CHAPTER 12

Zoning and Land Use

RICHARD G. HUBER

A. DECISIONS

§12.1. Zoning: Variances. Local zoning ordinances and by-laws may well be, as has been said, rather rough and elementary means of controlling land use within a community.1 Certainly no land use planner today would consider zoning a complete answer to the regulation of land use. But zoning has been the major control device of most communities, and the only one in some. Being a rather rough-and-ready system, however, zoning cannot be enforced rigidly without consideration of changes, developments, and initial zoning errors. The most used safety valve has been the variance but, as with all safety valves, close control tolerances are required.2 The Supreme Judicial Court has had a remarkable record among state courts in resolving the problems raised by the variance procedure. It has approved variances that have complied strictly with the statutory authority while disapproving many variances granted by local boards of appeals. The Court’s opinions reflect, in fact, complete sympathy with and understanding of zoning and land use control. Readers of the Court’s opinions, as well as presumably about half of the parties litigant, may not agree with the application of the Court’s policies in individual cases, but the policies themselves are sound and correct, insofar as we can be informed by planning art.3

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§12.1. 1 See, e.g., comments in Gallion, The Urban Pattern 168-177 (1950); Siegel, Relation of Planning and Zoning to Housing Policy and Law, 20 Law & Contemp. Prob. 419 (1955).

2 There are those who object to the term “safety valve” in relation to the variance procedure. In Reps, Discretionary Powers of the Board of Zoning Appeals, 20 Law & Contemp. Prob. 280, 281 (1955), the author states that the large number of variances that have been freely granted in most municipalities suggests that the appropriate simile is not “safety valve” but “a leak in the boiler.”

3 Of course, planners and writers have disagreed as to whether land use planning and control is an art or a science, or if it has even advanced to the stage where it can be considered to be either. But, certainly, many principles of land use control have been determined and the general policies sought to be effected are largely
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General Laws, c. 40A, §15, governing the granting of variances by boards of appeals, has been interpreted by the Supreme Judicial Court to set up three major requirements for the granting of variances, all of which must be satisfied. Thus the petitioner for a variance must show, first, that conditions especially affecting his locus but not the general zoning district cause him substantial hardship, second, that desirable relief can be granted, and third, that no substantial detriment to the public good will be caused in granting the variance, and it will not destroy or seriously limit the intent and purposes of zoning law.

In Planning Board of Springfield v. Board of Appeals of Springfield, the petitioner for a variance failed in the Supreme Judicial Court because he did not prove any hardship especially affecting his locus that did not equally affect other loci in the vicinity. The petitioner sought a variance permitting the building of a hardware store on two lots in a residence zone. The lots were surrounded by two- and three-family homes, with a few interspersed vacant lots, although there were two business districts nearby, the closer of which began 250 feet from the locus. The petitioner leased a store building in this nearby business district, but the lease had expired and could not be renewed. There was ample uncontroversed evidence that the petitioner had built up substantial neighborhood good will and that no other store buildings in the neighborhood were available or adequate.


5 The complete text of G.L., c. 40A, §15(3), after the 1958 amendment, is as follows:

"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, financial or otherwise 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."

The board of appeals granted the variance, subject to limitation, but the Superior Court found this decision exceeded the statutory power of the board. Justice Macaulay found that the hardship involved was personal to the petitioner and not one that affected this locus especially as compared to other loci in the vicinity, and also found that granting the variance would seriously affect the intent and purpose of the zoning ordinance. The Supreme Judicial Court held that the finding of no hardship to the locus was controlling, as supported by the evidence and not plainly wrong, and therefore affirmed.

In Benjamin v. Board of Appeals of Swansea the Supreme Judicial Court reversed the Superior Court's "confirming" of a variance, since granting the variance would be to the detriment of the public good and would nullify or substantially derogate from the intent or purpose of the zoning law. The petitioner and her now deceased husband had, in 1950, erected a large structure on a part of their land; the structure was in the shape of a T, the crossbar facing the road and largely used for residential purposes, and the vertical portion housing a perfume factory. Swansea adopted a zoning by-law in 1953 which classified the locus in a residential and rural zone; the perfume factory, a nonconforming use under the by-law, continued operation until 1957, shortly after the husband's death. The variance sought, to permit the use of this building for a restaurant, was granted by the board of appeals subject to certain limitations on use, and "confirmed" by the Superior Court.

No evidence was adduced that showed any change in use of nearby land in the zone since the adoption of the by-law, although the road on which the property faced was improved and was carrying somewhat more traffic. The Supreme Judicial Court found, on these facts, that granting the variance would be a detriment to the public good and would nullify or substantially derogate from the purpose of the zoning by-law. With this finding, the Court found it unnecessary to consider the issue of hardship.

7 The limitation was the construction of a six-foot cedar fence on the boundaries of the locus. Record, p. 8.

8 Record, pp. 13-15. The findings, ruling and order for decree by Justice Macaulay in this case are comprehensive, complete and knowledgeable, and are a model for this type of case.


10 The Supreme Judicial Court noted that the form of decree used by the justice of the Superior Court was not correct, citing Lambert v. Board of Appeals of Lowell, 295 Mass. 228, 3 N.E.2d 784, 786-787 (1936). The decree of the Superior Court should not "confirm" the board of appeals decision but should have stated that the granting of the variance was within the statutory jurisdiction of the board of appeals.

11 Record, pp. 17-19. The restrictions were designed to preserve, insofar as possible in a restaurant operation, a residential appearance and character, and to avoid marked interference with the enjoyment of nearby residential properties.

12 Record, pp. 16-27. See note 10 supra.

13 The Court also considered the variance problem in the case of Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87, 153 N.E.2d 631 (1958). The case involves primarily the question of an exception and is therefore discussed in §12.4 infra.
§12.2. **Zoning: Nonconforming uses.** Adoption of a new or revised zoning law by a community will almost invariably find certain land uses in the various zones that do not comply with the new zoning regulations. The Massachusetts enabling act permits zoning regulations to be applied to these nonconforming uses only after a period of non-user.\(^1\) If the master plan and the zoning law are to become fully effective, it is apparent that nonconforming uses must be strictly limited to those existing at the time of adoption of the zoning law, with no change in type of use or extensive increase in amount of use being permitted. This will at times result in the abandonment or cessation of nonconforming commercial and industrial uses.\(^2\) In individual situations, however, particularly with residential and light commercial uses, the immediate effect of limiting nonconforming uses strictly may be to encourage blight or, at least, to prevent what would otherwise be improvements in a neighborhood.\(^3\) This conflict of policy is difficult to solve, but it would appear that the Supreme Judicial Court, in requiring that nonconforming uses not be changed or considerably expanded, is following the better policy. If changes seem necessary, they should be accomplished by amendments to the zoning law, either to change zones or zone requirements, or to permit certain exceptions within a given zone.

During the 1959 Survey year the Supreme Judicial Court decided two nonconforming use cases. In *Town of Seekonk v. Anthony*,\(^4\) the town sought an injunction to prevent Anthony from carrying on a “ready-mix” cement business in a residence area. The town zoning by-law became effective December 26, 1942. At that time Anthony conducted a gravel and sand removal and processing plant on the locus and sold this gravel and sand, often mixed with dry cement, to purchasers. Dump trucks capable of handling such loads were used and certain loading mechanisms were upon the land. During the years following the adoption of the zoning by-law, Anthony improved his business facilities to include much more satisfactory loading and storage facilities and the use of trucks with revolving drums and water facilities, which permit mixing the concrete in transit to the place for which it is ordered. This represented on Anthony’s part an adoption

\(^{1}\) G.L., c. 40A, §5. See also special provisions in id. §§5A, 11. Some states permit municipalities to require compliance within a certain period of time after adoption of the ordinance. See Anderson, Amortization of Nonconforming Uses, 10 Syracuse L. Rev. 44 (1958); Note, 5 Villanova L. Rev. 416 (1959).

\(^{2}\) See, e.g., Benjamin v. Board of Appeals of Swansea, 338 Mass. 257, 154 N.E.2d 913 (1959), discussed in §12.1 supra, which involved a nonconforming use in the operation of a perfume factory. Personal family reasons caused the cessation of the business and, since a variance for a restaurant was denied, it appears that the property will now have to comply with the limitations of the rural and residential zone in which it is located.

\(^{3}\) The prevention of extensive home and business improvements and additions will, of course, tend to freeze the individual property in a less satisfactory economic form in many situations.

of the technological advances in his business, and as a consequence he not only maintained but apparently improved his competitive position. The Superior Court decided, in essence, upon findings of fact, that Anthony's business was the same nonconforming use as existed at the time of the adoption of the zoning by-law.\(^5\)

The Supreme Judicial Court, in an opinion by Mr. Justice Cutter, reversed the Superior Court. It found not merely a permitted increase in the volume of business done in an existing plant but a change and enlargement of the plant that made it different in kind in its effect upon the neighborhood.\(^6\) Thus the use violated the zoning by-law provision that denied to the board of appeals the right to permit a nonconforming use to be expanded or changed to one more detrimental or objectionable to a neighborhood. Anthony was ordered to remove such types and numbers of structures as were not present on the land in 1942, and to stop such methods of operation as he did not employ when the zoning by-law was adopted.\(^7\) The limitations imposed upon Anthony will almost certainly make his business, which was competitive in 1942, non-competitive today, and will thus cause a heavy reduction in use, if not abandonment of at least the cement features of the business. The opinion represents probably the strongest position yet taken by the Supreme Judicial Court to prevent nonconforming uses from being changed or altered to take advantage of technological advances in a business. Strict adherence to the policy of the case will do much to reduce nonconforming uses, even under the rather strict limitations of the state enabling act. We can sympathize with the landowner in this and similar cases, but if zoning is to be effective as a land use control device the decision and its policy are not only correct but absolutely necessary.\(^8\)

In Vasilakis v. City of Haverhill\(^9\) the plaintiff sought a declaratory judgment that he was entitled to a permit to build a large extension on a roadside restaurant. When the restaurant was originally built in 1948 the locus was zoned for business except for a 70-foot strip zoned as residential. The plaintiff was granted a variance permitting the use of the residence zone area for customer parking upon conditions, the major one being that no more buildings, additions, or structures could be built upon the property. Amendment of the zoning ordinance in 1956 placed the entire locus in a rural residential

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\(^5\) Record, p. 15.
\(^6\) The Court cited Inspector of Buildings of Burlington v. Murphy, 320 Mass. 207, 210, 68 N.E.2d 918, 919 (1946), and the cases there cited, for its conclusion.
\(^7\) The Court also found that height limitations of the zoning by-law had been violated in the erection of certain conveyor and loading mechanisms, they being held not to be permitted accessory uses to which the zoning height limitations did not apply; they were also ordered removed.
\(^8\) Of course, the opinion is based upon the town zoning by-law, not directly upon the state enabling statute, G.L., c. 40A. But the policy expressed applies state-wide. In addition, the provisions of the Seekonk by-law involved in this case are common throughout the Commonwealth. Thus this case will be a guide for all future cases involving the use of extensive technological advances in a business or industry.

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zone, and included the following provision: "Any building, part of a building, or land which at the time of the adoption of this ordinance is being put to a use which does not conform with the provisions of this ordinance may be . . . d. Enlarged to an extent up to twenty-five percent (25%) of the floor and/or ground area of the building or land which was used at the time of the adoption of this ordinance." 10 The building inspector denied the plaintiff's request for a permit to expand his existing building from 720 to 3000 square feet, the lot containing a total of 45,000 square feet.11 The Superior Court found that the 1956 zoning amendment would give the plaintiff the right to expand his building as he sought if it were not for the variance restriction preventing increase in size and number of buildings upon the locus.

The Supreme Judicial Court agreed with the lower court that, so long as the plaintiff used the 70-foot strip for parking purposes under the variance, he could not under the conditions of the variance build the proposed addition to his building upon any part of the lot, including that originally zoned for business in 1948. But the Court disagreed with the lower court's finding that the 1956 amendments would permit the proposed extensive addition. The use of the words "and/or" in the amended ordinance was held to mean that, if land use alone were involved, there could be a 25 percent increase in this land use, but that, if building use were involved, the area of the present building, not total land area, would control the size of the permitted addition.12 The Court thus found that, if the plaintiff were willing to give up the parking variance, he had the right to a permit allowing him to add 25 percent of the present 720 square feet of floor area to his building, but no more.

§12.3. Zoning: Amendments affecting approved subdivisions. General Laws, c. 40A, §7A, adopted in 1957,1 prohibits amendments of a zoning ordinance or by-law from being applied to any lot in an approved subdivision for three years after the date of the approval, if the lot complied with the zoning law in effect at the time of the approval. Theoretically this section is undesirable since it could prevent a municipality from effectuating its master land use plan. But, as has

11 It is not certain that the entire 45,000 square feet of lot area was being used in the business, but there was no question raised that sufficient of the lot was being used so that, if land area rather than building area controlled, the permit sought would have been valid under the ordinance.
12 The Court intimated that the construction of the ordinance to mean that non-conforming building uses could be expanded to include increases up to 25 percent of the used land area might well be unconstitutional and also invalid under the state enabling act.

§12.3. 1 Added by Acts of 1957, c. 297. It reads as follows: "Notwithstanding any other provision of law, no amendment to any zoning ordinance or by-law shall apply to or affect any lot shown on a definitive subdivision plan for residences which has been previously approved by a planning board until a period of three years from the date of such approval has elapsed, provided said lot complies with the provisions of the zoning ordinance or by-law existing at the time of said approval." This section was amended by Acts of 1959, c. 221, discussed in §12.10 infra.
been discussed elsewhere, some municipalities had indulged in ad hoc zoning to prevent the development of approved subdivisions. Section 7A at least prevents this type of abuse of authority.

During the 1959 Survey year, the Supreme Judicial Court had its first opportunity to interpret Section 7A. In Smith v. Board of Appeals of Needham, the plaintiffs had received approval of their subdivision plan in August, 1957, at which time the land area was zoned in a general residence district. In March, 1958, the town meeting voted to change the area in which the subdivision was located to a single residence district. In April, 1958, the plaintiffs sought permits to build two-family homes upon seven lots in the subdivision, which permits were not granted. On appeal, the board of appeals held that Section 7A did not apply to "use" zoning but merely to provisions in the zoning laws that are subject to planning board approval, such as lot size, setbacks and similar zoning limitations. Therefore, the restriction of these lots to single residences was upheld. The Superior Court found the board's decision was within its jurisdiction. The Supreme Judicial Court rejected the limited meaning given to Section 7A by the board and the lower court, stating that the plain language of the section gives the owner three years after approval of his subdivision plan to proceed under the zoning law in effect at the time of approval. It, therefore, found that the board had acted in excess of its authority, and reversed.

The interpretation of Section 7A by the board of appeals was artful and not illogical but it did ignore the plain meaning of the words of the statute and also, most certainly, the abuse of authority it was designed to stop. In fact, the close time connection between the approval of the subdivision plan of the plaintiffs, who were trustees of a trust well known to have substantial investments in two-family homes, and the change in the zoning by-law suggests that this was the very type of situation the statute was designed to prevent. If the town had a satisfactory master plan, maintained up to date, it would not be necessary to resort to ad hoc zoning to try to prevent what it considered an undesirable development in the town. This case illustrates, from what we can gather of the facts, one of the penalties a town will henceforth pay for improper and incomplete land use planning.

§12.4. Zoning: Exceptions. The Zoning Enabling Act permits a municipality to provide for certain exceptions in its zoning law, provided there is general harmony between the permitted exception and the land use area in which it is permitted. This provision permits a

3 See, e.g., Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942), in which lot size requirements were changed to one acre.
5 See, generally, G.L., c. 41, §§11M, 81O, 81U-81W, for powers and duties of the planning board under the Subdivision Control Law.
6 Its interpretation seems to have depended considerably upon the word "lot" in Section 7A. See Brief of the Board of Appeals of Needham, pp. 5-10.

§12.4. 1 G.L., c. 40A, §4.
municipality to control certain uses which might, if freely allowed, cause deterioration of the land use area in which they were permitted, or at least might not accord with the master land use plan. During the 1959 Survey year, the Supreme Judicial Court decided two cases involving exceptions permitted under local zoning laws.

In *Wrona v. Board of Appeals of Pittsfield,* the plaintiff sought a permit to build an extension on a motor freight terminal located in a single residence district in the city. The local ordinance permits the board of appeals to grant a permit for extension of a building, whether conforming or nonconforming, at the same locus, as long as the exception would be within the general purpose and intent of the zoning law, and provides that the board can impose conditions. The board granted the permit sought, and its decision was held to be within its authority by the Superior Court. The decision was, however, reversed by the Supreme Judicial Court. The Court treated the case as a request for a permit for an exception rather than as a request for a variance, and assumed that the exception permitted in the ordinance conformed to the requirements of the enabling act. But the enabling statute and the ordinance both require that exceptions be in harmony with the general intent and purpose of the zoning law. In Pittsfield the zone in which the locus is located requires setbacks of 20 feet from the street and 25 feet from the rear of the lot. The Superior Court had found that the proposed extension brought the building to within a few feet of the lot of an adjacent landowner. The Supreme Judicial Court thus held that the board could not grant the requested permit since the exception would violate the setback requirements and consequently not be in harmony with the intent and purpose of the zoning ordinance. The Court further stated that, even if the proceeding before the board were interpreted as a request for a variance, the necessary finding of "substantial hardship" was not made.

2 *338 Mass. 87, 153 N.E.2d 651 (1958).*
3 The exception permitted in the ordinance was as follows: "Permit a substitution for, or an alteration to, an existing building, structure, or use, whether conforming or nonconforming, or an extension in the same or even into a more restricted district if limited to the same premises as such existed on the twenty-eighth day of December, nineteen hundred and twenty-seven, or as lawfully permitted subsequent thereto, including the erection of a supplementary nonconforming building."
4 That the Court had some doubt as to whether the ordinance conformed to the enabling act is indicated by its citation, preceded by "See, however," of Planning Board of Reading v. Board of Appeals of Reading, *333 Mass. 657, 132 N.E.2d 386 (1956),* and Smith v. Board of Appeals of Fall River, *319 Mass. 341, 65 N.E.2d 547 (1946).*
5 G.L., c. 40A, §4, includes the following requirement: "Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law . . . ."
7 If a lot is less than 100 feet deep, the rear yard limitation is 25 percent of lot depth. In the present case the lot was 100 feet deep, so this alternative provision did not apply.
8 As the Court notes, changes in yard requirements can be granted in a variance proceeding. *338 Mass. 87, 90, 153 N.E.2d 631, 633 (1958).*
made. While it is not certain that the landowner could have shown substantial hardship, it is clear that he sought the wrong type of exemption from zoning law limitations; no exception could be granted but, if the various requirements could have been proved, a variance would have given the relief sought.

When a permit for an exception has been granted it is possible that action by the landowner will waive his rights under the permit. This was the main issue of several in Cities Service Oil Co. v. Board of Appeals of Bedford. On August 9, 1955, Cities Service obtained a permit to use a locus for a filling station, as a permitted exception under business district restrictions of the town. A condition of the permit was that it was based upon the plot plan and photograph of the type of building planned. In March, 1956, Cities Service obtained from the building inspector a building permit, which expired six months after issue. In March, 1957, Cities Service again sought a building permit for a gasoline station of slightly different construction than the one submitted originally at the time the zoning by-law permit was obtained. The building inspector refused to grant the permit. Cities Service then submitted a petition for the purpose "to hear further evidence on petition of Cities Service Oil Co., to allow construction and operation of gasoline filling station on parcel of land . . . [described]." After hearing, the board of appeals notified Cities Service that a filling station at the proposed location would not be to the best interests of the town, and denied the petition. At the hearing before the board, Cities Service's representatives indicated they had come only to request a new building permit and not to combat evidence relating to the permit for the exception to use the land for a filling station.

The Supreme Judicial Court, in an opinion by Mr. Justice Whittmore, found that, on all the facts, Cities Service had not abandoned its rights under the 1955 zoning by-law permit. While Cities Service's actions were somewhat equivocal, the facts indicate that its only clear, actually expressed intent was to obtain a new building permit.

The Court also found that the lower court's findings implied that Cities Service had waived its rights under its 1955 zoning by-law permit, but that this implied finding was not sustained by the evidence. The Court assumed that a party can waive a right before a board of appeals, as before a court, if its conduct reasonably declares this intention and if the hearing then proceeds as if the right was given up or not relied upon. But, even if Cities Service's conduct might raise a question as to its intention, the hearing did not proceed as required in a waiver situation, since the issue of equivalence of the filling station plans was considered throughout the entire hearing. Thus the ambiguity of Cities Service's conduct at the hearing, at which evidence relating to the suitability of the lot for a filling station was received, was not resolved by the statement or action of anyone at the time when this conduct could have operated as a waiver. For the

board to indicate in its decision, for the first time, that it construed the petition as a renewal of a request for a zoning by-law permit, rather than a building permit, came too late.

The Court finally found that the “decision of the board cannot be sustained in any aspect.” The decision did not purport to revoke the 1955 zoning by-law permit which, even if it could have been revoked, would have required express notice and hearing. The board decision, even if it could be construed as finding no “plan equivalence,” makes no findings or statements of reasons on this issue.

The Cities Service case underlines for local zoning officials the fact that a grant of a permit for an exception is construed to be a permanent zoning change. The record clearly indicates that the reasons given by the board of appeals for its decision on the 1957 request for a building permit were facts that should have been known to them in 1955 when the permit for the exception was originally granted.\(^\text{10}\) Proper planning practice in the town would have prevented the grant of a permit for an exception at the time of the original application.

§12.5. **Zoning: Exemption from lot size requirements.** When zoning is imposed upon an area the prescribed requirements may so seriously affect certain vested property interests that the standards are not applied to these properties. These restrictions are most typically either permitted nonconforming uses or exceptions. But there is a third category in which land has been set off or prepared for a given use but is not yet so used.\(^\text{1}\) Perhaps the most typical situation of this type is the residential lot of substandard size that was not yet built upon when the lot size limitations were imposed. A local exemption\(^\text{2}\) involving lot size was interpreted in *Clarke v. Board of Appeals of Nahant.*\(^\text{3}\) The Supreme Judicial Court affirmed a Superior Court decree allowing the building of a residence at the locus. The minimum lot area section of the by-law, adopted in 1937, included provision for an exemption that “Lots duly recorded by a plan or deed or assessed at the time this by-law is adopted may be used, providing that all requirements in regard to yards are fulfilled.” In 1940, the following additional matter was added to the section: “Nothing con-

\(^{10}\) The reasons given by the board were: (1) the proposed filling station would be a great safety hazard; (2) the proposed pump location was too close to the highway; and (3) the parking area was too limited. The record clearly shows that these facts could not have been unknown in 1955, if proper planning practice was followed. See Record, pp. 18-22. See also 338 Mass. 719, 726, 157 N.E.2d 225, 230 (1959).

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tained in this section, however, shall prevent the construction or placing of any building on any lot in any of said districts containing a smaller area provided such lot on the effective date hereof does not adjoin other land of the same owner available for use in connection with said lot." 4

In 1929, the plaintiff's parents were grantees of a deed that separately described two lots in the town. These lots faced parallel streets, and were back to back, but adjoined for only some thirteen feet, and one lot was somewhat higher than the other. The lots were described separately in the deed and assessed separately. In 1956 the plaintiff's parents deeded one of these lots to him, and it is on this lot that he wished to build his home. The Supreme Judicial Court disagreed with the finding of the Superior Court that the plaintiff's lot was not "available for use in connection with" the adjoining lot of his parents, since it could have been used for permits accessory uses. Thus the plaintiff did not fit within the 1940 exemption provision, but equally clearly he did fit within the 1937 exemption provision. This being established, it became a matter of statutory construction to determine if property that complies with the 1937 provision also has to comply with the 1940 provision. The Court found that, if the 1940 provision controlled all land within the zoning district, the 1937 provision would govern few if any parcels of land. It is an accepted canon of statutory construction that all parts of a statute must be given meaning. Thus the Court held that land that was within the 1937 exemption provision did not have to comply with the 1940 provision, and the plaintiff was entitled to build his home on the locus.

§12.6. Zoning: Spot zoning. Cases in which spot zoning issues arise generally involve amendments to the zoning ordinance or by-law, in which a relatively small area, undistinguishable from nearby property, has had its zone classification changed.1 However, in Tracy v. Board of Appeals of Marblehead,2 the petitioners claimed that a small area zoned for business in 1928, when the original zoning by-law was adopted, constituted spot zoning. The locus involved in the case was one of two contiguous, relatively large lots that were used for business purposes in 1928, and a business zone consisting of these two lots was one of a number of small business zones created in the by-law. Evidence adduced at the trial in the Superior Court led to a finding by the justice that the town meeting intended to treat the two lots as nonconforming uses, but zoned them as a business district.3 The trial justice found the area was spot zoned and, therefore, that the board of appeals exceeded its authority in upholding the issuance by

4 Several other provisions were added to this section in 1940 but are not pertinent to the present dispute.

3 Record, p. 11.
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the building inspector of the permit for a business structure on the land.

The Supreme Judicial Court reversed the lower court, finding no spot zoning on these facts. The test is whether the zoning was "clearly arbitrary and unreasonable" or whether it "can reasonably be thought to bear some tendency to advance the interests of the public." Particularly as this zone was established by the original zoning plan of the town, deference to those with knowledge of local conditions is appropriate when reasonable doubt exists as to where zone lines should be drawn. The Court also referred to an earlier opinion, in which it had held that the inclusion of a number of small business districts did not invalidate the Marblehead zoning ordinance as a whole, as supporting its finding of reasonableness as to this particular small business district.

§12.7. Zoning: Accessory uses. The importance of the airplane as a mode of transportation has raised many community land use problems, most of which have involved provisions for airports and air space nearby. But the use of private planes may soon create a number of other planning problems, as is illustrated by Building Inspector of Falmouth v. Gingrass. Gingrass had obtained a permit to build a house and a "garage and storage." He used the garage and storage facility to house his private seaplane; his house abutted a pond and he had a license from the Massachusetts Aeronautical Commission to operate a private seaplane base on the pond. The single residence district in which the home was located permitted the construction of a two- (or on special permit a four-) car garage as an accessory use. The Supreme Judicial Court upheld the lower court's determination that "garage" in the by-law referred to a building for storing surface vehicles and did not include airplanes.

The Court also found no constitutional question was presented. The by-law permits the storage of airplanes in certain locations in districts classified for agriculture, business, and light and heavy industry. Conditions of private plane use and storage, at least at present, are not so well established that it is unreasonable classification not to provide for aircraft storage in a single residence district. And there is no constitutional requirement that, because of the special conditions of this lot, which made the use of the plane safe and non-disturbing to others in the vicinity, the by-law provide a special classification for land so located. In addition, in cases of substantial hardship, the by-law provides for the grant of a variance. The importance of the Gingrass case does not lie in the completely sound decision by the Court, but in its highlighting of a problem municipalities may wish


2 Gingrass had attempted in 1957 to obtain a variance to permit the storage of an airplane on his property, but the request for variance was refused. Record, p. 2. Since there seems to be no basis for a finding of "substantial hardship," the refusal to grant the variance was correct.
§12.8. Regulation of buildings and facilities. Building, fire, housing and other similar codes constitute major means by which a municipality can control and guide land use. Three cases decided by the Supreme Judicial Court during the 1959 Survey year illustrate the effectiveness of these codes for this purpose.

Maher v. Town of Brookline and its companion case, Aspinwall Nursing Home, Inc. v. Town of Brookline, involved the validity of fire regulations for lodging houses, adopted by the town in 1956. The regulations included a number of requirements involving structural changes in existing lodging homes, which changes would cost the lodging house owners a considerable amount. General Laws, c. 143, §§44 and 45 require certain fire precautions in hotels, lodging and boarding houses, and Section 46 states in part that:

the selectmen of towns . . . shall prescribe as they deem necessary, except so far as is specifically required in the preceding sections . . . what further provisions for the prevention of fires, and for the better protection of life in case of fire, shall be made by the several keepers of hotels, boarding or lodging houses within their respective limits.

The lodging house keepers in the Maher case contended that Section 46 did not cover structural matters and applied only to larger types of lodging houses covered by the two immediately preceding sections. The Court, after analyzing the history of these sections, rejected these arguments. It also rejected a contention that the regulations violated other sections of Chapter 143 by holding that the present provisions supplemented these other sections. Equal protection of the laws existed, in spite of the regulations not being applied to hotels in Brookline, since there is a reasonable basis for not treating hotels and lodging houses similarly.

The Maher case decided many of the points raised in its companion case, the Aspinwall Nursing Home case. The Supreme Judicial Court held that there was no conflict between state licensing of nursing homes and local fire regulations. Since the nursing home was li-
licensed under G.L., c. 140, §23, it could not argue that it was not properly subject to regulation by the town in these rules that specifically covered every lodging house in Brookline required to be licensed under G.L., c. 140. Even if it were not so licensed, it would still clearly fit into the general definition of lodging houses contained in G.L., c. 140, §22.

*Paquette v. City of Fall River,* the third of this group of cases, involved the validity of a city housing ordinance that required a large number of habitability changes in cold water flats. The standards imposed by the ordinance are similar to the Minimum Standards of Fitness for Human Habitation adopted by the Massachusetts Department of Public Health. Because of the cost of the required changes, market values of buildings containing cold water flats were reduced 30 or 40 percent. Cold water flats constitute about 25 percent of the housing accommodations in Fall River, and the plaintiffs owned a number of buildings containing these flats. In the hearing before a master the city had stated that it did not claim that the operation of cold water flats was an offensive trade. The trial justice drew an inference from this statement by the city that the flats were not nuisances, fire hazards or health hazards and held the ordinance to be arbitrary, unreasonable, and unconstitutional.

The Supreme Judicial Court, in an opinion by Mr. Chief Justice Wilkins, reversed. It held that the inference that the flats were not nuisances or hazards was not justified. The lower court erred in holding that there was no review of the superintendent of public buildings' decision that a violation existed, since the ordinance prescribed a review procedure. The ordinance was enacted under G.L., c. 143, §3, a constitutional exercise of the police power. Since no notification of violation had been issued to the landowners, only the question of jurisdiction of the superintendent of public buildings and of the board of appeal was open to challenge. The ordinance was not unconstitutional as applying to existing structures since it applies only to violations occurring after its passage. While these habitability provisions are an invasion of vested property rights, this does not make them unconstitutional. Every presumption favors the validity of statutes and ordinances in which the legislative body makes a decision that

6 338 Mass. 368, 155 N.E.2d 775 (1959), also discussed in §9.2 supra.

7 The ordinance requires, for example, installation of hot water facilities, lavatory basins and bathubs or showers, room heating facilities, window and door screens, two separate electrical outlets in each room, and other similar requirements. In addition, the number of square feet per occupant and type of access between rooms of the flat are prescribed. 338 Mass. at 371, 155 N.E.2d at 777-778.

8 This section gives a city or town the power to regulate buildings and structures within its limits for the prevention of fire and preservation of life, health and morals.

9 The Court noted that this challenge to the jurisdiction of the superintendent and the board was limited to the questions raised by the landowners in this case, since the Court could not properly make a declaration of general application to all persons and properties that might become affected by this detailed and extensive ordinance.
certain measures are necessary for the preservation of life, health and morals. The master's report contained no findings that would rebut the presumption of validity. 10

These cases represent again an expression of the essential sympathy of the Supreme Judicial Court towards efforts of legislative bodies to improve housing and land use conditions. They suggest that broad attacks upon the constitutionality of such statutes and ordinances are nearly always bound to fail although, of course, it is possible that the application of a given statute or ordinance to a given person or parcel of property might still be held unconstitutional on specific findings of fact.

§12.9. Improved harbors: Powers of harbor master. The great increase during recent years of recreational boating has resulted in the construction of many docks and marinas in harbors throughout the United States. These docking facilities obviously affect not only the use of the water in which they are located and the land to which they are affixed, but may cause traffic and parking problems, may prevent the use of nearby land for similar purposes, and may tend to change the character of the land area near which they are located. In Town of Scituate v. Maxwell 1 the harbor master of the town refused to permit the construction of a marina in the harbor and, when work was continued, removed the moorings and floats already installed. The Supreme Judicial Court affirmed the Superior Court's holding that the harbor master and the town could not interfere with the construction and operation of the marina. The case turned upon the powers given to a harbor master by G.L., c. 102, §§19-26, the Court holding that the harbor master's statutory powers of control over "vessels" meant control of ships, boats and barges and not other structures, even if they consist in part of floats. 2 The question of whether the state Department of Public Works had power to regulate marinas was left open. 3 This case highlights a problem that cities and towns on harbors will be facing much more in the future. Control of the building and use of these docking facilities is obviously required and the cities and towns, as well as the state and federal governments, have an interest in how the problem is solved. A study designed to suggest legisla-

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10 The Court noted that similar ordinances have been sustained in Iowa, Maryland, New York and Wisconsin. 338 Mass. 368, 376, 155 N.E.2d 775, 780 (1959).

§12.9. 1 1959 Mass. Adv. Sh. 1053, 159 N.E.2d 344. The companion case of Maxwell v. Town of Scituate was decided in the same opinion.

2 The town had urged that "vessel" be given the very broad meaning it has often been given in maritime law. Brief for Appellants, pp. 8-14.

3 The town had argued that the marina was not under the exclusive control of the Department of Public Works by virtue of G.L., c. 91, §§10 and 14, and that therefore the harbor master was given the power to control. The Court did not decide this point, which involved the question of whether "wharves and piers" included marinas, since not only was the Department not a party but the Court's determination of the statutory power of the harbor master controlled no matter what the Department's powers might be. 1959 Mass. Adv. Sh. 1053, 1057, 159 N.E.2d 344, 346-347.
tion that would acknowledge the interests of all governmental units involved, giving each some proper measure of control, should be undertaken by the General Court.

B. Legislation

§12.10 Zoning Enabling Act. The Zoning Enabling Act was amended four times during the 1959 Survey year. The three major amendments were designed to limit the authority of cities and towns over the zoning standards they can set. State control of the details of zoning ordinances and by-laws is theoretically undesirable since zoning should take into consideration local conditions that are certainly unknown to the General Court. But the present practice of allowing each municipality to set its own zoning standards, without any consideration of the effect of this zoning on the metropolitan or urban area of which it is a part, can be remedied in only two ways. The more desirable solution is to require regional land use control in each metropolitan and urban area of the Commonwealth, but this does not seem to be politically feasible. The alternate solution is to set limitations upon the zoning powers of municipalities and, seemingly, there has been substantial need for this type of legislation since the adoption of the present Zoning Enabling Act in 1954. This solution, if properly carried out, is not unsatisfactory. But the present legislative practice of amending the act on an ad hoc basis, generally as the result of recommendations of a group that has been adversely affected by some municipal legislation, is a very poor way of solving zoning problems. If municipalities are consistently imposing improper zoning standards something is wrong with the enabling act that ad hoc amendments can hardly solve. In addition, these amendments often reflect the point of view of one particular group and only incidentally do they coincide with the general policy of the enabling act.

General Laws, c. 40A, §§5 and 11 protect a landowner's nonconforming uses from the effect of zoning laws adopted or amended by municipalities. Neither section, however, covers the situation of a lot, laid out some time in the past but not yet built upon, which does not now meet the zoning law specifications for lot size and frontage. This situation, and the town's solution of it, was the subject of Clarke v. Board of Appeals of Nahant, decided during the 1959 Survey year. Local solution of the problem is, however, not desirable since

§12.10. 1 See, for example, the amendments discussed in 1958 Ann. Surv. Mass. Law §14.9, as well as those discussed in this section.

2 Section 5 protects uses that are nonconforming with the local zoning law and makes it almost impossible for a local zoning law to insure that anything but the landowner's "own sweet will" will remove this use. Section 11 protects uses for which permits have been granted or for which structures are in progress at the time of adoption of the zoning law or its amendments. See also Section 10, which permits the Department of Public Utilities to exempt public service corporations from zoning restrictions.

8 338 Mass. 473, 155 N.E.2d 754 (1959), discussed in §12.5 supra.
it tends either to produce excessive diversity among communities or often to be inconsiderate of the special needs of the owners of these now substandard lots. In Acts of 1958, c. 492, a new Section 5A was added to the Zoning Enabling Act. The new section applies to lots, duly recorded or registered, that complied with minimum area and frontage requirements of the local zoning law at the time of recording or registering. It provides that these lots may be used for residential purposes if the lot is over 5000 square feet in area, has a frontage of at least 50 feet, is in a residential district, does not adjoin land of the same owner, and conforms otherwise in area and frontage requirements to the present effective zoning law. One of the major causes of blight is the prevalence in many communities of a large number of vacant lots in residential areas. The present act is consequently generally salutary in permitting homes to be built upon lots that are not excessively small even if they do not comply with local zoning lot area requirements. The act does not exempt the property covered from yard requirements, and these requirements, if properly designed and enforced, will prevent extensive overcrowding.4

Many cities and towns have amended their zoning laws, almost always on an ad hoc basis, so as to make the development of subdivisions unprofitable. The problem has been discussed earlier in this chapter in connection with the 1959 Survey year case of Smith v. Board of Appeals of Needham.6 As was there noted, a three-year moratorium upon the application of zoning laws to approved definitive subdivision plans was imposed by G.L., c. 40A, §7A. Subdividers now quite generally, however, submit preliminary plans of subdivisions to the planning board for tentative approval and recommendations for change, and this has given some municipalities the opportunity to amend their zoning law between the time of submission of the preliminary plan and the date of approval of the definitive plan. Acts of 1959, c. 221, amends Section 7A to protect the subdivider in this situation. In effect, the amendment prescribes that the zoning law in effect at the time the preliminary plan is properly submitted will govern as long as the definitive plan is submitted within seven months after the preliminary plan, and if the subdivision is to be developed for residential use. This amendment to Section 7A gives a subdivider protection which experience has shown to be necessary. Unfortunately it does not protect a municipality that is, in good faith, working out a master land use plan on the basis of which it adopts a new zoning plan for the area in which the subdivision is located. Just as time is required for a subdivider to develop his plans to final approval, so a municipality needs time to revise its zoning on the basis of thorough preliminary analysis and planning. In the meantime a subdivider, fearing the prospective new zoning, could submit a preliminary plan. It would seem that some

4 Of course, this lack of control of yard requirements in the act offers a big loophole by which aggressive municipalities will undoubtedly restrict the effect of the act.

reasonable statutory protection for a municipality that is in good faith in changing its zoning could be provided. If the new zoning law were enacted within a relatively short time, perhaps six months, after the submission of the preliminary plan, and the zoning law was in accordance with a master land use plan developed for the community, priority should be accorded to the community's zoning law.

Cities and towns, for understandable reasons, have often prescribed large lot and floor area minimums in their zoning laws. But there are at least two objections to this type of restriction. First, of course, this type of zoning prevents the development of new single-family housing for low- and medium-income families, thus encouraging economic segregation. Second, and more technically, these restrictions are open to the objection that they exercise a direct rather than an indirect influence over building development. Of course, there are some countervailing factors. Acts of 1959, c. 607, attacks one of these two problems, that of minimum floor area requirements for single residences. It amends Section 2 of G.L., c. 40A, which governs the authority of cities and towns to enact zoning ordinances and by-laws. Cities and towns are forbidden to set minimum floor area requirements for the living space of a single-family residential building greater than 768 square feet. This minimum will give a one-floor residence, exclusive of exterior and interior walls, of approximately 35 by 22 feet. A home of this size would probably sell for no more than $15,000 in a subdivision development, and thus medium- if not low-income buyers should be able to finance it. The act fails, of course, to attack the large lot requirement, which is the most common zoning restriction that prevents the building of inexpensive housing. Cities and towns that now find their restrictions on floor area outlawed have the opportunity to impose the same general limitation by enacting substantial minimum lot size requirements. But some cities and towns are not in the position to impose large lot restrictions to the same extent that they have been able to impose large floor area minimums, and to that extent the act will have some effect.

General Laws, c. 40A, §§6 and 17 govern the procedure for public hearings of planning boards, boards of appeals, and municipal governing bodies on zoning matters. Acts of 1959, c. 317 amends these sections to prescribe specific notice requirements for all public hearings. Notice must be given on two successive weeks in a newspaper of general circulation in the community, the first publication to be at least twenty-one days before the date of the hearing. If no newspaper exists that meets the requirement of general circulation within the community, a notice must be posted at a conspicuous place in the city.

See Note, 60 Yale L.J. 506, 516-517 (1951).

Aesthetic and property values are, of course, preserved by large minimum lot and floor area requirements. In addition, rapidly expanding municipalities can in this way control population increase so that they can keep up with the demands for municipal services and facilities. And, certainly, low cost subdivisions, even those built within the past fifteen years, have often proven a source of blight in those communities in which they have been located.
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or town hall at least twenty-one days before the date of the hearing.

§12.11. Subdivision Control Law. Amendments to the Subdivision Control Law have been made extensively since its adoption in its present form in 1953.1 Three relatively minor amendments were adopted during the 1959 Survey year. Acts of 1959, c. 144, slightly alters the procedure required before the Subdivision Control Law becomes effective in a city or town by requiring that the copy of the rules and regulations of the planning board be certified by the city or town clerk, rather than the board, when it is furnished to the register of deeds and the recorder of the land court.2

Acts of 1959, c. 410, adds new matter to Section 81Q of the Subdivision Control Law, which involves the adoption of rules and regulations by the planning board. It permits these rules to require a turnaround when an approved way does not connect with another way, with provision that the turnaround easement of non-abutting property shall terminate when the way is extended.3 Section 81S of the Subdivision Control Law, covering submission of the preliminary plan, was rewritten by Acts of 1958, c. 206.4 During the 1959 Survey year the new section was further amended by Acts of 1959, c. 189. Two changes deal with notice to the city or town clerk. The section, since the 1958 amendment, has required that the subdivider give notice to the city or town clerk that he has submitted a preliminary plan. The 1959 amendment requires that the planning board notify the city or town clerk of its approval or disapproval of the plan. When a subdivider has given his notice by delivery, rather than by registered mail, he may request a written receipt for the notice. The third change requires the planning board to act on the preliminary plan within sixty days after its submission, either approving it, with or without modification, or disapproving it. This time limitation on planning board action will prevent untoward delays and also is essential if other provisions of the General Laws are to have meaning.5

§12.12. Inspection and regulation of buildings. The state law regulating the inspection of buildings1 was amended twice during the

§12.11. 1 The present law, G.L., c. 41, §§81K-81GG, was adopted by Acts of 1953, c. 674, replacing the earlier act adopted by Acts of 1947, c. 340. Of the twenty-three sections of the present law, twelve have been amended, some extensively and several times, since adoption of the statute.

2 Two minor language changes, not affecting the meaning of Section 81N, were also made by the act.

3 The easement for any turnaround in a plan approved after January 1, 1960, terminates with the approval and recording of a plan showing extension of the way, except for that portion of the turnaround included in the extension, and the recording of a certificate by the planning board of the construction of the extension. This termination provision does not apply to easements appurtenant to a lot abutting the turnaround. For further discussion of this act, see §1.7 supra.


5 For example, Acts of 1958, c. 221, discussed in §12.10 supra, requires the submission of a definitive plan within seven months after submission of the preliminary plan. If the planning board could hold the preliminary plan indefinitely the whole purpose of the act could be defeated.

§12.12. 1 G.L., c. 143, §§3-61.
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1959 Survey year. The more important amendment sets out detailed procedure for action by the officer or board charged with the duty of issuing permits. The officer or board is required to refuse or issue a permit for a residence for no more than four families within thirty days after receipt of the application for the permit. The applicant must be notified of the decision; if it is refused, detailed reasons for the refusal must be given. On failure of the officer or board to act within thirty days, the permit is deemed to be issued but the applicant, within thirty-five days after his application, must file a notice of failure to act with the city or town clerk. If the board or officer does not act within the thirty-day period, any person, municipal officer or board aggrieved has the same right of appeal as if the permit had been directly granted, and the appeal period runs from the date the applicant files the notice of failure to act. The applicant cannot commence construction under his notice of failure to act until twenty days after he files the notice and if no appeal has been entered before the end of the period. This act should improve as well as make more uniform the procedure for issuance of building permits. The interests of the officer or board with the power to grant permits, of the applicant for the permit, and of persons aggrieved by the grant of the permit are all appropriately governed. The General Court may have been wise in limiting this act to permits for residences for four or fewer families. Certainly the board or officer charged with the duty of issuing permits might well require more than thirty days to determine if a large complicated building meets requirements. It may also be undesirable to have permits for large residential or commercial and industrial buildings granted through inaction by the board or officer. The principle of the present amendment is essentially sound, however, and the General Court might consider applying it to all building permits, granting lengthier time periods for action by boards or officers as the buildings become more complex.

§12.13. Mass Transportation Commission. The close interrelationship of transportation to the development of land uses, although apparent to all students of land use planning and control, is not always realized in actual legislation and planning. Massachusetts has at

2 Acts of 1958, c. 515, which adds a new paragraph to G.L., c. 143, §3.

§12.13. 1 Even commentators do not always recognize this relationship. Much recent comment upon the possibility of the loss to the Boston area of the Inner Belt highway considered only the effect on motor vehicle transportation. But, in turn, most comment on the Route 128 circumferential highway has dealt with the land uses developed by the highway. Certainly the close interrelationship of transportation and land use development can seldom be seen more graphically than it is in the dramatic changes in land use along Route 128 since it was built.
least taken a step in the direction of recognizing the relationship by creating the Mass Transportation Commission. At least one of its functions relates directly to the problem of the relationship of transportation facilities and problems to the economic needs and opportunities of the Commonwealth. But it would be overly optimistic to assume that the Commission can do much with this problem in the immediate future. It is a part-time board and its creation reflects the crisis created by the breakdown of commuter train transportation in the Boston area. Its immediate function is to salvage something from the wreck of the past and to develop some policies and recommend some legislation that will keep a great number of totally diverse and politically powerful interests sufficiently satisfied so that some satisfactory even if "jury-rigged" system of mass transportation in the Boston area can be set up within the next few years. While the act setting up the Commission speaks in terms of investigation, study, planning and recommendations, Acts of 1959, c. 475, adopted about a month after the original act setting up the Commission, directs it to exercise the Commonwealth's outstanding option to purchase the Old Colony line from the New York, New Haven & Hartford Railroad. This latter act quite clearly reveals the essential immediate purpose of the Commission; but in time, as the immediate and crucial, not to say desperate, problems of the present are solved, the Commission may develop into a long-range planner in the mass transportation area. Resolves of 1959, c. 93, directs it to make a study of subway and rapid transit facilities in connection with the Prudential Development in Boston and this gives it an opportunity to do some medium- if hardly long-range planning in its field. Past experience with mass transportation in Massachusetts suggests that ad hoc, if at times original, solutions have been favored by both the executive and legislature. The creation of this Commission with at least modest planning powers marks a change of policy that is very desirable.

§12.14. Discrimination in housing. Acts of 1959, c. 239, amends G.L., c. 151B, §4(6), to require no discrimination because of race, color and creed in renting or furnishing multiple dwelling or contiguously located housing, in addition to the previously imposed restrictions upon publicly assisted housing. The act also amends Section 1 by inserting a definition of "contiguously located housing." The definition limits the application of this anti-discrimination act to housing that is or has been in the control of one person, or is or has been part of an approved subdivision, and which includes at least ten housing accommodations geographically abutting.

2 Acts of 1959, c. 416, adding new Sections 9, 10, and 11 to G.L., c. 16.
3 The Commission is, however, empowered to employ an adequate technical staff.
4 It has been reported, however, that the Commission is not carrying out its function nor is it hiring a staff. See Boston Herald, pp. 1, 9, November 30, 1959.

§12.14. 1 The restrictions upon "publicly assisted housing" were added to the statute by Acts of 1957, c. 426, commented on in 1957 Ann. Surv. Mass. Law §22.5.