardship" and "conditions especially affecting" the land "but not affecting generally the zoning district."

The holdings of the Supreme Judicial Court in several recent cases have, however, suggested that "substantial hardship" under the statute can never be purely financial hardship but must at least include hardship other than an economic one.[5] If the opinions of the Court are analyzed properly this is not what the Court is actually saying. The Court is making clear that either the other element of the requirement on the individual landowner, the uniqueness of his property in relation to others similarly zoned,[6] or the requirement that the public good must be considered [7] has not been met. These statements of the Court are and have been needed, since it is certain that variances are sought by landowners in all but a few cases for the purpose of economically benefiting themselves. The arguments they make concerning the uniqueness of their property and the lack of detriment to the public good and the zoning system are essentially afterthoughts made to comply with the statute. The Court must continually emphasize for the benefit of boards of appeals and landowners that the financial posi-

[2] See, e.g., Phillips v. Board of Appeals of Building Department of City of Springfield, 286 Mass. 469, 472, 190 N.E. 601, 602 (1934); Amero v. Board of Appeal of City of Gloucester, 283 Mass. 45, 52, 186 N.E. 61, 63 (1933); Prusik v. Board of Appeal of Building Department of City of Boston, 262 Mass. 451, 457, 160 N.E. 312, 314 (1928). See also the more recent cases of Everpure Ice Manufacturing Co. v. Board of Appeals of Lawrence, 324 Mass. 433, 438, 86 N.E.2d 906, 910 (1949); Real Properties, Inc. v. Board of Appeal of Boston, 319 Mass. 180, 183, 65 N.E.2d 199, 201 (1946). This is the general view in this country. See Annotation, 168 A.L.R. 13, 30-33 (1947).

[3] See Everpure Ice Manufacturing Co. v. Board of Appeals of Lawrence, 324 Mass. 433, 438-439, 86 N.E.2d 906, 910-911 (1949); Prusik v. Board of Appeal of Building Department of City of Boston, 262 Mass. 451, 457, 160 N.E. 312, 314 (1928).

[4] General Laws, c. 40A, §15(3), permits the grant of a valid variance only "where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law . . ." This is, of course, an additional requirement to the criterion dealing with the private landowner and his property.

[5] See Reynolds v. Board of Appeal of Springfield, 335 Mass. 464, 469-470, 140 N.E.2d 491, 496 (1957); Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 450, 136 N.E.2d 198, 200 (1956). The 1958 SURVEY year case of Vainas v. Board of Appeals of Lynn, 1958 Mass. Adv. Sh. 895, 898, 150 N.E.2d 721, 723, also upholds without comment a finding by the Superior Court that no "substantial hardship" existed, although the Superior Court's finding included a statement that financial hardship alone could not be "substantial hardship" under the statute. For the statement of the Superior Court, see note 10 *infra*.

[6] See Reynolds v. Board of Appeal of Springfield, 335 Mass. 464, 470, 140 N.E.2d 491, 496 (1957); Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 450, 136 N.E.2d 198, 200 (1956).

[7] See Blackman v. Board of Appeals of Barnstable, 334 Mass. at 450, 136 N.E.2d at 200.

tion of a landowner is not enough to warrant the grant of a variance.

The Court has also, in these cases faced situations in which property was usable in accordance with the zoning restrictions applicable, but a more profitable use could be made of it if the zoning was liberalized.[8] This type of case is essentially and importantly different from those in which a building or land is basically unusable under the zoning restrictions applicable to it.[9] In this later type of case there is true financial hardship but in the first type of case there is, correctly speaking, no hardship at all but merely a question of financial gain. When only a question of financial gain is involved, the grant of a variance will in all but a very few situations fail because the landowner cannot show that his land is unique in this respect from others in the zoning district.

While the Court has not meant to change its interpretation of what constitutes "substantial hardship" under the statute, there has been some doubt concerning the meaning.[10] Acts of 1958, c. 381, which adds to Section 15(3) of the Zoning Enabling Act the phrase "financial or otherwise" immediately following "substantial hardship," is a clarifying amendment.[11] It does, of course, remove any doubt that financial hardship alone, if of a substantial nature, and if all other

[8] In Vainas v. Board of Appeals of Lynn, 1958 Mass. Adv. Sh. 895, 150 N.E.2d 721, the landowner sought a variance permitting a full third story on a two and one-half story building. For a discussion of this case, see §14.1 *supra*. In Reynolds v. Board of Appeal of Springfield, 335 Mass. 464, 140 N.E.2d 491 (1957), the landowner sought permission to transfer a dwelling house into a nursing home. In Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 136 N.E.2d 198 (1956), the landowner sought a variance to establish a bathhouse on beach property zoned for residential purposes, a variance having previously been granted to permit use of the property for parking.

[9] The 1958 SURVEY year case of Rodenstein v. Board of Appeal of Boston, 1958 Mass. Adv. Sh. 599, 149 N.E.2d 382, discussed in §14.1 *supra*, illustrates a situation in which land is unusable for the purposes for which zoned.

[10] See, e.g., Record, p. 9, in Vainas v. Board of Appeals of Lynn, 1958 Mass. Adv. Sh. 895, 150 N.E.2d 721, wherein the Superior Court states in its findings: "It might be financially more beneficial to the *Owner* if the variance were granted, but the only hardship, if any, which he would suffer from the denial of the variance would be of a financial nature. There was no evidence before me as to the amount or extent of any such financial hardship. I find that any such financial hardship is not a 'substantial hardship' within the meaning of General Laws (Ter. Ed.), Chapter 40A, Section 15; and if a mere financial hardship can be or become a 'substantial hardship' within the meaning of such quoted words as used in said statute, then I find that the amount of any financial hardship which the *Owner* would suffer by a denial of this variance would not be substantial."

[11] The part of Section 15(3) amended now reads: ". . . owing to conditions especially affecting such parcel or such building but not affecting generally the zoning district in which it is located a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, *financial or otherwise* to the appellant . . ." The italicized words are those added by the amendment.

The act, as originally filed as House No. 3008, would quite possibly have changed the results of the Massachusetts cases, even though as actually enacted it merely restates the present doctrine. The proposed act would have added, after the part of the section quoted above, the phrase ". . . not commensurate with benefit received by the municipality by the restricted use of said premises."

requirements of the statute are met, will permit the grant of a variance. For the reasons stated above in this section, however, the amendment does not in any sense change the result of the cases that gave rise to the amendment; it will merely remove doubts some have felt because of the opinions of the Court in some recent cases.

Section 21 of the Zoning Enabling Act,[12] providing for appeals to the Superior Court, was modified by Acts of 1958, c. 175. The appeal must now be filed within twenty days after the decision has been filed with the office of the city or town clerk, in place of within fifteen days after the decision is recorded. Since Section 18 of the Zoning Enabling Act prescribes filing with the town or city clerk as the means of making decisions of the board matters of public record, this change merely increases the time allowed for appeals by an additional five days. The change conforms the appeal period to that already prescribed for appeals from actions of planning boards.[13] The amendment also adopts a new provision that the notice of the appeal must be given to the city or town clerk in time to be received by him within the twenty-day appeal period. This notice, therefore, will also make the appeal a matter of public record.

Acts of 1958, c. 202, clarifies the provision of the Zoning Enabling Act relative to the appointment and use of associate members of boards of appeals.[14] The chairman of the board is given specific authority to designate an associate member to sit in the absence of a regular member as well as in the previously covered situations of a regular member not acting because of inability or interest. The provision for assignment by the chairman of an alternate to sit when a vacancy occurs is clarified to indicate that the member so designated will continue to sit until the vacancy is properly filled.[15]

§14.10. Subdivision Control Law. The Subdivision Control Law,[1] as adopted in 1953,[2] has fulfilled its general purposes quite adequately but, as with all extensive and essentially novel legislation, amendments are required to clarify provisions that have proven vague, inexact or incomplete in practice. The purpose of subdivision control is to develop proper land use in subdivisions and within communities but the law has, in certain instances, acted so as to interfere with prompt development even in instances in which the land use plan was appropriate. During the 1958 SURVEY year the General Court adopted four amendments to the Subdivision Control Law which should insure more efficient as well as more correct practices under the law.[3]

Action on subdivision plan. The most extensive amendment com-

[12] G.L., c. 40A, §21.

[13] G.L., c. 41, §81, prescribing 20-day appeal period.

[14] Id. §14.

[15] The same clarification was made by Acts of 1958, c. 201, to the boards of appeals provision of the Subdivision Control Law, G.L., c. 41, §81Z.

§14.10. [1] G.L., c. 41, §§81K-81GG.

[2] Acts of 1953, c. 674.

[3] Acts of 1958, cc. 201, 206, 207, 377.

pletely replaced Section 81U of the law, which covers approval, modification or disapproval of a subdivision plan.[4] The amendment is designed to expedite the planning board process by the insertion of detailed procedural instructions on certain points, without making any major changes in substantive requirements. The section before amendment provided that within ten days of submission of the plan to the planning board the board should consult with the local board of health[5] as to whether use of the subdivision or part of it for building sites would present a public health problem. The amendment requires the developer to file a copy of his definitive plan concurrently with the local board of health and the planning board. The board of health must act within forty-five days, failure to act being deemed approval of the public health aspects of the plan. The powers given to the board of health has been specified in greater detail by the amendment and it must now give its reasons for disapproval of any building site and, if possible, its recommendations for adjustments necessary to remove the health hazard. The new provisions, in specifying the duties and responsibilities of local boards of health, will largely avoid the confusion of diverse local requirements, and will insure that all parties interested in the plan understand the duties and obligations of the others.

The planning board under Section 81U has always had the power to require provision for construction of ways and installation of municipal services. The developer could secure this construction and installation by either a bond or deposit of securities or by subjecting the plan to a condition that no lot would be sold and no building would be constructed until the construction of ways and installation of municipal services were completed, subject to certain exceptions. This part of the section was incomplete and insufficiently detailed to furnish adequate guides to planning boards and developers, and the 1958 amendment is designed to clarify these provisions so that they are more completely workable. In addition the amendment has changed the provision that performance may be secured by a condition to the plan to a provision that it may be secured by a duly recorded covenant running with the land.[6] This provision will avoid the confusion that

[4] Id., c. 377.

[5] The provisions of the section, both before and after amendment, apply to local boards of health or to such board or officer having public health powers and duties.

[6] The planning boards of some cities and towns within the Commonwealth have, as is well known, at times used the indefiniteness of the statute to prevent development of subdivisions that have met all legal requirements. See Muldoon, The Practical Background of the Zoning and Planning Problems of the Present and Future, 43 Mass. L.Q. No. 2, pp. 13, 16-17 (1958). As Muldoon points out, land use planning is not a purely local problem, particularly in eastern Massachusetts where the economies of the communities around Boston are completely intertwined. Thus the greater detailing of the duties and powers of planning boards and other land use bodies is a desirable development as it will help prevent local pressures within one community from affecting, perhaps seriously, the other communities contiguous to it. The other alternative, as Muldoon comments, is a state rather than local system of land use planning.

has existed as to whether deeds violating the restraint are voidable or void by making them specifically voidable within three years from the date of the deed.

Preliminary plans. One of the major difficulties with the Subdivision Control Law has been the inexactness and incompleteness of the provisions relating to the preliminary plans that may be submitted to planning boards. Acts of 1958, c. 205, is designed to remove from the law on this subject the ambiguities that have been discovered in its application.

A new definition is inserted in Section 81L, to define "preliminary plan." [7] One of the greatest problems under the law has been the uncertainty as to what should be included in the preliminary plan that may be submitted to the planning board by the developer. Because of this uncertainty local planning boards have instituted many diverse requirements. This new definition will now furnish the necessary guide to both builders and planning boards, and should remove one of the major sources of delay in obtaining approval of a subdivision plan.

Section 81S of the law, on submission of preliminary plans, is completely replaced by the amendment, but the amendment makes only two changes of substance.[8] It modifies the section to make it clear that any person may submit a preliminary plan and, if he does, must comply with certain prescribed notice provisions. It also provides that the board may disapprove the plan and, in that case, must indicate its reasons for disapproval.[9]

The amendment also inserts a new sentence in Section 81Q of the law, which governs adoption of rules and regulations by the planning boards.[10] The new provision prescribes the standards that the planning board will use in approving or disapproving the preliminary plan, and the definitive plan derived therefrom, as those standards in effect at the time of submission of the preliminary plan.[11]

Certificate of appeal. Acts of 1958, c. 207, is also an amendment to the Subdivision Control Law. It adds an additional requirement before a register of deeds can record a subdivision plan approved by the planning board. The plan must, under the amendment, bear a certificate of the clerk of the city or town that no notice of appeal was

[7] Acts of 1958, c. 206, §1.

[8] Id. §2.

[9] The original Section 81S did, by the use of the words "may give such preliminary plan its tentative approval," give the planning board by inference the power to disapprove the plan. There was, however, no provision requiring the board to state its reasons for disapproval.

[10] Acts of 1958, c. 206, §3.

[11] This, of course, can avoid the difficulty created for a builder by a board changing its standards to avoid approval of the subdivision plan. This provision carries forward the policy of Acts of 1956, c. 307, prohibiting a planning board from making a change in its rules and regulations applicable to a pending matter. See 1956 Ann. Surv. Mass. Law §1.3. Protection of subdivision developers from zoning ordinance and by-laws changes was also given by Acts of 1957, c. 297. See 1957 Ann. Surv. Mass. Law §11.3.

received during the twenty days following receipt and recording of the notice of approval of the plan by the planning board.

Associate members of boards of appeals. Acts of 1958, c. 201, clarifies the provisions of the Subdivision Control Law relative to the appointment of associate members of the boards of appeals.[12] The chairman of the board is given specific authority to designate an associate member to sit in the absence of a regular member in addition to the situations covered in the original section, i.e., when a regular member cannot act because of inability or interest. The provisions for assignment by the chairman of an alternate member to sit when a vacancy occurs on the board is clarified to indicate that the member so designated will continue to sit until the vacancy is properly filled.[13]

§14.11. Construction by the Commonwealth: Damage to privately owned land. One of the major problems connected with construction by and for the Commonwealth has been that damage is often done, during blasting and drilling operations, to near-by property that has not been taken by eminent domain. The problem is illustrated by *Sullivan v. Commonwealth,*[1] discussed in the 1957 ANNUAL SURVEY,[2] in which blasting done by a contractor "in a careful and approved manner" set up vibrations in a rock formation that caused considerable damage through the cracking of plaster and the breaking of a water pipe. The plaintiff landowner did not recover since no statutory authority existed for the payment of damages on these facts and there could be no recovery on a nuisance theory since the Commonwealth had not consented to be sued in tort. The damage was also held not to be a "taking" of private land for public use and therefore the constitutional requirement of payment did not apply. In another case, *Webster Thomas Co. v. Commonwealth,*[3] also discussed in the 1957 ANNUAL SURVEY,[4] recovery was permitted upon basically similar facts because the statute governing the laying out of state highways permits recovery for damage caused to near-by property by the construction work.[5] The contrary results of these and similar cases, when damage arises from basically similar injuries, has prompted the General Court to create a special commission to study the problem of this type of damage and to determine the feasibility of compensating landowners for their injuries.[6]

One of the penalties landowners properly suffer as members of a community is that the use of their land is subject to control for social purposes, and may consequently have a lower value than if its use were unrestricted. It is also proper for the community to do work for social

[12] G.L., c. 41, §81Z.

[13] The same correction is made by Acts of 1958, c. 202, to the board of appeals provisions of the Zoning Enabling Act, G.L., c. 40A, §14.

§14.11. [1] 335 Mass. 619, 142 N.E.2d 347 (1957).

[2] See 1957 Ann. Surv. Mass. Law §§22.1, 29.7.

[3] 336 Mass. 130, 143 N.E.2d 216 (1957).

[4] See 1957 Ann. Surv. Mass. Law §29.7.

[5] General Laws, c. 81, §7, permitted recovery in this case.

[6] Resolves of 1958, c. 14.

purposes, such as building roads, near private property and this, too, may lower the value of the land. Thus, in considering the problem of damage to land that may be caused by work done by the community for social purposes we could treat these damages as one of the expenses private landowners must accept as a price of being a member of the community. But there is a distinction between the lowering of market value and actual physical damage to property, since the physical damage must ordinarily be repaired immediately, and the expense may be a heavy burden to the landowner. And we have a feeling of injustice when two landowners similarly injured, as illustrated by the *Sullivan* and *Webster Thomas Co.* cases, do not receive similar damages. Some provision for compensation for damages done to all near-by property by work done by or for the Commonwealth is just and proper.

The solution of this problem should be the imposition of an absolute liability on the Commonwealth, with a provision that damage up to a certain amount remain uncompensable. The eminent domain cases, and the inexactness of the test used in these cases, makes a taking test inadequate since few if any of these damages constitute a taking.[7] Recovery should not be based upon any theory of nuisance, since it is not the negligence of the Commonwealth and its agents, but the damage done to private land, that is in issue. The only proper theory of liability is therefore one based on absolute liability. The Commonwealth should, however, have the defense of negligence on the part of the landowner, and should only have to pay damages to compensate for those injuries that proper action by the landowner could not prevent. To avoid a multiplicity of small claims, some minimum limit on liability should be imposed. Landowners, as members of a community, may properly not receive compensation for all the damages they have suffered.[8] It would seem most fair to have this recommended minimum some percentage of the assessed value of the property, perhaps one-half of one percent. Thus, for example, damages of over fifty dollars to property assessed at $10,000 would be paid by the Commonwealth, and the landowner would receive no compensation for damages up to fifty dollars.

§14.12. Local zoning legislation. The most important Massachusetts statute governing the details of zoning in a particular locality is the Boston zoning law, first adopted in 1924.[1] In 1956 the General Court enacted a new zoning law for the city of Boston, which has recently been accepted by the city.[2] Acts of 1958, c. 77, amended the

[7] See comment in 1957 Ann. Surv. Mass. Law §22.1.

[8] Setting a limit on damages would not seem to be objectionable on constitutional grounds. Certainly there is no requirement of compensation under the present law of the Commonwealth, except as it is given by statute. The proposed limit would treat each owner equally and the test based on assessment value of the property is a means courts would accept as within the discretion of the legislature.

§14.12. [1] Acts of 1924, c. 488, as amended.

[2] Acts of 1956, c. 665. As of September 15, 1958, the mayor had nominated the commissioners for the zoning commission created under the new act, but the city council had not yet acted on the nominations. The 1956 act will not completely replace the 1924 act until the zoning commission has prepared a zoning plan for

1956 zoning law for Boston, the most important change being an increase in the membership of the zoning commission, which will replace the board of zoning adjustment under the 1924 law.[3] Eleven, instead of nine, commissioners are now authorized, the additional two commissioners being selected at large by the mayor. Of the new total of three commissioners appointed at large by the mayor, at least one must own, alone or with others, and must occupy in whole or part as his residence a dwelling house having three or less dwelling units. The amendment also requires the mayor's appointments of all commissioners be confirmed by the city council. The 1956 act provided that any person, whether or not a resident of the city of Boston, who was a member of the board of zoning adjustment under the 1924 act, could act as a zoning commissioner, although generally commissioners must be residents of Boston. Because of the delay in the acceptance of the act by the city council of Boston, the 1958 amendments have made this provision applicable to members of the board who are members at the time of acceptance rather than passage of the 1956 act. Provision is also made to stagger the terms of the three commissioners that are appointed at large by the mayor, and all terms of commissioners will commence as of May 1, 1958.

Because of the increase in total number of commissioners, certain provisions relating to the number of commissioners who must act have been changed by the 1958 amendments. At least six commissioners are required for a quorum at a public hearing on zoning regulations.[4] Zoning regulations may be adopted, amended or repealed by a concurring vote of at least seven commissioners. The mayor has the right to veto these changes, and the concurring vote of at least nine commissioners is required to override his veto.[5]

Legislators have become increasingly aware that land use planning should properly consider factors other than those of a direct economic nature.[6] Massachusetts has recently enacted several statutes designed to preserve historic landmarks and areas, and to prevent the demolition of buildings and exterior alterations that would not be appropriate to the character of the district.[7] The Supreme Judicial Court has held in advisory opinions that these historic district statutes are well within the police power of the Commonwealth.[8]

---

the city, which will not take effect until twelve months have passed after filing of this new zoning plan with the General Court.

[3] Acts of 1924, c. 488, §20, as amended.

[4] Acts of 1958, c. 77, §2.

[5] The mayor's power to appoint at large three commissioners out of the total of eleven, along with the number required to override a veto, gives the mayor considerable power in preventing changes in the zoning law that he considers unwise or inappropriate.

[6] See, e.g., the provision in the new Boston zoning statute, Acts of 1956, c. 665, §2, which lists as one of the criteria for change, amendment and repeal of zoning regulations the preservation and increasing of amenities of land in the city.

[7] See, e.g., Acts of 1955, c. 601 (Nantucket); id., c. 616 (Beacon Hill in Boston); Acts of 1956, c. 447 (Lexington).

[8] Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); Opinion of the

Several amendments to Acts of 1955, c. 616, creating the Historic Beacon Hill District of Boston, were adopted during the 1958 SURVEY year. The area covered by the district was increased.[9] Provisions relating to the issue of permits, demolition of buildings, and enforcement have been altered and the act now covers as an additional requirement on landowners that the exterior color of a building not be changed without a permit.[10] Acts of 1956, c. 477, setting up an Historic Districts Commission in the town of Lexington, was amended by Acts of 1958, c. 185. The amendments change the method of selection of alternate members of the commission, make certain procedural changes, and permit the color of any building in the historic districts to be changed to white without the necessity of obtaining a permit.

§14.13. **Housing Authority Law.** Acts of 1957, c. 613, redefined "blighted open area" in the Housing Authority Law[1] to include recreational, commercial and industrial purposes, as well as the predominately residential purposes that were only permitted previously.[2] Acts of 1958, c. 198, corrected the definition of "land assembly and redevelopment projects"[3] so as to include these additional purposes in reference to action the project may take in relation to "blighted open areas."

Acts of 1958, c. 199, provides authority for appropriations by cities and towns having a redevelopment authority for the initial costs and annual administrative expenses of the authority.[4] Annual amounts that can be appropriated are limited on a scale based on valuations in the city or town. Authority is given, however, to appropriate additional amounts for estimates, plans, orders of taking and contract documents in connection with land assembly and redevelopment projects and urban renewal projects, with a provision that the city or town shall be reimbursed if the authority later receives money from other sources for these purposes.

§14.14. **Agricultural land use.** Resolves of 1958, c. 99, revives and continues the special commission studying the use and preservation of agricultural land in the Commonwealth.[1] Although Massachusetts is not primarily a farm state and has only a small amount of relatively poor land devoted to farming, an imaginative approach by this commission could do much to improve and develop farm land use. A close study of the type of farm operations that will be most successful in the state now and in the future, and land use and zoning plans effec-

---

Justices, 333 Mass. 783, 128 N.E.2d 563 (1955). These opinions are commented on in 1955 Ann. Surv. Mass. Law §11.6.

[9] Acts of 1958, c. 315.

[10] Id., c. 314.

§14.13. [1] G.L., c. 121, §§26I-26CCC.

[2] See 1957 Ann. Surv. Mass. Law §29.4.

[3] G.L., c. 121, §26J.

[4] The act adds a new paragraph to id. §26QQ.

§14.14. [1] The commission was originally created by Resolves of 1957, c. 76.

tuating these determinations, will markedly aid the farm economy and with it the entire economy of the Commonwealth.

§14.15. Explosives on property: Removal of hazardous conditions. General Laws, c. 148, §13, provides for the licensing of land by local licensing authorities for use of structures thereon for the storage, keeping, manufacture or sale of explosives and inflammables.[1] Acts of 1958, c. 251, amended this section to add a requirement that, within three weeks from the time the property is no longer being used for the licensed purpose, the licensee remove any hazardous condition incident to cessation of the use. Provision is made that, on failure of the holder of the license to act, the city or town can remove the hazardous conditions, charging the holder of the license for its work, and the statement of claim, when properly registered, becomes a lien on the land if the claim is not paid.

§14.16. Signs and structures projecting over public ways. General Laws, c. 85, §8, gives municipal authorities having charge of public ways the power to grant permits for signs, clocks, permanent awnings and other similar structures that project into or are placed over or on public ways. Section 9 has exempted certain of these structures from permit requirements, provided that they do not extend into or over the public way more than six inches.[1] Acts of 1958, c. 158, has amended this exemption section to increase to twelve inches the distance of extension into or over the public way.

§14.15. [1] The types of explosives and inflammables covered by the licensing provision are listed in G.L., c. 148, §9.

§14.16. [1] Section 9 also exempts poles, wires, conduits and appurtenances of various public utilities from the permit requirement.