Annual Survey of Massachusetts Law

Volume 1967 Article 14

1-1-1967

Chapter 11: Land Use Planning Law

Julian J. D'Agostine

Richard G. Huber

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

Part of the Land Use Planning Commons

Recommended Citation
D'Agostine, Julian J. and Huber, Richard G. (1967) "Chapter 11: Land Use Planning Law," *Annual Survey of Massachusetts Law*: Vol. 1967, Article 14.

CHAPTER 11

Land Use Planning Law

JULIAN J. D'AGOSTINE *and* RICHARD G. HUBER

A. ZONING

§11.1. **Denial of variance: Judicial review.** In *Pendergast v. Board of Appeals of Barnstable,*[1] the Supreme Judicial Court determined that a reviewing court could only reverse a denial of a variance by a local board of appeals if one of two situations existed: (1) the variance was denied "solely upon a legally untenable ground" and the board stated that the variance would have been granted but for that ground; or (2) the decision not to grant the variance was "unreasonable, whimsical, capricious, or arbitrary and so illegal."[2] This standard of review was based, first, upon the general concept of the proper scope of judicial review of an administrative decision and, second, upon the concept that no person has a legal right to a variance or a permit for an exception. For a number of years no case came before the Court that required more than a routine citation of *Pendergast.* In *Mahoney v. Board of Appeals of Winchester,*[3] however, the Court found that the board's denial of a special permit was arbitrary and directed that the decision be annulled; a similar result was reached in *Lombard v. Board of Appeal of Wellesley.*[4] While these cases represented no erosion of the *Pendergast* doctrine, they did reflect that the Court would give a more detailed consideration to the grounds given by boards of appeals for their decisions and would make a closer examination of the specific facts of the cases.

During the 1967 SURVEY year, *Lapenas v. Zoning Board of Appeals of Brockton*[5] reflected the closer scrutiny the Court now seems to be giving variance and permit denial cases. Two property owners owned tracts of land, located almost entirely in Abington. Each tract, how-

JULIAN J. D'AGOSTINE is a member of the Massachusetts Bar and practices in Acton, Massachusetts. He is a member of the Massachusetts Conveyancers Association and has been a guest lecturer in land use law at Suffolk University Law School.
RICHARD G. HUBER is Professor of Law at Boston College Law School and is Faculty Editor-in-Chief of the Annual Survey.
Mr. Huber wrote §§11.1 through 11.5, the balance being written by Mr. D'Agostine.

§11.1. [1] 331 Mass. 555, 120 N.E.2d 916 (1954), noted in 1954 Ann. Surv. Mass. Law §14.25.
[2] 331 Mass. at 559-560, 120 N.E.2d at 919.
[3] 344 Mass. 598, 183 N.E.2d 850 (1962), noted in 1962 Ann. Surv. Mass. Law §13.6.
[4] 348 Mass. 788, 204 N.E.2d 471 (1965), noted in 1965 Ann. Surv. Mass. Law §14.11.
[5] 1967 Mass. Adv. Sh. 843, 226 N.E.2d 361.

ever, included a narrow strip located in Brockton in an area which was zoned residential. The landowners were denied variances to permit the use of their narrow strips of Brockton land as access to their individual tracts located in Abington, which were both zoned and being used for commercial purposes. The Brockton board had denied the variances on the bases that the requirements of General Laws, Chapter 40A, Section 15(3), were not met and because such use for access to commercial property would derogate from the intent of the Brockton ordinance. The Supreme Judicial Court quickly disposed of the argument based upon the intent of the Brockton ordinance. Brockton had no interest in the Abington land, and its interests in protecting the residential areas across the road from the strips involved in the variance proceedings certainly would have been met by a variance that would keep those strips free of buildings. The Court stated: "We think that Brockton's zoning interests support no more than this."[6]

Under the particular circumstances of this case, the Court did not feel it necessary to remand the case to the board to reconsider its decision upon the basis of the corrected interpretation of the intent of the Brockton ordinance. While the board had not specifically stated, under the *Pendergast* formula, that it would have granted the variances except for the untenable ground of ordinance misinterpretation, the Court found that a refusal to grant them would now be capricious and arbitrary. Thus, a remand to the board for a decision that could only result in the grant of the variances would be a formality. Thus, a direct reversal would not infringe on the power of the local board to exercise its administrative discretion. This decision was fortified by the Court's determination that the petitioners could have successfully maintained an action to be relieved from the literal effect of the zoning ordinance.[7]

When the Court, in *Pendergast,* stated that no person was legally entitled to a variance, it was correct in the purely literal sense. As evidenced, however, in *Mahoney* and again even more clearly in *Lapenas,* fact situations do exist in which a person is entitled to affirmative relief from the application of the zoning laws. It would appear ridiculous to remit such a person solely to actions for a declaratory judgment that the application of the local ordinance to his property was beyond the power of the board, when he had sought a variance and the Court determines that he is entitled to one. The Court's opinion in *Lapenas* recognized that, on the facts of the case, such a disposition would be hair-splitting of a hyper-technical nature. Thus, the Court now appears to be recognizing that one of the two stated bases for *Pendergast* — that no one is entitled to a variance — has little meaning in some fact situations. *Pendergast's* continuing vitality, therefore, must depend upon the conventional limitations imposed

[6] Id. at 846, 226 N.E.2d at 364.

[7] Such an action may be brought under G.L., c. 185, §1(j 1/2), and G.L., c. 240, §14A.

upon judicial review of administrative decisions. This would seem to provide fully adequate protection to decisions of local boards of appeals, which will continue to retain the usual discretion given to administrative bodies, subject to the usual limitations of judicial review.

§11.2. **Non-conforming uses.** The continuation of uses which do not conform to the appropriate zoning ordinance, when enacted, are expressly protected by the Zoning Enabling Act.[1] If the traditional view is adopted that one of the major purposes of zoning should be to eliminate non-conforming uses,[2] courts undoubtedly should limit strictly any modifications in non-conforming uses. Strict limitations will inhibit the ability of such uses to keep pace with technological and commercial changes; and thus will hasten the elimination of the non-conforming uses. In *Town of Seekonk v. Anthony*[3] and *Town of Wellesley v. Brossi,*[4] the Supreme Judicial Court appeared to adopt such a policy in strictly limiting expansion of non-conforming uses to improve the users' competitive position.

The certainty that non-conforming uses are inevitably incompatible with the zoning plan, however, has suffered rather severe erosion. Most planners today recognize that the rather simple zoning patterns still prevalent in most communities tend unnecessarily to restrict non-conforming uses which are compatible with the objectives of the zoning plan, while correctly, in terms of planning objectives, restricting incompatible non-conforming uses. While not a factor recognized in the Enabling Act[5] or in the usual local regulations, a determination of whether a given modification of a non-conforming use should be permitted can most properly be made on the basis of compatibility. Thus, even a relatively major change in a non-conforming use should be permitted if the use, as modified, is compatible with desirable zoning and planning objectives. Even a minor change in non-conforming uses, however, should be objectionable if the use, as modified, conflicts with zoning objectives.

The disposition of *Morin v. Board of Appeals of Leominster*[6] suggests that the Supreme Judicial Court is well cognizant of the desirability of permitting modifications which are compatible with the zoning plan. The locus, owned by Camire, included a house and barn. In cold weather Camire ran a one-man printing concern in the house, and in warmer weather he ran the concern in the barn. The locus was zoned residential. In 1954, Camire received a so-called "variance" permitting him to use his dwelling as a year-round printing office. In

§11.2. [1] G.L., c. 40A, §5.

[2] See Russian Hill Improvement Ass'n v. Board of Permit Appeals of San Francisco, — Cal. 2d —, 423 P.2d 824 (1967), for a recent expression of this view, most authoritatively and originally stated in Bassett, Zoning §10.5 (1936).

[3] 339 Mass. 49, 157 N.E.2d 651 (1959), noted in 1959 Ann. Surv. Mass. Law §12.2.

[4] 340 Mass. 456, 164 N.E.2d 883 (1960), noted in 1960 Ann. Surv. Mass. Law §13.2. See also 1964 Ann. Surv. Mass. Law §14.12.

[5] G.L., c. 40A, §5.

[6] 1967 Mass. Adv. Sh. 951, 227 N.E.2d 466.

1963, because of family growth, he sought and received a "variance" to modify the barn on the premises so that the printing business could be conducted therein, rather than in the dwelling where it had been conducted exclusively for the immediately preceding nine years.

The Supreme Judicial Court affirmed the lower court's holding that the so-called "variances" were in excess of the board of appeals' authority.[7] Camire obviously had a non-conforming use for a one-man printing business on the locus, and the issue, therefore, was whether the barn could still be used for this business. The barn had been so used at the time of the adoption of the zoning ordinance and no provision in the ordinance terminated a non-conforming use for abandonment. Thus the Court correctly concluded that the barn could still be used for the business, even after nine years of non-use.

The use, by Camire, of an automatic printing press was also contested. Although it was not clear whether the press had been in use when the zoning ordinance was passed, the Court found that the use of improved and more efficient instrumentalities in the pursuit of the non-conforming use did not affect the determination that the present use was a continuation of the originally permitted use. Such changes as may have occurred did not change the original nature and purpose of the business, and thus the strict limitations reflected by the *Anthony*[8] and *Brossi*[9] opinions were not in issue.[10]

Had the printing business in the present case constituted, in any sense, a serious breach of the zoning pattern or a near nuisance in the zoning district, the Supreme Judicial Court might well have reached another result. The adjoining landowner, however, could only testify that he was occasionally annoyed by a "thump" when the automatic press was in use. Thus the non-conforming use was not incompatible with the planning and zoning considerations affecting the area surrounding the locus. Limitations on the changes in the non-conforming use, where the changes are of a relatively minor nature such as were involved in the *Morin* case, would serve no valid public purpose and would result in the elevation of form over substance.

§11.3. Eminent domain: Conflicts between public uses. As has been noted in earlier SURVEYS,[1] the increased demand for land required to carry out new and extended public projects has created a number of conflicts when land devoted to one public use is sought for another public use. It appears that no single procedure for settling these disputes is suitable in all situations, but one may well wonder at the rather frequent necessity, in the Commonwealth, of having such

[7] See G.L., c. 40A, §15(3). For a discussion of the statutory requirements, see 1960 Ann. Surv. Mass. Law §13.1.

[8] Town of Seekonk v. Anthony, 339 Mass. 49, 157 N.E.2d 651 (1959).

[9] Town of Wellesley v. Brossi, 340 Mass. 456, 164 N.E.2d 883 (1960).

[10] The Court found Town of Wayland v. Lee, 325 Mass. 637, 643, 91 N.E.2d 835, 839 (1950), controlling on this issue.

§11.3. [1] See 1965 Ann. Surv. Mass. Law §14.25; 1963 Ann. Surv. Mass. Law §13.15.

disputes settled by the courts. Certainly any efforts to improve the law of eminent domain in this Commonwealth should consider methods of settling such conflicts as one of the most important problems to be solved.

Sacco v. Department of Public Works[2] was an action brought by residents of the town of Arlington[3] to enjoin the Department from filling a portion of Spy Pond in connection with the widening of Route 2. The lower court's decree dismissing the bill was reversed in the Supreme Judicial Court. The Court first noted that under the provisions of General Laws, Chapter 91, Section 19, great ponds cannot be filled except "as authorized by the general court and as provided in this chapter [91]." The Court then restated the established doctrine that "plain and explicit legislation" is required before land devoted to one public use can be diverted to a second public use.[4] It found no such authority in the general power, relied on by the Department, to take "such public . . . lands . . . or parts thereof or rights therein . . . as it may deem necessary. . . ."[5] The Court also found that the proposed use as a highway was inconsistent with the present use as a pond, and, therefore, the Department could not rely on the doctrine that slight indications of legislative intent permit a taking for a consistent use.

This policy of preserving one public use from encroachment by another, even if of equal or perhaps greater importance, is consistent with prior holdings, which the Department ingeniously attempted to distinguish.[6] The decision, however, did not settle the issue except on the basis of priority of use. The Court may not have had any other reasonable choice, given the status of previous decisions and the statutory framework within which the courts must operate.

The problem, however, is in need of legislative solution. The legislature presently confronts these questions on an ad hoc, case by case, basis. Determinations based solely on a particular agency's persuasiveness with the legislature, if this results in giving a blanket priority to that one agency, are not always ideal ones. Highways, for example,

[2] 1967 Mass. Adv. Sh. 1005, 227 N.E.2d 478.

[3] The issue of the plaintiffs' standing to bring this suit was raised in the pleadings but not pressed by the Department. The question of standing can be vital in a case, but it is often not raised. See §11.5 *infra*. For a discussion of standing in the urban renewal context, see 1965 Ann. Surv. Mass. Law §14.31.

[4] 1967 Mass. Adv. Sh. at 1006, 227 N.E.2d at 479, quoting Higginson v. Treasurer and School House Commissioners of Boston, 212 Mass. 583, 591, 99 N.E. 523, 527-528 (1912).

[5] Acts of 1965, c. 679, §1, incorporating by reference this quoted language from Acts of 1956, c. 718, §6.

[6] The Department attempted to distinguish Commonwealth v. Massachusetts Turnpike Authority, 346 Mass. 250, 191 N.E.2d 481 (1963), noted in 1963 Ann. Surv. Mass. Law §13.15, and Appleton v. Massachusetts Parking Authority, 340 Mass. 303, 164 N.E.2d 137 (1960), noted in 1960 Ann. Surv. Mass. Law §13.9. The Court, however, apparently satisfied with its doctrines as enunciated in those cases, was unwilling to accept the careful and clever distinctions made by the Department.

may be ideal land uses in certain areas, fully entitled to priority over competing land uses, whereas in other areas, their need for priority may be much more doubtful. Legislative guidelines that permit flexibility appear to be necessary. Given the desirability of flexibility and having experts rule on these matters, decisions on these issues would be handled most appropriately by an administrative body, acting under legislative guidelines.

The question of priorities between federal and state regulation of land represents another manifestation of this same question. In the 1967 SURVEY year case of *Commonwealth of Massachusetts v. Bartlett,*[7] the issue arose because the Commonwealth planned to take certain property of the Boston & Providence Railroad for its own transportation uses, terminating certain present passenger and freight uses of the line by the New Haven Railroad. Both railroads were in reorganization under the federal Bankruptcy Act. The district court rejected the Commonwealth's argument that the power of eminent domain is an inherent attribute of sovereignty subject only to the federal constitutional limitations of due process and just compensation. This result is consistent with *Berman v. Parker,*[8] in which the United States Supreme Court held that eminent domain and police regulations were merely two ways of exercising government power. Thus eminent domain is no more an attribute of state sovereignty than any police regulation and equally subservient to federal legislative regulation under the supremacy clause of the federal Constitution. The bankruptcy court's consent to the taking was, therefore, held to be required. The district court also found that the proposed taking would amount to an "abandonment" under the Interstate Commerce Act,[9] and, thus, the approval of the Interstate Commerce Commission was also required.

The result reached in *Bartlett* is unobjectionable, since it can be assumed that the federal regulation will consider the state's proper interests. The settling of disputes between federal and state governments, however, on the basis of federal supremacy, if inevitable in the judicial context, is unacceptable in the legislative context. Each type of case in which federal and state interests conflict requires a sophisticated balancing, not an unrealistic resort to a simplistic formula. The need to find solutions that consider priorities based on the actual relative importance of two conflicting policies has not been solved in a fully satisfactory way at any level of government. Solutions premised on priority of use or superiority of level of one government over the other can furnish, at best, only a framework for careful legislative solutions. Absent legislative guidelines, courts must fall back on these simple and often undesirable guides, which may work well in a fair number of cases but certainly not in all.

[7] 266 F. Supp. 390 (D. Mass. 1967).
[8] 348 U.S. 26 (1954).
[9] 49 U.S.C. §1(18) (1964).

§11.4. Amendments: Spot and piecemeal zoning. Once an area is zoned for certain restricted uses, landowners in the area gain a vested interest in the retention of the imposed limitations except to the extent the public interest requires a change.[1] The interest of the landowners is the type of interest in land that is constitutionally protected by due process concepts. As a consequence, the rezoning of an area always presents not just the constitutional issues involved in an original zoning but also those raised by the requirement of protecting those interests generated by the original zoning. In addition, the basic constitutional and statutory requirement of uniform zoning for similar areas has made it necessary in many jurisdictions to show some form of material error in the original zoning, or a substantial change of conditions to justify rezoning.[2] The basic policies reflected in these limitations are undoubtedly desirable, but an overly technical or overly preservative approach can prevent the adoption of desirable rezoning. In many situations the change of conditions involved may be minor or may not even exist, but more modern concepts of land use control may suggest that a zoning change is desirable. Consequently, Massachusetts, along with New York, has essentially rejected the doctrine that either a mistake or a change of condition is necessary to support an amendment to a zoning ordinance.[3] The Supreme Judicial Court, in three opinions decided during the 1967 SURVEY year, continued its basic tendency to support rezoning if the grounds for such rezoning can be said to be reasonable.

In *Coleman v. Board of Selectmen of Andover*,[4] the petitioners sought a writ of mandamus to compel the enforcement of the zoning bylaw as it existed prior to the rezoning of one lot from residential to business use. The original zoning described the zones solely by means of a zoning map, at a scale of 800 feet to one inch. The boundaries of zoning areas were extremely difficult to determine and, for many years, the town officials had believed that this particular locus was in a business district. In connection with an appeal from the grant of a building permit for a business structure on this locus, it was determined, in 1963, that the locus was in an area zoned for residential use. At a special town meeting in 1964 the locus was rezoned for business in a separate warrant, other zoning changes and boundary delineations being made in another bylaw adopted at the same meeting. Land adjacent and similar to the locus was not rezoned.

§11.4. [1] See Mitchell v. Board of Selectmen of South Hadley, 346 Mass. 158, 190 N.E.2d 681 (1963), noted in 1963 Ann. Surv. Mass. Law §13.2; Hodge v. Luckett, 357 S.W.2d 303, 305 (Ky. 1962); 1 Rathkopf, The Law of Zoning and Planning, c. 27, pp. 6-8, 13-23 (3d ed. 1966).

[2] Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953); Parsons v. Town of Wethersfield, 135 Conn. 24, 60 A.2d 771, 4 A.L.R.2d 330 (1948); Smith v. Board of Appeals of Salem, 313 Mass. 622, 48 N.E.2d 620 (1943).

[3] Cohen v. City of Lynn, 333 Mass. 699, 132 N.E.2d 664 (1956); Levitt v. Incorporated Village of Sands Point, 6 App. Div. 2d 701, 174 N.Y.S.2d 283 (1958), *aff'd*, 6 N.Y.2d 269, 160 N.E.2d 501 (1959).

[4] 351 Mass. 546, 222 N.E.2d 857 (1967).

The Court, in an opinion by Mr. Justice Whittemore, found that new legislative action concerning the lot's classification was sustainable because of the past confusion over boundary lines and the good faith action taken in dependence upon the mistaken belief as to permitted uses. The Court also implied that the disputed change in the locus' zoning could be considered as part of the general redefinition of boundaries which was effected at the same town meeting. Since there was no showing that either the general redefinition of boundaries or the disputed rezoning of the specific locus was unreasonable, the Court upheld the amendment despite the fact that similar adjacent lots were not rezoned.

It is doubtful if all courts would support the rezoning in the *Coleman* case, at least without requiring that it be considered part of a larger legislative decision to redraw and specify boundaries. Thus, under the rather narrow Maryland doctrines limiting rezoning, a recent case very similar on its facts to *Coleman* held that rezoning because of a boundary map mistake was not permitted.[5] On somewhat different facts, a recent Minnesota case also held that mistake in location of a lot on a zoning map did not justify rezoning.[6] In Massachusetts, however, the Court has not required that "substantial changes in the locus" exist before authorizing a zoning change.[7] If zoning is to be a relatively flexible device to control land use and development, the Massachusetts test of reasonableness is certainly preferable to the approach of Maryland or Minnesota.

Kennedy v. Building Inspector of Randolph,[8] more clearly than *Coleman,* required an affirmation of the rezoning since a major change of conditions had occurred in the area since the time of original zoning. The original zoning was unusual as it placed the periphery of a triangle of land near the city center in a residential zone and the interior of the triangle in an industrial zone. The factory located in the center of the triangle expanded so that its work force grew from 28 to 1500 between 1951 and 1963. The locus rezoned was one lot on which a dwelling condemned by the local board of health had stood. The factory, upon obtaining the rezoning, had leveled the lot, landscaped it, provided an entrance to make fire equipment accessible to the factory from this direction, and installed a parking lot for 50 cars. The industry's other land included parking for 500 cars, and thus a great number of employees had to park on the streets near the factory location. This entire triangular tract was also near the town

[5] Mark v. Crandell, 244 Md. 193, 223 A.2d 248 (1966). The Maryland doctrine requires either the showing of an error in the original zoning or a change of conditions of considerable amount before rezoning is sustainable. Wakefield v. Kraft, 202 Md. 136, 141, 96 A.2d 27, 29 (1953). The presumption of validity of the rezoning is thus very weak, even if it can be said to exist.

[6] Olsen v. City of Hopkins, 149 N.W.2d 394 (Minn. 1967).

[7] See Cohen v. City of Lynn, 333 Mass. 699, 132 N.E.2d 664 (1956).

[8] Kennedy v. Building Inspector of Randolph, 351 Mass. 550, 222 N.E.2d 860 (1967).

center so that parking for civic and business purposes competed with the factory workers for the same limited number of street parking spaces.

The Court found that the rapid growth of the factory itself constituted a change of conditions which would support the rezoning. Provision of fire access and relief from traffic congestion clearly promoted the public interest in the rezoning. The Court thus found that the town meeting did not exceed its powers in adopting the amendment lessening the undesirable consequences created by the area's changed conditions. While one may regret the effect of these changed conditions upon the owners of residences on the periphery of the triangle, the rezoning of the locus will not change their position in any substantial way.

In *Van Sant v. Building Inspector of Dennis*,[9] the zoning bylaw amendment brought substantial portions of property near the locus under zoning use restrictions for the first time, but the locus was excluded and left unzoned. As the Court noted, this is a form of spot zoning in reverse, and it raises the same basic problems that are met in piecemeal zoning under an original zoning law.[10] The question is: Does the imposition of substantial restrictions upon nearby property while leaving the locus free of these restrictions treat similar land in an unequal manner that is thus arbitrary and unreasonable?[11]

In 1964 the east side of the highway upon which the locus abutted was rezoned residential except for an area about 300 feet on each side of a side road that constituted the entrance to an open-air theater. Properties on the west side of the highway, upon which the locus faced, were also assigned a residential classification, but upon motion of the owner of the locus, his property was specifically excepted from the area so restricted. The lower court, on a petition for mandamus against the building inspector, seeking to require that he enforce the zoning use restrictions as to the locus, held that the amendatory bylaw was properly adopted and the locus was therefore correctly exempted from the residential use restrictions.

The Supreme Judicial Court affirmed. The factors which influenced the Court in its opinion included the existence of the theater road and a nearby road used as access to a golf course, the exemption from the residential zoning limitations of the property across the road from the locus, the use of the locus for the non-conforming purposes of house painting and other business purposes, and the fact that the zoning plan was adopted with knowledge of the physical characteristics and general nature of the neighborhood. Since, considering these factors, the decision not to zone the locus could not be considered unreasonable, it was upheld.

[9] 1967 Mass. Adv. Sh. 555, 225 N.E.2d 325.

[10] 1 Rathkopf, The Law of Zoning and Planning c. 26, pp. 1-2 (3d ed. 1966).

[11] Whittemore v. Building Inspector of Falmouth, 313 Mass. 248, 46 N.E.2d 1016 (1943); Leahy v. Inspector of Buildings of New Bedford, 308 Mass. 128, 31 N.E.2d 436 (1941).

From the legal standpoint the decision is unexceptionable. From the planning viewpoint, however, one may well question the entire pattern of the zoning amendment that was adopted. Why was the land on one side of the road near the theater entrance left unzoned while the land, including the locus, opposite it, apparently subject to the same effects from the theater, was zoned for residential purposes? Despite the possibility, under the Massachusetts Zoning Enabling Act, of zoning less than the entire community,[12] were there any good reasons for failing to establish a complete zoning pattern for the town? More facts are required before these and similar questions could be answered, but those facts available suggest that poor planning practice was reflected in a poor zoning bylaw.

§11.5. **Zoning: Aggrieved party.** It is, of course, accepted law in the Commonwealth that a private party cannot sue directly to enforce zoning restrictions but must seek mandamus against the public officials responsible for enforcement.[1] In turn, however, the party seeking mandamus is considered to be attempting to enforce a public right and the action is in the general public interest.[2] Thus, unlike the law of a number of states, the person seeking mandamus against local officials to require them to enforce zoning regulations need not establish any particular special damages that are unique to his own property.[3] Damages, even if only similar to that suffered by the public generally, seem to constitute sufficient standing for a petitioner seeking this extraordinary remedy.

The zoning enabling act, however, permits an appeal in connection with the grant or denial of a zoning variance, special permit, or building permit. This right of appeal applies to persons aggrieved or to municipal officers or boards.[4] While the Supreme Judicial Court has usually been generous in finding that a particular petitioner is aggrieved,[5] it has imposed some limitations upon those who can appeal.

12 Noonan v. Moulton, 348 Mass. 633, 639, 204 N.E.2d 897, 901 (1965) (no requirement of comprehensive plan). Since there is no requirement that zoning be in accordance with a comprehensive plan, the Court has been able to sustain as zoning a bylaw with the sole content of forbidding use of a trailer as a home except in a licensed trailer camp. Town of Granby v. Landry, 341 Mass. 443, 170 N.E.2d 364 (1960), noted in 1961 Ann. Surv. Mass. Law §12.12.

§11.5. 1 See Atherton v. Selectmen of Bourne, 337 Mass. 250, 257, 149 N.E.2d 232, 236 (1958), noted in 1958 Ann. Surv. Mass. Law §§14.2, 14.5.

2 Dresser v. Inspector of Buildings of Southbridge, 348 Mass. 729, 205 N.E.2d 724 (1965), noted in 1965 Ann. Surv. Mass. Law §14.14; Brady v. Board of Appeals of Westport, 348 Mass. 515, 204 N.E.2d 513 (1965); Gamer v. Zoning Board of Appeals of Newton, 346 Mass. 648, 195 N.E.2d 772 (1964).

3 See 3 Rathkopf, The Law of Planning and Zoning c. 66 (3d ed. 1966), for a general discussion of the state of the law.

4 G.L., c. 40A, §13 (to boards of appeals), §21 (to Superior Court and Supreme Judicial Court).

5 Vainas v. Board of Appeals of Lynn, 337 Mass. 591, 150 N.E.2d 721 (1958), noted in 1958 Ann. Surv. Mass. Law §§14.1, 14.9 n.8; Marotta v. Board of Appeals of Revere, 336 Mass. 199, 143 N.E.2d 270 (1957), noted in 1957 Ann. Surv. Mass. Law §§11.2, 33.3.

Under the old Boston zoning statute, the Supreme Judicial Court has held in *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston,*[6] that a purpose of the zoning statute is to protect land values, not a proprietor's competitive position. Therefore, a competitor who attempted to challenge the introduction into a more restricted zone of a use permitted in the zone in which the competitor's property was located was not a "person aggrieved."[7] The general concept is that a person aggrieved within the meaning of a zoning statute is one who suffers damage apart from that suffered by the general public and, further, these special damages must affect the value of the real property owned or occupied by the petitioner.[8] The status is not given to an individual merely because the value of the business he is operating on his property will be reduced. The policy underlying this rule is not difficult to find. Courts recognize that zoning, particularly of areas for commercial use, has a tendency to restrain trade because only a certain limited area of land is made available for these uses. The courts, thus, are careful to limit this undesirable zoning by-product by holding that property owners having these partial or complete business monopolies acquire "no vested rights to monopolies created by zoning laws or ordinances."[9]

Although the issue was not contested in the Supreme Judicial Court, the question of whether the plaintiffs were aggrieved parties, and thus able to contest the grant of a special permit, was perhaps the most interesting aspect of *Shoppers' World, Inc. v. Beacon Terrace Realty, Inc.*[10] In this case the three plaintiffs were a large shopping center corporation, leasing the land from an insurance company, a theater corporation that was leasing from the shopping center corporation certain land and buildings, and the theater corporation's parent corporation, guarantor on the theater corporation's lease. All were bound, under the terms of their own leases, to pay local real estate taxes on the premises occupied, and costs of care, maintenance and operation of their respective properties. They appealed from a decision giving the defendant realty company a special permit to construct two theaters, one "legitimate" and the other "motion picture." These theaters would be located on land in the same zoning district as the

[6] 324 Mass. 427, 86 N.E.2d 920 (1949).

[7] Id. at 432, 86 N.E.2d at 922-923.

[8] 2 Rathkopf, The Law of Zoning and Planning c. 40, p. 16 (3d ed. 1966). See Kyser v. Zoning Board of Appeals of Westport, 230 A.2d 595 (Conn. 1967) (adjoining landowner not an aggrieved party when minor variance from rear yard requirements is granted); Tyler v. Board of Zoning Appeals of Woodbridge, 145 Conn. 655, 145 A.2d 832 (1958); Jahnigen v. Staley, 225 A.2d 277 (Md. 1967).

[9] Cord Meyer Development Co. v. Bell Bay Drugs, Inc., 20 N.Y.2d 211, —, 229 N.E.2d 44, 46 (1967). See also on the issue of business competition constituting special damages, Hughes v. City of Peoria, 80 Ill. App. 2d 392, 225 N.E.2d 109 (1967), in which the court found untenable objections by central business district businessmen to a rezoning of an area over three miles from the district as a shopping center.

[10] 1967 Mass. Adv. Sh. 1183, 228 N.E.2d 446.

plaintiffs' land. Both properties are in a highly commercial area and are at least 600 feet apart, across a divided highway. The lower court found that the shopping center corporation was an aggrieved party.

If one examines the facts of the present case in the light of both general and Massachusetts precedent, the status of the petitioners as aggrieved parties is certainly open to question. The *Circle Lounge & Grille* case, although not decided solely on this issue, holds that the effect of increased competition is damnum absque injuria. In *Shoppers' World* it is difficult to see any special damages to the petitioners except economic loss from increased competition. This does not seem on the facts, anymore than it did on the facts of *Circle Lounge & Grille,* to be the loss of real property value that will support a finding of special damage and thus the status of aggrieved person.

§11.6. Procedure: Special permits. General Laws, Chapter 40A, Section 4, authorizes the granting of special permits by the board of appeals, city council, or selectmen as designated by the appropriate ordinance or bylaw. The designated body must hold a hearing before granting the special permit and before holding the hearing, must give notice as required in Section 17. Briefly, Section 17 calls for two notices in the local newspaper, the first to be given not less than fourteen days before the hearing. The Supreme Judicial Court has required strict adherence to these sections, and this policy was continued in two cases decided during the 1967 SURVEY year.

In *Gallagher v. Board of Appeals of Falmouth,*[1] the selectmen granted a special permit pursuant to Section 21 of the zoning bylaw. This bylaw was enacted prior to Chapter 40A, Section 4, and contained less stringent notice requirements. The decision was brought to the board of appeals where the selectmen's action was affirmed. Four property owners appealed the decision to the Superior Court under General Laws, Chapter 40A, Section 21, and the Court annulled the decisions of the selectmen and board of appeals. The Supreme Judicial Court, in affirming the lower court, held that the selectmen were exercising a zoning power under General Laws, Chapter 40A, Section 4. Although they had given notice pursuant to the bylaw, the notice failed to meet the requirements of Sections 4 and 17 of the enabling act. Consequently, the selectmen lacked jurisdiction to grant the special permit. Failure to give the statutory notice was not cured by the board of appeals hearing because where the town has given the power to grant special permits to the selectmen, the board of appeals has no jurisdiction in the matter. The *Gallagher* holding that statutory notice requirements are mandatory for jurisdictional purposes was reaffirmed in *Lane v. Selectmen of Great Barrington.*[2]

A second holding of *Gallagher* and *Lane* relates to the method of appealing from the selectmen's action in granting or denying a special permit. General Laws, Chapter 40A, Section 13, permits review by a

§11.6. [1] 351 Mass. 410, 221 N.E.2d 756 (1966).
[2] 1967 Mass. Adv. Sh. 835, 226 N.E.2d 238.

board of appeals of an action by an administrative official. The Court in the above cases held that the selectmen were not acting in that capacity although they did act as enforcers of the bylaw. Accordingly, no appeal lay under Section 13. The proper method of review was to appeal to the Superior Court under General Laws, Chapter 40A, Section 21.

The *Gallagher* and *Lane* cases, in requiring at least the minimum statutory notice, evince a greater solicitude for the public's rights than the older bylaws had. It would be advisable for local government counsel to revise these bylaws to bring them into conformity with the procedural requirements of Chapter 40A. These decisions might also be commended for holding that appeal from the selectmen's decision lay to the Superior Court directly, rather than to the board of appeals first. This procedure will facilitate quick resolution of conflicts over special permits. On the other hand, bypassing the administrative process may unnecessarily add to the lower courts' burdens. Further, it creates, in a sense, a procedural trap for the unwary. Appeal to the Superior Court must be within twenty days of the selectmen's decision. If an invalid appeal is prosecuted to the board of appeals and twenty days expired during such appeal, the aggrieved party may not resort to Section 21. Review of the granting of a permit may then only be available by collateral attack.[3] No review may be available for the denial of a special permit.

§11.7. Procedure: Appeal to Superior Court. Aggrieved parties may appeal the decisions of boards of appeals, municipal officers, and municipal boards to the Superior Court under General Laws, Chapter 40A, Section 21. The procedure for perfecting the appeal is intricate in several respects. A bill in equity must be filed within twenty days after the decision from which the appeal is taken has been filed with the city or town clerk's office. A copy of the decision appealed from bearing the filing date of the decision and certified by the city or town clerk must be attached to the bill. Within fourteen days of the filing of the bill in the Superior Court, the petitioner must serve notice and a copy of the bill on the requisite parties, which include the original applicant, if he is not appealing, and the members of the administrative body making the decision. Within twenty-one days after entry of the bill, the petitioners must file an affidavit that the notice has been given. Lastly, notice of the filing of the bill in equity and a copy thereof must be given to the city or town clerk. Three cases decided during the 1967 SURVEY year raise the question: to what extent must this procedure be followed in order to obtain and maintain jurisdiction.

In *Muldoon v. Board of Appeals of Watertown*,[1] the petitioner had failed to follow the procedure of Section 21 in that (1) he did not join

[3] See Brady v. Board of Appeals of Westport, 348 Mass. 515, 518-521, 204 N.E.2d 513, 515-517 (1965).

§11.7. [1] 351 Mass. 702, 221 N.E.2d 466 (1966).

the original applicant as respondent, and (2) consequently the affidavit did not show service on the original applicant. A year later, the original applicant moved to intervene and essentially to dismiss the bill. The Superior Court dismissed the bill and the Supreme Judicial Court affirmed, relying on language in the statute requiring dismissal of a bill where the affidavit of service is not filed in the requisite time period.

The same defects were present in *McLaughlin v. Rockland Zoning Board of Appeals.*[2] The petitioner, however, moved to add the original applicant and for an order of notice for personal service less than a month after the statutory time period had expired. On appeal from the granting of the motion, the Supreme Judicial Court held that the trial court did not abuse its discretion where the appeal was timely and no material delay in prosecuting the appeal had resulted. The Court reasoned that the purpose of the statute is to avoid delay. If the trial judge were required to dismiss timely appeals, for defects in procedure, the substantive issue might still be litigable by a mandamus proceeding, but only after delay had resulted. Therefore, giving the trial judge discretion to allow curatory amendments effectuates the purpose of Section 21.

The Court's holding prevents Section 21 from becoming a procedural trap for the unwary. On the other hand it lessens the incentive for practitioners to exercise care in perfecting their appeals. Failure to comply with the intricate requirements is thus more likely, and wasteful litigation over these defects will continue. For example, in *McLaughlin,* the petitioner also failed to enclose a separate notice of the filing of the bill with the copy of the bill he sent to the town clerk. In *Richardson v. Zoning Board of Appeals of Framingham,*[3] the petitioner failed to attach a certified copy of the decision appealed from to the bill in equity. Instead, he attached a photocopy of the certified copy. The Court held in both cases that the notice purpose underlying these requirements was met by the methods used, although they were incorrect. Litigating such issues is wasteful of both the courts' and the parties' time. Although Section 21 is intricate, it clearly states what is required. Perhaps it would be better to require strict compliance. Practitioners would then be forced to discipline themselves. Wasteful litigation could be avoided.

B. Subdivision Control

§11.8. Conditional approval of subdivision plan. Under Chapter 41, Section 81M, the powers of the planning board are directed to be exercised with due regard for the provision of adequate access to all the roads in the subdivision by streets and ways that will be safe and convenient for travel. Further, the planning board must secure ade-

[2] 1967 Mass. Adv. Sh. 205, 223 N.E.2d 521.
[3] 351 Mass. 375, 221 N.E.2d 396 (1966).

quate provisions for water, sewerage and drainage, as well as for the coordination of the ways in said subdivision with each other and with neighboring subdivisions and adjoining public ways. The planning board's concern, therefore, should not be limited merely to the laying out of ways and services within the subdivision, but also to the connection of these ways and services with adjoining subdivisions and public ways existing.

As the Subdivision Control Law is a relatively new law in Massachusetts, many ambiguities have yet to be resolved by the Supreme Judicial Court. The particular area that causes the greatest concern in the future development of a town or city as an entity is the extent to which a planning board may require a subdivider to design the ways within the subdivision so as to insure their logical connection with ways that may be built on adjoining land presently undeveloped.

The legislature, in order to implement further the provisions of Chapter 41, Section 81M, enacted Section 81Q which directs that a planning board shall adopt reasonable rules and regulations relative to subdivision control. Prior to the adoption of such rules and regulations, a hearing must be held; the hearing and notice requirements are set forth in the statute. The rules and regulations, in order to comply with Section 81Q, must contain detailed requirements as to the construction of ways and installation of municipal services. The statute further requires that the planning board, in establishing such standards, shall give due regard to the prospective character of the subdivision, including the prospective amount of travel and any other necessary adjustment. Lastly, in order to complete the administrative powers given to the planning board by the foregoing sections and to insure a practical and reasonable administration, the legislature enacted Section 81R which authorizes the planning board, in any particular case where such action is in the public interest and not inconsistent with the intent and purposes of the Subdivision Control Law, to waive strict compliance with its rules and regulations.

Over the last few years, the Supreme Judicial Court has several times been called upon to construe Chapter 41, Sections 81M, 81Q and 81R. In *Piper v. Planning Board of Southborough*,[1] the Court indicated that the procedures of Section 81 are mandatory. A prospective subdivider must know, prior to the filing of his subdivision plan, what will be required of him in the way of street construction and installation services. A few years later, the Court in *Castle Estates, Inc. v. Park and Planning Board of Medfield*,[2] relying on the *Piper* case, held that the planning board of Medfield could not condition its approval of a subdivision on the subdivider's providing certain water supply and drainage where the board had failed to adopt regulations establishing requirements for water and drainage.

An area of the Subdivision Control Law that has received very little

§11.8. [1] 340 Mass. 157, 163 N.E.2d 14 (1959).
[2] 344 Mass. 329, 182 N.E.2d 540 (1962).

attention from the Court is the extent to which a planning board can impose, as a condition of its approval, a requirement that the subdivider install or improve ways and services beyond the limits of the subdivision in order to improve the services to the said subdivision. In *Town of Stoneham v. Savelo*,[3] the subdivider, as a condition to approval, agreed to complete and improve a substandard private way so as to afford better access to the subdivision. The Court held the subdivider bound by his agreement.

A similar situation arose in *Rounds v. Board of Water and Sewer Commissioners of Wilmington*,[4] where the planning board required, as a condition of its approval, that the subdivider install larger water mains in streets beyond the limits of the subdivision so as to insure an adequate water supply to the subdivision. The Court upheld the action of the planning board, not on the grounds that such conditions were reasonable and lawful, but rather on the grounds that the subdivider had a right to appeal such conditional approval of the subdivision under Chapter 41, Section 81BB, and in failing to do so, he was forever barred from raising this issue.

In an earlier case, *Daley Construction Co., Inc. v. Planning Board of Randolph*,[5] the subdivider filed a plan with the planning board that met all the requirements of the rules and regulations, including the installation of water pipes. However, the plan was disapproved on the sole ground that an acute shortage of water and pressure existed in the particular area. The subdivider appealed under Section 81BB. The Court, in finding for the subdivider, held that although the language of Section 81M directs the planning board to secure adequate provisions for water, its power is limited to the installation of adequate water pipes and did not extend their powers to require the subdivider to provide adequate water supply and pressure.

From the foregoing it appears that planning boards frequently condition subdivision approval on the construction of ways and services within the subdivision for the benefit of future development of adjoining land and without the subdivision for the benefit of the subdivision. Further, the Court has yet to resolve the validity of these conditional approvals where the board has set forth its standards in rules and regulations although the *Daley* case intimates a restrictive view of board powers. During the 1967 SURVEY year, the Court again had the opportunity to resolve the issues in *Lyman v. Planning Board of Winchester*.[6] The developer filed a preliminary subdivision plan which covered seven and one-half acres of vacant land in an area that was already developed to the north and the east. The proposed subdivision was bounded on the south and west sides by undeveloped land owned by an abuttor. The abuttor's land also had frontage on an

[3] 341 Mass. 456, 170 N.E.2d 417 (1960).

[4] 347 Mass. 40, 196 N.E.2d 209 (1964).

[5] 340 Mass. 149, 163 N.E.2d 27 (1959).

[6] 1967 Mass. Adv. Sh. 461, 224 N.E.2d 442.

existing public way and would not, by necessity, need access through the proposed subdivision. The Winchester planning board made specific provisions in the rules and regulations for the projection of streets and services to the property line of adjoining land both developed and undeveloped. So far as pertinent to this case, the regulations provided that in the instance of undeveloped adjoining property which, in the opinion of the planning board, is suitable for ultimate development, provisions shall be made for the proper projection of streets and services to the exterior boundaries of the subdivision at such size and grade as will allow future projection. In the preliminary plan, the subdivider, in accordance with the planning board's regulations, provided for an extension of a proposed way including sewer, storm drainage and water lines to the abuttor's land, thereby affording direct access in all respects to the abuttor. The planning board, after reviewing the preliminary plan recommended an elimination of this access to the abuttor's land in view of the topography of the land. At the public hearing on the definitive plan, the abuttor objected to this denial of access to the proposed roads in the subdivision but the board approved the definitive plan. The abuttor then appealed to Superior Court. The trial judge found that the planning board's action was based on the fact that the grade of the road necessary for the connection would not be in the best interest of the town as being excessive and, further, that any method of solving the grade problem would seriously injure the proposed development. The trial judge also found that the expert engineering testimony presented at the trial supported the opinion and action of the planning board.

The Supreme Judicial Court, without determining the validity of the road projection requirements as provided for in the rules and regulations of the Winchester planning board, and assuming such to be valid for the purpose of this decision, relied on the findings of the trial judge and held that such action by the planning board was reasonable and proper. To do otherwise would be an improper enforcement of a regulation that would serve no public purpose. Citing *Barney and Carey Co. v. Town of Milton*,[7] the Court further stated that the planning board could properly rely on the provisions of Chapter 41, Section 81R, and waive its own rules and regulations in any given instance where the application of such rules would be unreasonable. In view of the unusual engineering and topographical circumstances of this particular subdivision, the application of the rules could be found to be unreasonable.

The *Lyman* case thus gives judicial sanction to the waiver by a planning board of their rules and regulations pursuant to the statutory provisions of Section 81R, even in instances where such waiver denies access to an owner of undeveloped adjoining land who desires such access for future development.

It seems clear from the *Lyman* case, that had the fact situation been

[7] 324 Mass. 440, 87 N.E.2d 9 (1949).

altered to the extent that the planning board required the projection of a way and services to the adjoining land, even though such was not feasible from an engineering and topographical standpoint, that the Court, upon the developer's appeal, would have held such action as an improper exercise of their rules and regulations. Consider, however, how the Court would have ruled if we further alter the hypothetical fact situation to the extent that the evidence established the reasonableness and feasibility of such connection. Assume also that such extension would not benefit the developer in any way, but rather would cause him the additional expense of construction and force him to dedicate a portion of his land for the extension of a way for which he will receive no compensation. Would this not violate his constitutional rights to due process? We must await further decisions of the Court in this important area which, due to the meagerness of cases, is virtually undeveloped in Massachusetts. The lack of appeals is due, in large part, to the fact that a developer finds it more economical, from both a timing and financial standpoint, to agree to the conditions of the planning board rather than incur not only the additional expense in litigation, but the extreme time delay necessarily involved in such litigation.

§11.9. **Legislation.** General Laws, Chapter 41, Section 81X, sets forth the procedure for modifying, amending, or rescinding definitive subdivision plans. As part of that procedure, the planning board must record the change. Acts of 1967, Chapter 248, amended this section by adding the requirement that the planning board must state in its notice that the change does not affect any subdivision lot or rights appurtenant thereto where the lot was conveyed or mortgaged in good faith for valuable consideration subsequent to planning board approval of the change. The register of deeds or the recorder of the land court is directed not to record the notice unless it contains this statement. It remains to be seen whether the required statement can effect a change as to any of the subdivision where one lot having a right to use all the ways shown on the pre-existing plan is conveyed or mortgaged in good faith.

General Laws, Chapter 41, Section 81U, was amended during the SURVEY year by Acts of 1967, Chapter 567. Previously, the planning board had to secure the installation of municipal services and construction of ways in the subdivision by (1) requiring a performance bond and/or (2) placing a restrictive covenant in each lot forbidding building upon or selling the lot prior to completion. The amendment permits the planning board to accept as security an agreement, between the developer, first mortgagee and board, that the first mortgagee shall retain sufficient funds, otherwise due the developer, to secure the requisite performance. If the work is not completed, the funds shall be available for completion.

The statute is progressive but may raise some problems. It appears that the agreement does not effect a binding assignment to the locality. Thus, in the event of bankruptcy of the developer prior to completion,

D'Agostine and Huber: Chapter 11: Land Use Planning Law

the locality may find it difficult to obtain the funds to complete the requisite performance.

Another difficulty is that the phrase "otherwise due the developer" is unclear. It may refer to the total sum due on the mortgage or the sum due the developer at each stage of work completion. Since the usual mortgage calls for disbursement by the mortgagee in stages, it is probable that the amendment only authorizes holding back sums due at each stage. Thus, there may not be sufficient funds held back at all times during the agreement. The amendment, also, does not clarify who is to arrange for the completion, in the event of the developer's default. Supplementary agreements clarifying these and other ambiguities are desirable if the locality is to be fully protected using the procedure permitted by this amendment.

Published by Digital Commons @ Boston College Law School, 1967