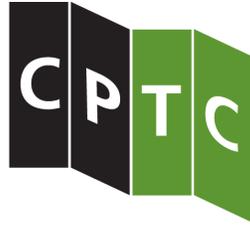


The Citizen Planner Training Collaborative



CITIZEN PLANNER

TRAINING COLLABORATIVE

Special Permits and Variances

The Citizen Planner Training Collaborative:

*University of Massachusetts Extension
Massachusetts Department of Housing and Community Development
American Planning Association, MA Chapter
Massachusetts Assn. of Regional Planning Agencies
Massachusetts Assn. of Planning Directors*

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I. SPECIAL PERMITS

A. Introduction

A special permit is a use that may be allowed in a zoning district upon issuance of a discretionary special permit by the special permit granting authority (SPGA) as established by the zoning ordinance or by-law. General Laws Chapter 40A, §9 (hereinafter referred to as Section 9) states, in part, that

[z]oning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.

Chapter 40A, §§9, 9A, 9B, and 9C go on to detail a host of specific uses which may be regulated by special permit and to establish procedures for the administration of special permits.

The Appeals Court in SCIT v. Planning Board of Braintree, 19 Mass. App. Ct. 101, 109 (1984), offered a succinct definition of special permits:

The role of the special permit in land use planning is not something new. Special permit procedures have long been used to bring flexibility to the fairly rigid use classifications of Euclidean zoning schemes . . . by providing for specific uses which are deemed necessary or desirable but which are not allowed as of right because of their potential for incompatibility with the characteristics of the district Uses most commonly subjected to special permit requirements are those regarded as troublesome (but often needed somewhere in the municipality, for example, gasoline service stations, parking lots, and automobile repair garages) . . . and uses often considered desirable but which would be incompatible in a particular district unless conditioned in a manner which makes them suitable to a given location

The special permit regulates that middle tier of uses between those so offensive that they are prohibited and those so innocuous that they are allowed as of right.

Many early special permit decisions of the Supreme Judicial Court (SJC) helpfully point out that a variance and a special permit are quite different. The variance is used to authorize an otherwise prohibited use or to loosen dimensional requirements otherwise applicable to structures. A variance is to be issued sparingly and only if all of the statutory prerequisites have been met. Special permits are issued to authorize specifically itemized uses after weighing the benefit or detriment of a specific proposal. In general, the court has emphasized that the criteria for the issuance of a special permit "are less stringent than those involved in the application for a variance." Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 153 (1976).

A special permit is not to be confused with a building permit. In LaCharite v. Board of Appeals of Lawrence, 327 Mass. 417, 422 (1951), the court noted that "a permit to build is entirely different in kind from the special permit. One is issued by the building inspector and the other is authorized by decision of the board only after many formalities have been complied with." These "formalities" entail the procedural requirements of Chapter 40A, §9, including notice, public hearing, and a final decision, none of which are applicable to a building permit. After the issuance of a special permit, the successful applicant must obtain a building permit if construction is contemplated.

Special permits in some respects resemble the process known as site plan review. Indeed, some uses require approval under both devices. There is, however, one key difference. The site plan review board's powers are limited to "regulation of a use, rather than its prohibition." Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25, 31 (1970). On the other hand, a special permit granting authority has the full range of discretion in assessing an application, including the right to deny the permit.

Where locally authorized, a special permit may be used to vary dimensional requirements set forth in a by-law or ordinance. In a dimensional variance, the petitioner is excused from lot area, frontage, yard, or depth requirements. The special permit mechanism may be used to accomplish the same result. Local authorization to do so eliminates the applicant's need to demonstrate hardship, a prerequisite for a variance. For example, in Woods v. Newton, 351 Mass. 98, 102-103 (1966), the court upheld an ordinance authorizing waiver of the height limitation of forty feet under the auspices of a special permit. In Emond v. Board of Appeals of Uxbridge, 27 Mass. App. Ct. 630, 632-636 (1989), the Appeals Court specifically held that the special permit device may be used to "fine-tune" dimensional standards in particular situations.

B. Prerequisites in the Ordinance or By-law

Case law has established several prerequisites for the exercise of special permit powers. Local ordinances or by-laws must comply with each of these prerequisites, or run the risk that the courts will declare the special permit provision invalid.

1. Adequate standards

Local ordinances or by-laws must state standards for the evaluation of special permit applications. The by-law must "provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits The standards need not be of such a detailed nature that they eliminate entirely the element of discretion from the board's decision." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638 (1970).

The courts have been extremely generous in reviewing such regulations. For example, in Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 118 (1955), an ordinance instructing

the special permit granting authority to consider only "the effects upon the neighborhood and the City at large" was upheld as adequate. See, e.g., Simeone Stone Corp. v. Oliva, 350 Mass. 31 (1965) ("obnoxious to the neighborhood, detrimental effect upon adjoining properties"); Sellors v. Concord, 329 Mass. 259 (1952) (such use is not detrimental to the neighborhood, due consideration shall be given to conserving the public health, safety, convenience, welfare, and property values).

On the other hand, several decisions, following Smith v. Board of Appeals of Fall River, 319 Mass. 341 (1946), have held that poorly worded or overly broad standards cannot stand. See Clark v. Board of Appeals of Newbury, 348 Mass. 407 (1965). Unless the court is faced with the rare case in which standards are totally absent or hopelessly contradictory, it is doubtful that Smith imposes any real limitation.

2. Specificity requirement

Section 9 limits the award of special permits to "specific types of uses which shall only be permitted in specified districts." These uses and districts must be clearly spelled out in the local ordinance or by-law. In Gage v. Egremont, 409 Mass. 345, 349 (1991), the SJC held invalid the town's by-law authorizing by special permit "any . . . use determined by the planning board . . . not offensive or detrimental to the neighborhood." The court reasoned that this generic approach violated the charge of the statute to be specific.

Similarly, uses not specifically authorized are not eligible for consideration because of similarities to other uses expressly mentioned. "It is not enough that a use for which a special permit is sought be 'consistent' or 'compatible' with a specific use for which the by-law states such a permit may be granted." See, e.g., Board of Appeals of Webster v. Z & K Enterprises, Inc., 1 Mass. App. Ct. 845 (1973). (court upheld the denial of a special permit for a mobile home park, where the by-law only allowed "hotel or tourist court.") Only those uses actually spelled out are eligible for consideration. As a result, the courts have frequently been called upon to decide whether a proposed use "fits" within a specific category of use allowed by special permit. See, e.g., Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147 (1976) (nonprofit indoor tennis facility); Pratt v. Building Inspector of Gloucester, 330 Mass. 344 (1953) (stable in residential district); Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148 (1977) (greenhouse).

Finally, the statutory charge that special permits be allowed for specific uses is quite literally interpreted. In SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101, 110-112 (1984), the Appeals Court invalidated a Braintree by-law which conditioned all uses in a business district on a special permit. Section 9 limits the special permit granting power to "specific types of uses"; the court held that the Braintree by-law exceeded this authority by placing all uses on this status.

3. Uniformity requirement: SCIT doctrine

Section 4 of the Zoning Act requires, in part, that

[any] ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.

As noted above, in SCIT, Inc. v. Planning Board of Braintree, 19 Mass App. Ct. 101, 107-108 (1984), the Appeals Court reviewed a Braintree by-law that placed all uses in a business district on special permit status. The court ruled that chapter 40A, §4 "does not contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." In Gage v. Egremont, 409 Mass. 345, 348 (1991), the SJC limited SCIT to the proposition that not all uses in a district could be placed on special permit. "[A] zoning by-law must permit at least one use in each zoning district as a matter of right."

SCIT and Gage, taken together, mandate that towns may not place all uses in a district on special permit. At least one use must be allowed as of right. This as of right use need not be a business use - presumably it could be any use. Nothing prevents a town from placing all business uses on special permit status, presumably even in a business district, as long as one use is available as of right. The lower courts have ruled that this requirement pertains also to overlay districts. Boch v. Planning Board of Tisbury, 5 LCR 16 (1997); KCI Management Corporation v. Board of Appeal of Boston, C.A. No.: 97-02221B (Suffolk Super. Ct. 1998)

However, towns are advised to avoid the temptation to leave only the following uses available as of right:

- * Agricultural, religious, or educational uses exempted under G.L. c. 40A, §3;
- * Passive recreation or conservation;
- * Other de minimus uses as of right. See, e.g., Unisys Corp. v. Town of Sudbury, Misc. Case No. 141550 (Land Ct. 1991).

C. Statutorily Authorized Special Permits

Chapter 40A, §9 states specific uses that may be authorized by special permit. These include:

- * special permits authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, installation of solar energy systems, protection for solar access, or other amenities;

- * special permits authorizing multi-family residential use in nonresidentially zoned areas where the public good would be served and after a finding by the special permit granting authority, that such nonresidentially zoned area would not be adversely affected by such a residential use, and that permitted uses in such a zone are not noxious to a multi-family use;
- * special permits authorizing cluster developments;
- * special permits authorizing planned unit developments;
- * special permits authorizing the use of structures as shared elderly housing;
- * special permits authorizing uses, whether or not on the same parcel as activities permitted as a matter of right, accessory to activities permitted as a matter of right, which activities are necessary in connection with scientific research or scientific development or related production.

In addition, Chapter 40A, §9A, allows adult bookstores or adult motion picture theatres to be regulated by special permit. Such zoning ordinances or by-laws may state the specific improvements, amenities or locations of proposed uses for which such permit may be granted, and may provide that the proposed use be a specific distance from any district designated by zoning ordinance or by-law for any residential use or from any other adult bookstore or adult motion picture theatre or from any establishment licensed under the provisions of G.L. c. 138, §12. This type of special permit is subject to the same procedural requirements as an orthodox application governed by section 9.

D. General Public Hearing Process

The public hearing process is set forth in Sections 11 and 15 of Chapter 40A, the Zoning Act. The purpose of the public hearing is to provide an opportunity for interested persons to appear and express their views pro and con. Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111 (1982). The following materials apply to public hearings in general, both for variances and special permits. Specific provisions related to either special permits or variances will be discussed separately.

1. Notice

Notice of a public hearing must be published in a newspaper of general circulation in the community. The notice must be published once in each of two successive weeks and the first publication in the newspaper must be at least 14 days before the day of the public hearing. The public hearing notice must also be posted in the city or town hall for a period of not less than 14 days before the day of the public hearing. See Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971) (do not count the day of the public hearing when determining the 14 day time period);

Crall v. Leominster, 362 Mass. 95 (1972) (requirement that notice be published in a newspaper once in each of two successive weeks means calendar weeks and need not be one full week apart); Lane v. Selectmen of Great Barrington, 352 Mass. 523 (1967) (notice is defective if the first publication of notice was less than 14 days before the hearing).

The public hearing notice must contain the following information:

- a. The name of the petitioner;
- b. A description of the property or area;
- c. The street address, if any, or other adequate identification of the location, of the area or premises which is the subject of the petition;
- d. The date of the public hearing;
- e. The time of the public hearing;
- f. The place of the public hearing;
- g. The subject matter of the public hearing; and
- h. The nature of action or relief requested, if any.

Exactly how precise the notice must be in describing the application has been the subject of a number of court cases. In Carson v. Board of Appeals of Lexington, 321 Mass. 649 (1947), the court held that a notice of public hearing which wrongly described the street location of the land in question was not defective where the notice could hardly have referred to any other land, and interested parties were not misled by the description. Further, the court determined that the notice, which specified that the petition was for the "erection and maintenance of a garage", was not defective where the notice did not disclose the size of the proposed garage where the petitioner was a bus company, and it was probable that the garage was intended for the storage of a considerable number of buses rather than for the accommodation of one or two private automobiles. See also Planning Board of Nantucket v. Board of Appeals of Nantucket, 15 Mass. App. Ct. 733 (1983) (where notice specified that the application was for relief under section 6-C-4 of the by-law to eliminate parking requirements for proposed retail, office and residential building, the notice was not deficient where the by-law had no such section and it was clear that section 6-B-4 must have been intended).

Notices that are sufficient to describe the proposed development have been upheld where the relief sought in the application differed from the relief granted. In Shoppers' World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63 (1967), the petition to the board was an appeal from the denial of a building permit. The public hearing notice described the subject matter as a special permit, and the court found that it was within the board's inherent administrative power to allow the

application to be modified to comply with the standards of the by-law. See also Duteau v. Zoning Board of Appeals of Webster, 47 Mass. App. Ct. 664 (1999) (although the petitioner filed an application for a special permit, the board responded to the application not with the grant of a special permit but with a favorable finding, and reclassifying the nature of relief sought by the petitioner was within the board's authority because interested parties had adequate notice that the applicant wished to use the locus for small engine repair).

Not all notices will pass muster. In Kane v. Board of Appeals of City of Medford, 273 Mass. 97 (1930), the notice merely recited that petitioner was seeking a variance of the zoning ordinance "as applied to the erection of alterations in a proposed building". This was ruled defective, as it could not be determined with reasonable certainty whether the petition was for a new building or for the alteration of a building. In addition, the notice did not identify the intended use of the proposed building, which was to be located in a residential area.

Notice of the public hearing must be sent by mail, postage prepaid, to the following parties in interest, even if the land of any party in interest is located in another community:

- a. The petitioner;
- b. Abutters;
- c. Owners of land directly opposite on any public or private street or way;
- d. Abutters to abutters within 300 feet of the property line of the petitioner;
- e. The planning board; and
- f. The planning board of every abutting community.

The assessors maintaining any applicable tax list shall certify to the special permit granting authority (SPGA) or the zoning board of appeals the names and addresses of parties in interest and such certification shall be conclusive for all purposes. The responsibility for mailing public hearing notice rests with the board and not the petitioner. Planning Board of Peabody v. Board of Appeals of Peabody, 358 Mass. 81 (1970). See Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663 (1985) (the Zoning Act requires only that the notice of decision "be mailed" and the board does not also have a duty to ensure that the notice is received. If the legislature had intended that the board ensure receipt, it could have so provided. The word "given" instead of "mailed" has been interpreted to require proof of receipt).

The SPGA or zoning board of appeals may accept a waiver of notice from, or an affidavit of actual notice to any party in interest, his stead or any successor owner of record who may not have received a notice. The SPGA or zoning board of appeals may order special notice to any such person giving not less than 5 or more than 10 additional days to reply.

The 14 day time period for publication in the newspaper does not apply to the notice mailed to the parties in interest. Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965). Failure to give adequate notice can be problematic, however. Medeiros v. Board of Alderman of Woburn, 350 Mass. 767 (1966) (action by special permit granting authority was invalid where required notice to planning board was not given); Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965) (receiving notice by mail 4 days before public hearing did not give interested party an opportunity to prepare his position and therefore was not reasonable).

A person who claims inadequate notice must usually show that he was prejudiced by the lack of notice if he appeals the board's decision on that ground. Kasper v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251 (1975). In Kasper, an abutter who did not receive notice by mail was not prejudiced where he learned of the public hearing through a newspaper publication 12 days in advance of the public hearing, and therefore had reasonable notice and an opportunity to prepare and present evidence. Further, he waived his right to object when, after objecting to the lack of notice, he proceeded to participate in the public hearing without requesting a postponement. See also Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982) (an interested party who did not receive notice was not prejudiced where he learned of the hearing through a notice in a published newspaper, found time to prepare for the hearing and was represented by counsel at the hearing).

2. Public hearing process

No public hearing for any special permit, variance or appeal can be held on any day on which a state or municipal election, caucus or primary is held in the community. A zoning board of appeals or SPGA can continue a public hearing to a date certain and give public notice pursuant to the Open Meeting Law (G.L. c. 40A, §18) without having to send new notice by mail to parties in interest. "It frequently occurs that a case is not finished on the advertised hearing day. It would be awkward, indeed, if mailed notice was required of each successive session." Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618 (1986).

A public hearing ends when rights of interested parties to present information and argue is cut off. Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111 (1982). Local boards often visit the site, and such site visits do not invalidate the decision. Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982) (visit by the chairman of a zoning board of appeals to the property for which a variance was sought and the examination of town tax records did not constitute an improper consideration of evidence not before the board). Once the public hearing is closed, however, the board should not consider other evidence. Caruso v. Pastan, 1 Mass. App. Ct. 28 (1973) (decision of a zoning board of appeals granting a special permit was not invalid by reason of a private consultation between the board and the town planning board after the public hearing and before its decision where there was nothing in the facts presented to the court to suggest that board was influenced in any respect, but court noted that the board of appeals should not have discussed the case with the planning board following the conclusion of its public hearing and prior to issuing its decision).

Absent a statutory restriction, a majority of a governmental body is a quorum and a majority

of the quorum can act. Clark v. City Council of Waltham, 328 Mass. 40 (1951) In determining the quorum requirement for conducting a public hearing, an easy rule to remember is that the same number of members of the governmental body necessary to make a favorable decision on a matter must be present at the public hearing. Sesnovich v. Board of Appeals of Boston, 313 Mass. 393 (1943); Real Properties, Inc. v. Board of Appeal of Boston, 311 Mass. 430 (1942) (when a statute requires a unanimous decision in a matter before a zoning board of appeals, there exists a statutory provision requiring that the quorum for such matter be all the members of the board). See District Atty. for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663 (1981) (under no circumstances can one vote constitute a majority of a quorum of a three-member board where one member votes to go into executive session and two members abstain).

Only those members of a SPGA or zoning board of appeals who are at the public hearing on a particular matter are entitled to vote on that matter. Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983). Upon municipal acceptance, however, G.L. Chapter 39, Section 23D allows a member who missed one session of the public hearing to vote after reviewing evidence including an audio or video recording of the missed session.

What constitutes a majority vote has been reviewed by the courts in a number of cases. For example, a temporary vacancy on a board does not transform a five member board to a four member board, thus quorum and voting requirements are still those required for a five member board. Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982). Failure to obtain the necessary quantum of vote means the motion fails. Tanner v. Board of Appeals of Belmont, 27 Mass. App. Ct. 1181 (1989)(rescript) (where two members of a board voted in favor and two voted against, and the fifth member was absent, the application was defeated as it required four affirmative votes to grant a special permit); Security Mills Limited Partnership v. Board of Appeals of Newton, 413 Mass. 562 (1992) (a concurring vote of four members of a board consisting of five members means that four members must agree on the result and not the reasoning for reaching that particular result).

E. Special Permit Procedures

This section provides an outline of procedures for special permits in particular, in addition to the general observations above. The procedures are generally found in G.L. c. 40A, Sections 9, 11, and 16.

The special permit granting authority can be the planning board, zoning board of appeals, board of selectmen, board of aldermen, city council, or zoning administrator under Chapter 40A, Section 1A. Chapter 40A, Section 9, requires that special permit granting authorities adopt and file rules and regulations with the municipal clerk. Such rules and regulations must prescribe a size, form, contents, style and number of copies of plans and specifications and the procedure for a submission and approval of such permits.

Where the planning board is designated as a SPGA, the zoning ordinance or by-law can provide for associate planning board members. See Section 9. The number of associate members allowed for a planning board is one for a five member board, and two for a board of more than five

members. The role of the associate members is the same as for associate members of the board of appeals. An associate member can be designated to vote if a member is absent, unable to act, has a conflict of interest or if there is a vacancy.

All applications for special permits must be filed by the petitioner with the municipal clerk. The municipal clerk must certify the date and time of filing. A copy of the application, including the certification by the municipal clerk must be filed forthwith by the petitioner with the SPGA.

An application for a special permit that has been transmitted to the SPGA may be withdrawn, without prejudice, by the petitioner prior to the publication of the notice of a public hearing. After publication of the public hearing notice, an application can only be withdrawn without prejudice with the approval of the SPGA.

The Zoning Act specifies that zoning ordinances or by-laws may provide that special permits be submitted and reviewed by other municipal boards and officials. Such reviews may be held jointly and the boards and officials may make recommendations to the SPGA. Failure of such boards and officials to make any recommendations within 35 days of receipt of the special permit application by such boards and officials shall be deemed lack of opposition to the special permit.

The SPGA must hold a public hearing within 65 days from the date of filing. The required time limit for holding the public hearing may be extended by written mutual agreement between the petitioner and the SPGA. A copy of such agreement must be filed in the office of the municipal clerk. Final action by the SPGA must be taken within 90 days following the date of the public hearing. Kenrick v. Board of Appeals of Wakefield, 27 Mass. App. Ct. 774 (1989) (when board continues hearing on special permit, the 90 day period within which the board must act runs from the close of the public hearing). The required time limit for taking final action may be extended by written mutual agreement between the petitioner and the SPGA. A copy of any such agreement must be filed in the office of the municipal clerk. Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981); Shea v. Board of Aldermen of Chicopee, 13 Mass. App. Ct. 1046 (1982)(rescript) (the 90 day time period in which a board must take final action on a special permit includes filing the decision with the municipal clerk). A SPGA may grant a special permit by a two-thirds vote of a board of more than five members; a vote of at least four members of a five member board; and a unanimous vote of a three member board.

The SPGA must make a detailed record of its proceedings indicating the vote of each member and the reasons for its decision. Copies of the detailed record and proceedings must be filed with the municipal clerk within 14 days after the decision. Board of Aldermen of Newton v. Maniace, 429 Mass. 726 (1999) (board took final action by recording with the city clerk the result of its vote on a special permit and was not compelled to file at the same time the reasons for its decision in order to avoid a constructive approval). Notice of the decision must be mailed forthwith, by the SPGA, to the petitioner, parties in interest and to every person at the public hearing that requested a notice. The notice must specify that any appeal must be made pursuant to General Laws Chapter 40A, Section 17 and filed within 20 days after the date the notice was filed with the municipal clerk.

Upon the grant of a special permit, or any extension, modification, or renewal, the SPGA shall issue to the owner and the petitioner a certified copy of its decision containing the name and address of the owner, identifying the land affected, specifying compliance with the statutory requirements for the issuance of the special permit and certifying that copies of the decision have been filed with the planning board and the municipal clerk. Schiffone v. Zoning Board of Appeals of Walpole, 28 Mass. App. Ct. 981 (1990); Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982) (findings which support grant of a variance or special permit are rigorous, while denial does not require such detailed findings but simply adequate findings and reasons); S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 9 Mass. App. Ct. 477, 481 (1980); Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 277 (1969); (a special permit granting authority's power to grant or deny special permits is discretionary and a decision of a special permit granting authority will not be disturbed unless it is based on an untenable ground or is unreasonable, whimsical or capricious). Notice of the decision must be mailed forthwith, by the SPGA, to the petitioner, parties in interest and to every person at the public hearing that requested a notice. The notice must specify that any appeal must be made pursuant to Chapter 40A, § 17 and filed within 20 days after the date the notice was filed with the municipal clerk.

The municipal clerk must certify that 20 days have elapsed after the decision has been filed in the office of the municipal clerk and no appeal has been filed or if it has been filed that it has been dismissed or denied. No special permit, or any extension, modification or renewal thereof, can take effect until a copy of the decision bearing the certification of the municipal clerk is recorded in the registry of deeds or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

A SPGA has the inherent power to correct an inadvertent or clerical error in its decision, but the board may not make a substantive amendment which changes the result of an original decision, or which grants relief different from that originally granted without compliance with the relevant notice and hearing requirements. Tenneco Oil Co. v. City Council of Springfield, 406 Mass. 658 (1990)

A special permit will lapse after two years, unless a shorter time period is specified in the zoning by-law or ordinance, if a substantial use has not commenced except for good cause or, in the case of a permit for construction, if construction has not commenced except for good cause. Excluded from any lapse period is the time required to pursue or await the determination of any appeal taken pursuant to Chapter 40A, Section 17. McDermott v. Board of Appeals of Melrose, 59 Mass. App. Ct. 457 (2003) (under the statute, it is the use that must commence within the two year period to prevent the lapse of a special permit and the failure to record the special permit is not fatal); Lobisser Building Corp. v. Planning Board of Bellingham, 454 Mass. 123 (2009) (we do not interpret the statute to mean that both substantial use and construction must commence to avoid lapse of a special permit).

F. Decision

In making its special permit decision, the SPGA is limited to consideration of the criteria detailed in the ordinance or by-law. "The board may not refuse to issue a permit for reasons unrelated to the standards of the by-law for the exercise of its judgment." Slater v. Board of Appeals of Brookline, 350 Mass. 70, 73 (1966). For example, in Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148, 157 (1977), the Appeals Court held that a board decision based, in part, on the character and reputation of the applicant was not sustainable. However, the board may consider the future effects of the proposed use. Humble Oil & Refining Co. v. Board of Appeals of Amherst, 360 Mass. 604, 606 (1971); Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 278 (1969); MacGibbon v. Board of Appeals of Duxbury, 347 Mass. 690, 692 (1964). The board must find in the record "substantial facts which rightly can move an impartial mind, acting judicially, to the definite conclusion reached." Shoppers World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63, 67 (1967). Information not included in the record is not properly considered. MacGibbon v. Board of Appeals of Duxbury, 347 Mass. 690 (1964).

When granting a special permit, the SPGA must "make an affirmative finding as to the existence of each condition of the statute or by-law required for the granting of the . . . special permit." Vazza Properties, Inc. v. City Council of Woburn, 1 Mass. App. Ct. 308, 311 (1973). For example, in Pierce v. Board of Appeals of Carver, 2 Mass. App. Ct. 5, 6 (1974), a board decision to grant a special permit for a mobile home park was annulled. The by-law called for consideration of potentially detrimental effects on the "neighborhood and town." When the board evaluated only the effect on the neighborhood, the court remanded for a finding on detriment to the town.

On the other hand, "refusal to grant a special permit does not require detailed findings." MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 515 (1976). If the board finds any permissible reason to deny the application, its decision will be sustained.

The granting authority has the full range of discretion in shaping its decision.

Neither the Zoning Enabling Act nor the town zoning by-law gives . . . an absolute right to the special permit The board is not compelled to grant the permit. It has discretionary power in acting thereon. The board must act fairly and reasonably on the evidence presented to it, keeping in mind the objects and purposes of the enabling act and the by-law. MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638-639 (1970).

Several decisions hold that a board may deny a special permit even if the permit might have been lawfully issued. Humble Oil & Refining Co. v. Board of Appeals of Amherst, 360 Mass. 604, 605 (1971) ("The mere fact that the standards set forth are complied with does not compel the granting of a special permit . . ."); Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275 (1969); Pioneer Home Sponsors, Inc. v. Board of Appeals of Northampton, 1 Mass. App. Ct. 830, 831 (1973) ("the board, in the proper exercise of its discretion, is free to deny a special permit even if the facts show that such a permit could be lawfully granted"). See also Davis v. Zoning Board of Chatham, 52 Mass. App. Ct. 349 (2001).

G. Conditions

Section 9 allows the imposition of "conditions, safeguards and limitations on time or use" in the issuance of a special permit. Case law provides many examples of conditions permissible under this authority, including

- * private disposal of solid waste; Middlesex & Boston Ry. Co. v. Board of Aldermen of Newton, 371 Mass. 849, 852 (1977).
- * deadline to commence construction, signage, alarm system; Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 151 n.3 (1976).
- * limits on vehicles, number of students, gender of residents, noise, possession of substances, maintenance, landscaping, parking spaces; Shuman v. Board of Aldermen of Newton, 361 Mass. 758, 762 n.7 (1972).
- * dust control; Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618 (1986).
- * three year term with automatic renewals; Hopengarten v. Board of Appeals of Lincoln, 17 Mass. App. Ct. 1006 (1984).
- * sewer connection and bond. Caruso v. Pastan, 1 Mass. App. Ct. 28 (1973).
- * hours of operation and police details during periods of heavy traffic. Mandracchia v. Zoning Board of Appeals of Westminster, 5 LCR 3 (1997).

A special permit, unlike a variance, may be conditioned by limiting its duration to the term of ownership or use by the applicant. Huntington v. Zoning Board of Appeals of Hadley, 12 Mass. App. Ct. 710, 715-717 (1981).

Innovative conditions sometimes inspire hostility. In Middlesex & Boston Ry. Co. v. Board of Aldermen of Newton, 371 Mass. 849 (1977), and Hopengarten v. Board of Appeals of Lincoln, 17 Mass. App. Ct. 1006 (1984), applicants unsuccessfully challenged conditions attached to their special permits because of alleged discrimination. Both matters involved conditions imposed by the granting authority for the first time. In Middlesex, the board imposed a condition that all solid waste be handled by a private disposal company. In Hopengarten, the board issued a special permit for a private tower for a term of three years, with automatic renewal provisions. Both conditions were unique in the annals of the respective boards. The appellants in both cases claimed that these new policies amounted to unequal treatment of their applications. The court rejected both claims, indicating that a board is free to establish a new policy, where based on a rational objective.

When a special permit application is accompanied by plans or specifications detailing the work to be undertaken, the plans and specifications become conditions of the issuance of the permit. Any significant departure from the plans or specifications, without action by the granting authority, may result in significant risk to the applicant. In DiGiovanni v. Board of Appeals of Rockport, 19 Mass. App. Ct. 339 (1985), petitioner put in foundations that were not in accordance with approved plans. "We think it axiomatic that when a variance is granted for a project `as shown by . . . plans' . . . the variance requires strict compliance with the plans, at least as far as the site

location and bulk of buildings are concerned we conclude that the language of a variance is to be construed against the individual requesting the variance, rather than against the granting authority." Id. at 346-347. The same requirement certainly applies to plans accompanying a special permit.

Where an ordinance or by-law lists conditions that shall be attached to the issuance of a special permit, the SPGA's failure to include these conditions may result in modification by the court. Wizansky v. Board of Appeals of Brookline, 21 Mass. App. Ct. 915 (1985).

The court has rejected conditions that attempt to delegate or defer decisions. In Weld v. Board of Appeals of Gloucester, 345 Mass. 376, 377 (1963), the Supreme Judicial Court reviewed a special permit with a condition indicating that "the water situation must be arranged to the satisfaction of all concerned." The court noted that a "board may condition the right to operate under a permit presently issued upon the completion of proposed work in accordance with identified plans or other certain standards." Id. at 378. But, in annulling the decision of the board, the court held that this condition was defective because it either delegated the decision to other persons (outside the board) or involved "a further determination of substance before the permit can issue." Id.

The Weld decision "is often cited but almost invariably distinguished." However, it remains a trap for the unwary. In Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618 (1986), the issuance of a special permit for gravel removal was accompanied by this condition: "Before commencing any operation, a detailed plan of dust control must be submitted to the Board for approval." Abutters complained that this condition "postpones for future action a determination of substance, the fatal weakness of the special permit in Weld." Id. at 624. The court annulled the special permit and remanded the matter to the board.

When a granting authority has imposed an invalid condition, the court will not allow the decision to stand. Instead, the matter must be remanded for consideration without the unauthorized condition. Lovaco v. Board of Appeals of Attleboro, 23 Mass. App. Ct. 239, 243 (1986).

The special permit constitutes a powerful land use device in the hands of local decision makers. It is crucial to understand the deference a reviewing trial court owes to a SPGA in this regard. Two appellate decisions state this standard most succinctly. In Humble Oil & Refining Co. v. Board of Appeals of Amherst, 360 Mass. 604, 605 (1971), the court held that "[t]he mere fact that the standards set forth [in the by-law] are complied with does not compel the granting of a special permit." Thus, even where the applicant complies with all performance standards in the proposal, this does not compel the issuance of the special permit. In Pioneer Home Sponsors, Inc. v. Board of Appeals of Northampton, 1 Mass. App. Ct. 830, 831 (1973), the Appeals Court ruled that "the board, in the proper exercise of its discretion, is free to deny a special permit even if the facts show that such a permit could be lawfully granted." This characterization of the deference due the local decision should be committed to memory by all special permit granting authorities.

II. VARIANCES

A. Introduction

The power to grant variances from the provisions of local zoning ordinances and by-laws is entrusted to the zoning board of appeals under the Zoning Act, Chapter 40A. “No person has a legal right to a variance and they are to be granted sparingly.” Damaskos v. Board of Appeal of Boston, 359 Mass. 55, 61 (1971). In Dion v. Board of Appeals of Waltham, 344 Mass. 547 (1962), the Supreme Judicial Court wrote: “Variances are to be granted sparingly and granting them has been surrounded by many statutory safeguards. . . . The legislative policy of avoiding variances, except upon a clear showing that the prerequisites have been satisfied, the circumstance that no evidentiary weight may be given to the board’s findings. . . and the provisions for a new hearing, viewed together, show that the burden rests upon the person seeking a variance and the board ordering a variance to produce evidence at the hearing. . . that the statutory prerequisites have been met and the variance justified.” Id. at 555-556.

The legislative history of variances in Massachusetts is inexorably linked to the 1926 Standard State Zoning Enabling Act, drafted by then U.S. Secretary of Commerce, Herbert Hoover. The Act, codified eventually in one form or another by all fifty states, included the following power, among others, for the board of adjustment:

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.
Standard State Zoning Enabling Act, Section 7.3, U.S. Department of Commerce, 1926.

The Massachusetts Legislature authorized the grant of a variance in 1924 as part of the state’s original Zoning Enabling Act. The Legislature revised the statutory language and requirements for the grant of a variance several times, including revisions in 1933, 1954 and 1958. The most recent statutory revision was Chapter 808 of the Acts of 1975, which enacted a comprehensive re-write of Chapter 40A into what is the current Zoning Act.

B. Substantive Requirements

Chapter 40A, Section 10 requires that the grant of a variance be made only where the zoning board of appeals (ZBA) finds the following three “required findings” have been reached in the affirmative. Note that these requirements are conjunctive, not disjunctive “Since the requirements for the grant of a variance are conjunctive, not disjunctive, a failure to establish any one of them is fatal.” Guiragossian v. Board of Appeals of Watertown, 21 Mass. App. Ct. 111, 115 (1986). See also Wolfson v. Sun Oil Company, 357 Mass. 87 (1970), “Each requirement of the statute must be satisfied before a variance may be granted.” Id. at 90. The ZBA must reach affirmative conclusions for all three findings. To repeat, a finding that two of the three requirements have been met is not sufficient for the grant of a variance.

In addition to requiring that all three findings be made in the affirmative, the courts have reminded ZBA's that their conclusions must be in the form of statements—analyses—that support the findings set forth in the variance decision. Simply copying the statutory findings language is insufficient. The board must reach affirmative conclusions on the following three requirements that consist of either analytical or otherwise substantive information. “The specific findings necessary to satisfy the requirements for granting a variance are not met by a ‘mere repetition of the statutory words.’” Wolfson v. Sun Oil Co., 357 Mass. 87, 89 (1970).

The ZBA is authorized to grant variances only if it finds that an application meets all of the following criteria:

1. “owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located”
2. “a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner. . . ;
3. “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.”

1. Finding no. 1: Soil conditions, shape or topography

A key requirement of variance law in Massachusetts is the determination that there is “something wrong” or “something unusual” about the parcel for which a variance is sought. By statute, this peculiarity must be evident in the parcel’s soil, the parcel’s shape or the parcel’s topography.

As important as an affirmative finding that the parcel has peculiar soils, shape or topography is the finding that this peculiarity is unique within the zoning district where the parcel is located. In Planning Board of Watertown v. Board of Appeals of Watertown, 5 Mass. App. Ct. 833 (1977), the court noted that the peculiarity must not affect the district as a whole. “[A] condition need not affect all property in a district in order to be regarded as a condition generally affecting the district as a whole.” *Id.* at 835. In Kirkwood v. Board of Appeals of Rockport, 17 Mass. App. Ct. 423 (1984), the Appeals Court upheld a lower court’s annulment of a variance. The court concluded, among other things, that the property and its attendant geologic constraints, simply was not unique relative to the zoning district in which it lies. “Ledge (hard rock), similar to that at the locus, comprises frontage of many houses on the waterfront. Most of the dwellings near the water incur similar exposure to the force of the elements and the ocean. Moreover, there is some other property in the district with topography generally like that of the locus. The only characteristic which really distinguishes Wrightson’s land is that it extends further into the ocean than the other waterfront property. The fact that inland property in the zoning district is not precisely identical to the locus in topography or shape is not controlling, however, since ‘a condition need not affect all property in a district in order to be regarded as a condition generally affecting the district as a

whole.” Id. at 428.

Although it is difficult to prove the requisite unique conditions on appeal, not all variances are annulled by the courts. In Wolfman v. Board of Appeals of Brookline, 15 Mass. App. Ct. 112 (1983), the Appeals Court upheld a lower court decision supporting the grant of a variance where the parcel “contains an irregular pattern of subsurface soil conditions and materials at varying levels of elevation and a relatively high water table...these soil conditions ‘show the locus to be unique as compared to other lots along Beacon Street...’” Id. at 115. But in Coolidge v. Zoning Board of Appeals of Framingham, 343 Mass. 742 (1962), the Supreme Judicial Court overturned the grant of a variance that was based on claims that development of residential property that abutted a business district was impractical. “Nor do we think that the subsidiary facts found by the judge would permit a finding that there was hardship ‘owing to conditions especially affecting ...the locus... but not affecting generally the zoning district in which it is located.’There is, however, nothing in the record from which we can infer that the factors giving rise to such a situation are not similarly present in the zoning district generally.... A district has to end somewhere. Care should be taken lest the boundaries of a residence district be pared down in successive proceedings granting variances to owners who from time to time through such proceedings find their respective properties abutting upon premises newly devoted to business purposes....What the interveners seek in effect and what the board has granted is a change in the zone boundary.... It may well be...that due to the conditions of the area in which the intervenor's land is located such a change would be beneficial to the community. This, however, is a matter for consideration by the town under procedures adopted for amendments to its zoning by-laws. The board’s ‘limited and carefully restricted variance power... may not be invoked for this purpose.’” Id. at 745-746.

The statute also allows a finding related to a unique shape of the parcel. Although there are many relevant cases where applicants sought to establish a unique parcel shape to justify a variance, a particularly compelling one involved the request by a gasoline station to expand its operation by constructing service bays. Wolfson v. Sun Oil Company, 357 Mass. 87 (1970). Years earlier the city revised its zoning ordinance, placing the property into three zoning districts. The proposed service bay construction could not comply with the rear and side yard setback requirements of one of the new zoning districts. The owner applied for and was granted a dimensional variance. On appeal, a lower court found that “because of the size and irregular shape of the locus, and more particularly because of the re-zoning in 1964 which divided it into three separate zones, the locus was unique.” Id. at 88. On appeal, the Supreme Judicial Court reversed. “The special circumstances found by the judge and the board is based on the premise that the size and irregular shape of the locus, together with its division into three separate zones, would result in violations of the code if any additional construction was attempted. Sunoco’s desire to change the operation of the gasoline station after purchasing the locus ‘with a zoning law limitation on its use cannot be made a fulcrum to lift those limitations.... In the instant case there was no ‘substantial hardship’.... [E]ven if the variance is not granted, Sunoco can continue to make reasonable use of the locus as a gasoline station.” Id. at 90.

Boards of appeal are in a difficult position when confronted with an applicant for an area variance for a lot that lacks minimum area requirements and has lost, or never obtained, grandfather

protection. The courts, however, have consistently concluded that a lot lacking sufficient area does not justify the grant of a variance. Mitchell v. Board of Appeals of Revere, 27 Mass. App. Ct. 1119, 1120 (1989)(rescript) (“the hardship arises solely from the fact that the lot is too small to qualify as a buildable lot under the zoning ordinance or to achieve exemption under the grandfather clauses applicable to lots created before zoning. In these circumstances §10 gives the board of appeal no authority to grant a variance.”)

While there are few cases where a variance was granted due to topographic constraints, this is likely a result of the tendency to lump the three criteria together—soils, shape and topography—more than the absence of situations where topographical problems exist. And while the statute allows the grant of a variance upon demonstration of a related hardship due to soils, shape or topography, most boards of appeal tend to see these three variables as fungible. Cases that have been decided on topographical constraints follow the same pattern as those discussed previously. Simply avoiding added costs or reducing difficulties associated with development of property with steep slopes or difficult topography does not provide legal justification for a variance. In Martin v. Board of Appeals of Yarmouth, 20 Mass. App. Ct. 972 (1985) (rescript), the Appeals Court overturned the grant of a variance for the construction of a garage that otherwise violated a front yard setback. One of the justifications for the grant of the variance, claimed the applicant, was that the variance allowed construction of the garage without removal of large oak trees. Similar to petitions requesting a variance to achieve a better view or reduce the amount of cuts and fills on a steep sloped lot, the court held that these factors do not rise justify a variance. “That something may be desirable does not, however, rise to the dignity of a hardship.” Id. at 973.

There have been instances where variances based upon unique topography have been upheld. See e.g., Crosby v. Board of Appeals of Weston, 3 Mass. App. Ct. 713 (1975) (rescript), “...the terrain and contour is such that construction on the locus requires locating the dwelling in a position as not to comply with the sideline requirements...the hardship did not arise from ‘changes and commitments made by the defendant after purchasing the land with a zoning law limitation on its use....’” Id. at 713.

2. Finding no. 2: Hardship

As anyone who has ever attended a ZBA hearing knows, where the applicant for a variance demonstrates financial, physical or other personal difficulties—so called hardships—the ZBA and the public at large is generally sympathetic. Such sympathy very often translates into the grant of the requested variance. Unfortunately, at least from a legal perspective, such sympathies, however well intentioned, are rarely the appropriate basis for the grant of a variance.

Massachusetts’ courts have held that the “hardship” “...must relate to the premises for which the variance was sought”. Hurley v. Kolligian, 333 Mass. 170, 173 (1955). In addition, the “hardship” must be linked to, or be caused by, the land’s unique or problematic soil conditions, shape or topography. The Supreme Judicial Court put it well: “Unless circumstances relating to the soil conditions of the land, the shape of the land, or topography of the land cause the hardship, no variance may be granted lawfully.” Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329,

331 (1993). The SJC also noted, “The judge relied on the ‘unique shape’ of the lot as subdivided. This consideration standing alone is, of course, irrelevant. The fact that the locus has a special shape because of the cul-de-sac cannot support the granting of a variance from area and frontage requirements. The hardship here has nothing to do with the shape of the land...The hardship is solely due to the failure of the owner of the locus to construct a house on the undersized locus before statutory protections against the zoning change ran out. That kind of hardship does not justify the granting of a variance.” Id. at 331-332. In a footnote, the SJC added this important point. “If the shape of any nonconforming lot would warrant a variance from area and frontage requirements, the door would be wide open for the construction of a house on each such lot in the Commonwealth.” Id. at 332, n. 5.

Because of this required linkage between soils, shape or topography and the hardship caused therefrom, Massachusetts’ courts have routinely rejected personal hardships as meeting the test. In one instance, the Appeals Court upheld the grant of a variance where, due to the unique circumstances of the lot’s shape (a so-called “pork-chop” lot) and accompanying hardship relating to the use of the land without a variance, the proper linkage was established. The court found that without a variance, the lot would be unbuildable. The interesting aspect of this case however, is that in addition to the shape-hardship connection, the applicant argued that a variance was warranted due to the failing health of his father and the family’s financial difficulties. The court rejected as irrelevant these latter claims of hardship, but upheld the grant of the variance on the establishment of the relationship to unique shape and resulting hardship to the land. Paulding v. Bruins, 18 Mass. App. Ct. 707, 711 (1984).

A second situation arises where government action is the cause of the hardship. In Adams v. Brolly, 46 Mass. App. Ct. 1 (1998), the court upheld the grant of a variance to a petitioner who lacked requisite frontage due to an eminent domain order by the Metropolitan District Commission (MDC). The court’s support for the variance turned on the fact that the petitioner had neither caused the hardship nor could have anticipated that such hardship would arise.

One oft-repeated situation is where the petitioner has created the hardship from which she now needs relief. Examples include the landowner with 2 acres of land in a zoning district requiring one acre minimum lot sizes who divides her parcel such that one parcel contains 1.2 acres and the other 0.8 acres. While the division can be lawfully accomplished, the landowner is now left with one complying lot and one that does not comply. This self-created hardship has consistently met with hostile review by the courts. It is a “...well-established principle in our cases prohibiting self-imposed hardships as a basis for obtaining a variance.” Adams v. Brolly, 46 Mass. App. Ct. 1, 4 (1998), citing a long line of Massachusetts cases.

Finally, and consistent with this discussion, Massachusetts courts are not sympathetic to the claim that but for the grant of a variance, the applicant will suffer “economic” or “competitive” hardships. A landowner’s desire to maximize his profit does not constitute substantial hardship. Once again, the fatal flaw generally suffered by this argument is its inability to link the unique circumstances of the lot with the hardship (in this case, financial) that these unique characteristics create. See 39 Joy Street Condominium Association v. Board of Appeal of Boston, 426 Mass. 485

(1998) where the Supreme Judicial Court, in a summarized review of several important variance holdings, stated: “We note additionally that ‘financial hardship to the owner alone is not sufficient to establish ‘substantial hardship’ and thereby justify a variance’”. Id. at 490.

3. Finding no. 3: The public good

The third finding that must be made is the board’s conclusion that the variance can be granted “without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.” This finding, more so than the other two, allows the ZBA some subjective leeway in its decision making process.

For example, in upholding the grant of a use variance, the Appeals Court allowed as justification for the variance the fact that the locus with the variance would be a substantial improvement over the locus constrained by existing zoning. “There is no question that the DiFlumeras’ use of the site for a small general store will be aesthetically more attractive than what previously existed at the locus... and that their modest business will be of substantial benefit to the district as a whole.” Cavanaugh v. DiFlumera, 9 Mass. App. Ct. 396, 400 (1980). It should be noted, however, that there were some extraordinary circumstances in the Cavanaugh case.

Although decided ten years earlier than Cavanaugh, the SJC set forth a more reliable holding regarding what finding number 3 means. In reviewing the grant of a variance that would have significantly improved vehicular parking and traffic conditions, but negatively impacted abutting property values, the SJC stated: “The test of the statute is general; the effect of a variance on the intent or purpose of the ordinance must be determined by appraising the effect on the entire neighborhood affected.” Cary v. Board of Appeals of Worcester, 340 Mass. 748, 753 (1960). The court went further, and provided this instructive advice, still relevant to boards of appeal today. “We do not think, however, that it can be concluded that the specific hurt here found to at least five residential properties is not a substantial derogation of purpose. The balancing of public advantage against the hurt to individuals which is inevitable with zoning is appropriately done in connection with the enactment or amendment of the ordinance or by-laws.... It is of limited operation in determining whether a proposed variance meets the rigid statutory conditions.” Id. at 753.

C. Use Variances

A typical variance, often referred to as a dimensional variance, can generally be labeled as an action by the ZBA to vary or reduce the requirement of a zoning by-law or ordinance relative to dimensional requirements of zoning. These include variations to setback requirements, frontage, area, width, height and lot coverage ratios prescribed by zoning. A use variance, however, refers to an action by the ZBA to allow a use not otherwise allowed by the zoning ordinance or by-law. For example, a request to allow a commercial use on residentially zoned property where the zoning ordinance prohibits commercial activities. Note that when a use variance is granted, the use for which the petition was made is allowed; however the zoning designation of the land does not change. In other words, a use variance granted to allow a commercial use on residentially zoned land does not change the zoning designation of the parcel.

Unlike dimensional variances, which may be granted under the Zoning Act, a use variance may be granted only in those cities and towns where the ordinance or by-law specifically authorizes the ZBA to grant use variances. In addition, the ZBA must make the three findings outlined above. It is estimated that one-third of the Commonwealth's cities and towns authorize their boards of appeal to grant use variances in compliance with G.L. c.40A, § 10.

Use variances are difficult to justify legally. Perhaps the most compelling argument in opposition to the grant of a use variance is the grant's likely conflict with a local comprehensive plan. A second problem with use variances is that it circumvents the statutory procedure for changing the zoning provisions. A city or town's legislative body adopts zoning in accordance with G.L. c.40A, §5. The adoption of new zoning (or amendment of an existing by-law or ordinance) can only be accomplished through compliance with several strict and unforgiving procedural requirements, including notice, advertisements, public hearings, reports and, finally, a two-thirds vote of the legislative body. Moreover, in towns, zoning by-laws are reviewed, for both substantive content and procedural compliance, by the Attorney General's office. As a result, the zoning adoption and amendment process is considered both thorough and procedurally fair.

Contrast the adoption of a zoning ordinance with the grant of a use variance, even though, as noted above, the use variance does not technically change the zoning designation. A use variance is granted by a three or five member ZBA following the procedural requirements specified in G.L. c.40A, §10. Neither legislative action (e.g. town meeting or city council) nor Attorney General review is required. Stated simply, the complex and intentionally deliberative process established to alter municipal zoning is absent in the variance process, and noticeable when the variance granted is of the "use" variety.

D. Conditions

Where a ZBA concludes that all the criteria discussed above have been met, and that a variance should be granted, the board should next deliberate as to what conditions, if any, should be attached to the variance approval. The ZBA has authority to grant variances subject to conditions and limitations. These include: (1) conditions and limitations on the use of the property (e.g. the property's use can be limited to a specified square footage or a building limited to a certain height or operations limited to daylight hours); (2) conditions that "extract" a public benefit necessitated by the grant of the variance (e.g. roadway improvements, stormwater drainage, exterior lighting) and (3) limitations on the time period(s) within which the variance will be valid (e.g. the variance shall expire in three years from the date of issuance or the variance shall be exercisable only during the months of June, July and August). By statute, a condition of approval may not include the continuation of the applicant's ownership of the property (e.g. that the variance will be void if the applicant conveys the property).

The zoning enforcement officer has the authority and the duty to enforce any variance condition. A condition of a variance is presumed to be inserted in the public interest. Therefore, a violation of such a condition warrants enforcement by the building inspector. Wyman v. Board of

Appeals of Grafton, 47 Mass. App. Ct. 635 (1999).

E. Procedures

For detailed information regarding this process, please refer to Chapter 40A, Sections 10, 11, 15 and 16. The process is similar to the process for special permits, set forth above, with certain differences as noted below. Please note that, unlike special permits, where the zoning ordinance or by-law may designate various boards as SPGA, the power to grant variances from zoning is delegated only to the zoning board of appeals by statute.

Any petition or appeal for a variance must be filed by the petitioner with the municipal clerk. The municipal clerk must certify the date and time of filing. A copy of the petition or appeal, including the certification by the municipal clerk must be filed forthwith by the petitioner with the zoning board of appeals.

Any petition for a variance that has been transmitted to the zoning board of appeals may be withdrawn, without prejudice, by the petitioner prior to the publication of the notice of a public hearing. After publication of the public hearing notice, a petition can only be withdrawn without prejudice with the approval of the zoning board of appeals.

The zoning board of appeals must hold a public hearing within 65 days from the receipt of a petition for a variance. The required time limit for holding the public hearing may be extended by written mutual agreement between the petitioner and the zoning board of appeals. A copy of such agreement must be filed in the office of the municipal clerk.

The zoning board of appeals must make its decision on a variance within 100 days after the date of filing with the municipal clerk. The required time limit for making the decision may be extended by written mutual agreement between the petitioner and the zoning board of appeals. A copy of such agreement must be filed in the office of the municipal clerk. The zoning board of appeals must make a detailed record of its proceedings indicating the vote of each member and the reasons for its decision. Copies of the detailed record and proceedings must be filed with the municipal clerk within 14 days after the decision.

The courts have been somewhat forgiving toward the local boards in interpreting these deadlines. In O'Kane v. Board of Appeals of Hingham, 20 Mass. App. Ct. 162 (1985), the court ruled that the requirement that a decision on a variance shall be filed with the municipal clerk within 14 days is merely directory, rather than mandatory. The board of appeals in that case made its decision earlier than required by the statute, and thus still filed the decision within the 100 day time limit. In Burnham v. Hadley, 58 Mass. App. Ct. 479 (2003), the court interpreted the statute as allowing the zoning board of appeals to file its decision within 14 days following the 100 day period in which the board must act.

Notice of the decision must be mailed forthwith, by the zoning board of appeals, to the petitioner, parties in interest and to every person at the public hearing that requested a notice. The

notice must specify that any appeal must be made pursuant to General Laws Chapter 40A, Section 17 and filed within 20 days after the date the notice was filed with the municipal clerk.

Upon the granting of a variance, or any extension, modification, or renewal, the zoning board of appeals shall issue to the owner and the petitioner a certified copy of its decision containing the name and address of the owner, identifying the land affected, specifying compliance with the statutory requirements for the issuance of the variance and certifying that copies of the decision have been filed with the planning board and the municipal clerk.

The municipal clerk must certify that 20 days have elapsed after the decision has been filed in the office of the municipal clerk and no appeal has been filed or if it has been filed that it has been dismissed or denied. No variance, or any extension, modification or renewal thereof, can take effect until a copy of the decision bearing the certification of the municipal clerk is recorded in the registry of deeds or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

F. Lapsed Variances

Variances must be used—put into practice—within one year of the date they are granted or else they lapse by operation of statute. G.L. c. 40A, §10. The statute provides, however, that the ZBA may, upon written petition from the variance recipient, extend the variance for up to six additional months. Requests for an extension must be filed with the ZBA prior to the lapse of the original grant of the variance (e.g. before the one year period expires). The ZBA has 30 days from the date requested to grant such an extension or the request is deemed denied. If the variance extension is denied or the Board of Appeals fails to act, the variance is deemed to have lapsed.

A lapsed variance can not be re-instated. A new variance must be applied for, all procedural requirements complied with and the variance ultimately approved, for a second time, by the ZBA. "...variance rights which are not seasonably exercised will automatically become void; that the holder of a lapsed variance who seeks to reestablish his rights must initiate a new proceeding under §10; that he must therefore make a new showing of the requirements set out in the first paragraph of that statute; and that it is for the board, as before, to decide the matter in the exercise of its discretion." Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 76, 81 (1982). See also, Maurice Callahan & Sons, Inc. v. Board of Appeals of Lenox, 30 Mass. App. Ct. 36 (1991) where the Appeals Court required the recipient of a variance limited to a five year period to offer the same levels of proof required by the statute for a renewal of the variance as he was required to demonstrate for the original grant. "Accordingly, the denial of the plaintiff's application for a permanent variance must be reviewed under established principles which dictate that the denial is in excess of the defendant's authority only if it is unreasonable, whimsical, capricious or arbitrary or based solely on legally untenable grounds." Id. at 40. In essence, no "credit" is allowed, nor should be given, to an applicant who applies for a variance after a previously issued variance has lapsed. The entire process must begin anew and while the petitioner may choose to emphasize the fact that a previous board, on a previous occasion saw fit to grant a variance, this emphasis has no legal significance without adequate

findings by the ZBA.

The statute and case law are silent as to whether deliberations on an extension request require a public hearing. Accordingly, a public hearing is seemingly not required. However, it is recommended that the ZBA's decision on whether to grant an extension be filed with the municipal clerk.

It is important to note that prior to the re-write of the Zoning Act in 1975, the statute did not contain a lapse provision for variances. At issue in many communities is whether these "old" variances are still valid, even if not exercised and despite the revisions to variance law in Massachusetts. The Appeals Court hinted that forcing an "old", un-exercised variance into a lapsed status is too harsh and not consistent with the intent of the old or even new provisions of the statute. Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985). "The notion that variances more than one year old, and remaining unexercised by the effective date of the new statute, are destroyed wholesale by a retroactive application of §10, would appear quite drastic, and hardly matches the text of that provision." Id. at 403. Note however, the Appeals Court's important caveat: "In holding that the variance at bar did not lapse but on the contrary has been sufficiently availed of, we do not mean to reflect in any way upon a possibility that an old variance, long unexercised, may lose its force by reason of radically changed conditions at the locus, including changes brought about by revisions of a zoning ordinance or by-law." Id. at 405.

What action or actions need to be taken to prevent the lapse of a variance has been a matter of debate, as to which the courts have offered some guidance. In Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985), a variance was granted to allow the owner of two adjacent lots to divide the lots so that she could sell one lot with an existing dwelling and build on the other. Neither lot as divided complied with the zoning by-law. The court determined that the sale of the lot with the house on it was a sufficient exercise of the variance, since, without the variance, the owner of the lot would have been in violation of zoning. In Cornell v. Board of Appeals of Dracut, 453 Mass. 888 (2009), the court held that failure to record the variance within the one year period caused it to lapse. The court also stated that, even if recorded, the variance had lapsed because Cornell failed to obtain a building permit within the one year period. Cornell's act of obtaining an approval not required endorsement on a plan was not sufficient to exercise the variance.

This 2011 module was prepared by Barbara J. Saint André, esq. of Petrini & Associates, P.C., and includes materials from previous modules prepared by Jonathon Witten, esq., and Donald Schmidt of DHCD.