CHAPTER 5
Zoning Practice: Procedures for Obtaining Variances and Special Permits

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CHAPTER 5

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Scope Note
This chapter provides a step-by-step roadmap of the procedures applicable to obtaining variances and special permits and explains the consequences that can follow procedural defects. It addresses practical questions such as where to file, when to file, and what to file. Next comes a discussion of hearings—notice, public hearings, and the open meeting law requirements. The chapter concludes with a discussion of the decision itself, including form, filing, notice, recording, modification, reconsideration, and withdrawal.

§ 5.1 INTRODUCTION

Despite the important substantive differences between variances and special permits, the procedures for obtaining variances and special permits are substantially similar. This chapter examines the statutory procedural requirements and offers some practical guidance for lawyers attempting to avoid the snares of the procedural thicket.

§ 5.2 CONSEQUENCES OF PROCEDURAL DEFECTS

Before discussing the procedures for obtaining variances and special permits, it is helpful to consider the consequences of procedural defects. Under Section 17 of the Zoning Act, a decision granting or denying zoning relief may be appealed by any “person aggrieved” within twenty days after the decision is filed with the municipal clerk. Under the corresponding provisions of Old Chapter 40A, such appeals were also available (G.L. c. 40A, § 21, as revised by 1973 Mass. Acts c. 1114, § 4, and 1974 Mass. Acts c. 78, § 1, twenty-one-day appeal period for appeals to the District Court; 1954 Mass. Acts c. 368, § 2, fifteen-day appeal period). Such appeals may be based on a procedural defect, at least when the defect has prejudiced the appellant (see § 5.11.4(c), Nonprejudicial Defect, below) as well as on any other ground. The challenging party, of course, has the burden of proving any procedural defects. See Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802, 811 (1981). An applicant

who wishes to avert or defeat such an appeal must ensure that the proper procedures are followed in every respect.


One of the significant reforms implemented by Chapter 808 was the adoption of a ninety-day appeal period for defects in notice of a public hearing and clarification that all other types of procedural defects are cured unless raised by an appeal commenced within the twenty-day appeal period. Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. 304 (1986). Cappuccio construed Section 17 to require appeal within the twenty-day period by reason of failure to give notice of the decision, since the ninety-day period applies only to notice of the hearing. Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. at 310. The ninety-day statute of limitations on procedural challenges to zoning relief set forth in G.L. c. 40A, § 17 should be applied “retroactively” to cure procedural defects in zoning relief granted before the effective date of 1975 Mass. Acts c. 808. See, e.g., Kagan v. United Vacuum Appliance Corp., 357 Mass. 680, 683–84 (1970) (retroactive application of long-arm statute); Mulvey v. Boston, 197 Mass. 178, 181 (1908) (retroactive application of a shortened statute of limitations). However, the new limitation period should be considered to have started to run with respect to prior zoning relief on the date that 1975 Mass. Acts c. 808 became effective in the municipality. See Sohn v. Watson, 84 U.S. 596, 600 (1873) (construing statute of limitations to run prospectively from the effective date of the statute).

Section 17 of the Zoning Act provides in part that

[the foregoing remedy [appeal within twenty days after filing of the decision with the city or town clerk] shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk . . . .]
The ninety-day statute of limitations eliminates the risk of indefinite vulnerability to collateral attack, except where there has been a total failure to provide notice, as required by G.L. c. 40A, § 11, and a plaintiff acts promptly to challenge the zoning relief after learning of it. Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186, 194–95 (2005). In Kramer, a special permit decision was filed with the city clerk on October 11, 2001. About eighteen months had gone by when Kramer saw an antennae structure under construction blocking the view from his window. Sixteen days later, on May 20, 2003, Kramer filed an action claiming, among other things, that neither he nor anyone else in his building (sixty-four residents of an abutting condominium) had received notice of the special permit hearing. The case was dismissed by the trial court because the ninety-day statute of limitations under G.L. c. 40A, § 17, for actions claiming a defect in notice of hearing, had expired.

In the Appeals Court’s view, the statutes of limitation in G.L. c. 40A, § 17 “are not designed to foreclose access to judicial review when there has been a total failure of notice to one such as Kramer, who was entitled to receive it.” Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. at 193. In effect, the ninety-day statute of limitations is tolled “until the abutter has notice of the project to which he objects.” Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186, 194 (2005). The court distinguished prior cases where litigation was dismissed for failure to file within the statutory deadline, including Kasper v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251 (1975); Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304 (1986); and Chiuccariello v. Building Commissioner of Boston, 29 Mass. App. Ct. 482 (1990), as cases where “the aggrieved party eventually received some sort of notice that either permitted him to appear at the hearing or to appeal within the ninety-day window.” Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. at 194.

The court remanded the matter for the trial court to determine “whether the board provided any other form of statutory notice.” Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. at 196. “If no notice sufficient to meet the statutory requirements was provided, the board must hold a new hearing.” Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. at 196. “[G]iven the relative ease of effecting the requisite notice required by § 11 and the self-interest of the permit-seeker in monitoring the board’s discharge of its notice obligations,” cases involving lack of notice of any kind are likely to be rare and, therefore, in the court’s view are unlikely to “threaten the interests of finality and predictability” achieved by the statute of limitation. Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. at 195 n.8.

At least with respect to structures and uses that have not already been constructed or commenced for a sufficient period of time that more than ninety days’ notice to all “persons aggrieved” can be inferred, an unfortunate result of this case is that real estate conveyancers, lenders, and buyers, who previously could rely on the expiration of the ninety-day statute of limitation without further inquiry, now must verify in each case that some notice (by publication, mailing, and posting) was given in compliance with the statutory requirements.
As Kramer well illustrates, the ninety-day statute of limitations does not completely eliminate the importance of avoiding procedural defects. Proper procedures must be followed in all respects if the applicant wishes to avoid vulnerability to an appeal within the ninety-day period. Even where an applicant is willing to run this risk, in the hope that no appeal will be filed within that period, it is often still necessary to make sure that proper notice of the public hearing has been given. For example, a developer who buys property or commences construction during the ninety-day period is at risk unless his or her attorney is in a position to confirm that there was no defect in published, mailed, or posted notice. Although a developer may be willing to take such chances, a construction lender may ask for an attorney’s opinion that the variance or special permit is not subject to attack on this basis.

Fundamental errors that could cause a decision to be vulnerable even ninety days after a variance or special permit is granted relate to jurisdiction and commencement of the appeal period. In particular, the applicant should

- confirm that the relief was granted by the proper board, G.L. c. 40A, §§ 9, 10. (A variance granted by a planning board or by a city council, for example, would be a nullity because such boards clearly have no jurisdiction over the subject matter. A closer question would be presented by a special permit granted by the wrong special permit-granting authority (SPGA) on the basis of a reasonable but erroneous interpretation of the municipal ordinance or bylaw; this might possibly be considered a “procedural” defect, which would be cured if not appealed within the twenty-day period.); and

- make sure that a decision was filed with the municipal clerk, G.L. c. 40A, §§ 15, 17, so that the applicable statute of limitations begins to run.

For further discussion, see § 5.4, What Municipal Board Can Grant Zoning Relief; § 5.15, Filing the Decision; § 5.17, Recording/Effective Date of the Decision; and § 5.21.5, Nature of Constructive Relief, below. Note also that the initial appeal period for violation of the open meeting law is thirty days after the alleged violation (as discussed in § 5.13, Open Meeting Law Requirements, below).

An applicant who needs to be able to rely on zoning relief after the twenty-day appeal period has expired but before the ninety-day appeal period has expired must additionally confirm the adequacy of published, mailed, and posted notice. (See § 5.11, Notice of Hearing, below.) All of the procedures set forth in this chapter must be followed, however, and the applicable substantive requirements must be met if the applicant is to be protected against the possibility of a successful appeal commenced within the twenty-day appeal period.

§ 5.3 WHO CAN FILE FOR ZONING RELIEF

The applicant for a variance or special permit may be either the owner of the affected land or someone “other than the owner.” G.L. c. 40A, § 11, ¶ 4. An applicant who is not the owner must have some connection with the land, but the courts have upheld the standing of such applicants in a wide variety of circumstances. See, e.g., Dion v.
Bd. of Appeals of Waltham, 344 Mass. 547, 554–55 (1962) (a “straw” holder of legal title); Carson v. Bd. of Appeals of Lexington, 321 Mass. 649, 652 (1947) (applicant was buyer under purchase and sale agreement contingent upon granting of building permit); Marinelli v. Bd. of Appeal of Boston, 275 Mass. 169, 172–73 (1931) (applicant who had oral agreement with landowner to buy or lease the land). Written authorization by the owner should suffice in any event; the presentation of such authorization could be required by a local rule or practice.

Brady v. City Council of Gloucester, 59 Mass. App. Ct. 691 (2003) considered the authority of a special permit-granting authority to deny a special permit based on “ownership” grounds. In Brady, the special permit was sought by an applicant that was a tenant in common with more than twenty other individuals. Three cotenants objected to the project. The court first dealt with the authority of the special permit-granting authority to inquire about ownership. The SPGA may require information about ownership as part of its application process, if only to allow proper notice of decision to be sent to owners in compliance with G.L. c. 40A, § 11. The more difficult question was whether the SPGA had authority to deny the requested special permit owing to the particular ownership issues presented in this case. The tenant in common had standing to apply for the permit. But the permanent nature of the patio being proposed was, under common law, deemed destructive of the common estate, and thus could not be implemented over the objection of any cotenant. Therefore, the SPGA had authority to deny the special permit based on the objections filed by the cotenants. The situation is otherwise “[w]here encumbrances on title do not impair the applicant’s rights to prosecute the proposed development.” Brady v. City Council of Gloucester, 59 Mass. App. Ct. at 697 (citation omitted). “But when an ownership issue adversely and substantially affects the development or use of the proposed project, the reviewing board need not ignore that reality.” Brady v. City Council of Gloucester, 59 Mass. App. Ct. at 697.

§ 5.4 WHAT MUNICIPAL BOARD CAN GRANT ZONING RELIEF

Variances may be granted only by the permit-granting authority (PGA), G.L. c. 40A, §§ 1A (definition) and 10 (variances), which is either

- the board of appeals (see G.L. c. 40A, § 12 with respect to the creation of and membership in boards of appeals) or
- a zoning administrator established by the municipal zoning bylaw or ordinance to whom such authority has been delegated by the board of appeals (see G.L. c. 40A, §§ 12 and 13 with respect to the creation of zoning administrators and delegation of powers to them).


A PGA may grant a variance that authorizes “a use or activity not otherwise permitted in the district in which the land or structure is located” only if the municipal
ordinance or bylaw “shall expressly permit variances for use.” G.L. c. 40A, § 10. However, use variances granted before January 1, 1976, which were limited in time, may be extended on the same terms and conditions. G.L. c. 40A, § 10; see Holmes v. Sudbury Bd. of Appeals, 67 Mass. App. Ct. 1108 (2007) (pre-1976 use variance allowed to lapse for fourteen months could not be extended). The degree of specificity required to “expressly” authorize use variances has not been considered by an appellate decision. Two decisions of the trial court that address this issue are Bergmann v. Garino, C.A. No. 79-2778 (Mass. Super. Ct., Middlesex County, Nov. 15, 1979) (Zobel, J.), and Mansour v. Fitchburg, Land Ct. Misc. Case No. 119070 (May 2, 1986) (Cauchon, J.). No specific provision of a zoning bylaw or ordinance is necessary to authorize a board of appeals to grant a variance other than one for use.

Special permits may be granted only by the special permit-granting authority (SPGA), G.L. c. 40A, § 9, ¶ 8, designated as such in the municipal zoning ordinance or bylaw. Section 1A provides that this term “shall include”

- the board of selectmen,
- the city council,
- the planning board,
- the board of appeals, or
- a zoning administrator.

An ordinance or bylaw may provide that “certain classes of special permits shall be issued by one [SPGA] and others by another [SPGA].” G.L. c. 40A, § 9, ¶ 8; see Walker v. Bd. of Appeals of Harwich, 388 Mass. 42 (1983) (interpreting provisions of zoning bylaw that divided special permit-granting authority between local planning board and board of appeals). An SPGA may grant a particular type of special permit only pursuant to express provisions of the ordinance or bylaw; in the absence of such provisions, a variance is required. Tambone v. Bd. of Appeal of Stoneham, 348 Mass. 359, 364 (1965); Wrona v. Bd. of Appeals of Pittsfield, 338 Mass. 87, 89–90 (1958); Wolfman v. Bd. of Appeals of Brookline, 15 Mass. App. Ct. 112 (1983) (special permit not authorized by bylaw but variance granted in alternative upheld). The power of a PGA to grant variances is not expressly limited to situations in which the ordinance or bylaw does not provide for a special permit, although a PGA might be justified in refusing a variance on the grounds of the availability of the same relief by way of a special permit.

A zoning administrator, where authorized by the zoning ordinance or bylaw, may exercise such powers and duties of the board of appeals as that board chooses to delegate to him or her, G.L. c. 40A, § 13, including the power to grant variances and whatever power to grant special permits the ordinance or bylaw may have conferred on the board of appeals. The zoning administrator’s decisions are subject to appeal to the board of appeals, as discussed later in this chapter. Few municipalities have appointed zoning administrators.
A permit-granting authority may not delegate to another board “the determination of an issue of substance, i.e., one central to the matter before the permit granting authority.” Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624 (1986). The issue of impermissible delegation is most likely to arise in the context of interpretation of the scope of authority granted to other boards in permit conditions. As a result, permit conditions that require a proponent to obtain additional approvals from other boards tend to be construed narrowly. See § 5.14.5, Conditions, below. Conversely, the act of obtaining such approvals from other boards cannot justify a material modification to the project that would otherwise require an amendment to the permit. See Chambers v. Bldg. Inspector of Peabody, 40 Mass. App. Ct. 762, 766–77 (1996) (where permit condition required final design review by City Community Development Department, such review could not authorize a modification of site plan that increased building footprint by 11 percent and relocated foundation wall closer to lot line).

§ 5.4.1 Board Rules and Customs

Section 9 of the Zoning Act provides that SPGAs “shall adopt and from time to time amend rules relative to the issuance of [special] permits, and shall file a copy of said rules in the office of the city or town clerk.” The SPGA’s rules “shall 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.” G.L. c. 40A, § 9, ¶ 10. (Section 9A contains substantially identical language concerning special permits for adult bookstores and motion picture theaters.)

Section 12 of the Zoning Act provides that

The board of appeals shall adopt rules, not inconsistent with the provisions of the zoning ordinance or bylaw for the conduct of its business and for purposes of [G.L. c. 40A] and shall file a copy of said rules with the city or town clerk. In the event that a board of appeals has appointed a zoning administrator in accordance with [G.L. c. 40A § 13] said rules shall set forth the fact of such appointment, the identity of the persons from time to time appointed to such position, the powers and duties delegated to such individual and any limitations thereon.

Section 15 of the Zoning Act further provides that “[m]eetings of [a board of appeals] shall be held at the call of the chairman or when called in such other manner as the board shall determine in its rules.”

The requirement for filing of the rules of a PGA or an SPGA with the municipal clerk is “directory,” not mandatory, and failure to so file will not affect the validity of the rules. Kiss v. Bd. of Appeals of Longmeadow, 371 Mass. 147, 157–58 (1976). Failure to adopt rules altogether is not grounds for annulling zoning relief absent a showing of prejudice. Burwick v. Zoning Bd. of Appeals of Worcester, 1 Mass. App. Ct. 739, 742–45 (1974). Older cases have held that a zoning board was bound to give notice in accordance with its own rules. See, e.g., Co-Ray Realty Co. v. Bd. of Zoning
§ 5.4 Massachusetts Basic Practice Manual


A necessary starting point for any attorney representing a client before a PGA or SPGA is to obtain and review the rules of the board, whether or not these are filed with the municipal clerk. It also is generally advisable for an attorney to investigate the existence of unwritten practices and customs before filing an application with or making a presentation to an unfamiliar board. (For example, the Waltham Board of Appeals followed a practice of requiring an applicant for zoning relief to read from a prepared text at the hearing, copies of which are distributed to the board prior to the hearing.) The attorney will also want to get copies of any forms used by the board, whether or not formally adopted.

§ 5.4.2 Due Process

A violation of the requirement in Article 29 of the Massachusetts Declaration of Rights that there be “an impartial interpretation of the laws, and administration of justice” may also provide a basis for vacating the grant of zoning relief in an egregious case. See Pierce v. Mulhern, No. 2001-2825-C (Mass. Super. Ct., Middlesex County, Jan. 27, 2003) (Lauriat, J.). In Pierce, Justice Lauriat vacated the grant of a special permit and remanded the matter to the zoning board of appeals for a new hearing where a zoning board member who sat on the case had, for many years, been involved in a series of prior town actions to promote the project. Pierce v. Mulhern, No. 2001-2825-C at 43. Justice Lauriat determined that there was a violation of due process under Article 29 because “no person having spent ten years and endless hours of voluntary devotion in local town politics in support of a single project could possibly have put that engagement and experience aside when called upon to adjudicate.” Pierce v. Mulhern, No. 2001-2825-C, at 37–38.

§ 5.4.3 Conflict of Interest

Members of a city council, board of selectmen, board of appeals, or planning board, as well as a zoning administrator, are “municipal employees” under the Massachusetts conflict of interest law, G.L. c. 268A, unless they have been properly designated as “special municipal employees.” G.L. c. 268A, § 1(g). Special municipal employees are designated as such pursuant to Section 1(n). A mayor, a member of a board of aldermen, a member of a city council, or a selectman in a town with a population in excess of 10,000 may not be designated as a “special municipal employee,” G.L. c. 268A, § 1(n), but a member of other boards apparently can be so designated. Zora v. State Ethics Comm’n, 415 Mass. 640, 648–50 (1993) (court assumed that member of conservation commission could have been designated special municipal employee).
(a) Basic Prohibitions

When a municipal employee “participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest,” that employee must advise “the official responsible for [his] appointment to his position of the nature and circumstances of the particular matter and make[ ] full disclosure of such financial interest” and get the written authorization of that official to participate in the matter. G.L. c. 268A, § 19(a), (b). General Laws Chapter 268A further prohibits a municipal employee from acting as an “agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.” G.L. c. 268A, § 17(c). Municipal employees are prohibited not only from sitting on an SPGA or PGA when they may have a direct or indirect financial interest in the outcome of the proceedings but also from appearing before an SPGA or PGA, with or without compensation, as agent for the applicant. Note that special municipal employees are subject to fewer restrictions.

(b) Remedy for Violations

If the state ethics commission finds, in an adjudicatory proceeding, that a violation of the conflict of interest law has “substantially influenced” the action taken by the municipal board, it may avoid, rescind, or cancel that action “upon request by said municipal agency.” G.L. c. 268A, § 21(a), as amended by 2009 Mass. Acts c. 28, § 80. A number of cases hold that a decision was not so influenced by participation at a hearing by an interested board member who did not vote. Kiss v. Bd. of Appeals of Longmeadow, 371 Mass. 147, 159 (1976) (board chairman, whose law firm represented petitioner’s estate, presided at the hearing but did not vote); McDonald’s Corp. v. Town of E. Longmeadow, 24 Mass. App. Ct. 904 (1987) (selectman affiliated with competitor chaired meeting and spoke against application, although he did not vote) (rescript); Shalbey v. Bd. of Appeal of Norwood, 6 Mass. App. Ct. 521, 528 (1978) (associate member of board appeared at hearing and spoke in favor of applicant’s petition but played no official role at hearing or in arriving at decision); cf. Sciuto v. City of Lawrence, 389 Mass. 939 (1983) (voting by alderman “substantially influenced” city council’s appointment of alderman’s brother as police officer); Lovequist v. Conservation Comm’n of Dennis, 379 Mass. 7, 16–17 (1979) (chairman of conservation commission, who presented case against wetlands application at hearing, abstained from decision-making deliberations); Board of Selectmen of Barnstable v. Alcoholic Beverages Control Comm’n, 373 Mass. 708, 710–14 (1977) (procedural impropriety where one of board members was wife of liquor license applicant who did not vote on her husband’s application but voted on the applications of her husband’s competitors). Despite the holdings of these cases, it is preferable for a board member to take no part in discussion or conduct of a hearing concerning a matter as to which he or she has a conflict. The rescission of governmental action is not automatic but must be “on such terms as the interests of the municipality and


It is unclear how courts will balance the legislative declaration in the Zoning Act that the remedy provided by G.L. c. 40A, § 17 is “exclusive” with the provision of the conflict of interest law allowing public action “substantially influenced” by a conflict of interest to be rescinded. It may be hoped that Section 17 will be construed as an absolute bar to the remedy of rescinding zoning decisions, except where the conflict is discovered and an action is commenced within the twenty-day appeal period. Relief available in cases instituted after the twenty-day appeal period has expired should be limited to the other, not insubstantial, penalties provided in the conflict of interest law. See, e.g., G.L. c. 268A, §§ 1(k), 19(a) (providing for fines of up to $10,000, imprisonment for up to five years). The certainty and finality of zoning decisions would be substantially undercut if three years after a decision private citizens are afforded the right to commence an action that seeks to rescind the decision. In any event, the remedy fashioned by the court in an action filed under the conflict of interest law should protect the rights of innocent third parties, such as an applicant or a mortgagee who changed position in reliance on the zoning relief without knowledge of the conflict. See Everett Town Taxi, Inc. v. Bd. of Aldermen of Everett, 366 Mass. 534 (1974).

(c)  Bribery and Inducements

It is not uncommon for an applicant to offer benefits to a municipality as an inducement for a grant of zoning relief. These may take the form of an undertaking to include desirable features in a project, a commitment to perform off-site improvements (often intended to mitigate traffic impact or reduce sewer infiltration), or an outright cash payment. These benefits customarily flow to the municipality itself, because giving anything of value to a board member for the purpose of influencing a zoning decision would be criminal bribery, under G.L. c. 268A, § 2. That statute bears reading, however:

Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any state, county or municipal employee . . . or who offers or promises any such employee . . . to give anything of value to any other person or entity, with
intent (1) to influence any official act . . . shall be punished by a fine . . . or by imprisonment.

G.L. c. 268A, § 2 (emphasis added); see also G.L. c. 268A, § 3. Some might argue that a promise to give something of value to the municipality itself gives rise to a violation. However, the case law suggests a contrary conclusion. Cf. Durand v. IDC Bellingham, LLC, 440 Mass. 45 (2003) (rezoning induced by developer’s offer of $8 million to town).

§ 5.5 WHERE TO FILE

Sections 9 and 15 of the Zoning Act provide that an application for a special permit or for a variance is to be filed by the petitioner with the city or town clerk and that a copy of the application, “including the date and time of filing certified by the city or town clerk,” is to be filed “forthwith” by the petitioner with the applicable SPGA or PGA.

A request for a variance or for a special permit as to which the board of appeals is the SPGA may also be brought in the form of an appeal, under G.L. c. 40A, § 8, from the denial of a building permit. See § 5.6, When to File, below. Such an appeal is commenced by the filing of a notice of appeal with the municipal clerk. The applicant must then file “forthwith” a copy of the notice, “including the date and time of filing certified by the city or town clerk,” with both the officer or board from which the appeal is being taken and the board of appeals. The officer or board from which the appeal is being taken is then required to “forthwith” transmit the record of the case from which the appeal is taken to the board of appeals. The procedure for an appeal to the zoning administrator and that for an appeal from the decision of the zoning administrator to the board of appeals is similar, except that in the latter case notice is also given to the board or officer from which the appeal was originally taken. G.L. c. 40A, § 15. Although this provision requires the zoning administrator to transmit the record of the case to the board of appeals, it does not expressly require the appellant to file a certified copy of the notice with the board of appeals. This appears to be a legislative oversight, and it would be prudent to file a copy of the notice with the board of appeals anyway.

The requirement to file “forthwith” could lead to unfortunate outcomes. It would be reasonable to suppose that a delay of a few days in making the additional filing(s) would not be considered fatal but that the filing would not be considered complete, for purposes of (a) the thirty-day period for filing an appeal under Section 8 or for filing an appeal from a zoning administrator under Section 15 or (b) initiating the time periods within which the PGA is required to act until a certified copy of the application is filed with the board. This point is not illuminated by the fact that Section 9 requires that an SPGA hold its hearing within sixty-five days after the “date of filing” of the application, while Section 15 requires a board of appeals to hold a hearing within sixty-five days after “receipt of notice by the board of such appeal, application or petition.”
If one were inadvertently to file such an appeal directly with the board of appeals, without filing with the municipal clerk, the board of appeals would not acquire jurisdiction over the appeal. Greeley v. Zoning Bd. of Appeals of Framingham, 350 Mass. 549, 552 (1966). Filing a petition for a variance with the board of appeals but not with the municipal clerk would presumably produce the same result. In Building Inspector v. Brown, 51 Mass. App. Ct. 1107 (2001) (unpublished decision; text available at 2001 WL 476943), the appeals Court affirmed the trial court's conclusion that failure to file an appeal from the building inspector's order with the town clerk within thirty days of the order deprived the board of appeals of jurisdiction to consider the appeal. The Zoning Act and the town zoning bylaw required submission to the clerk within thirty days. The petition was filed in a timely manner with the board of appeals, but the town clerk did not receive a copy until forty-one days after the order. When the appellant from the building inspector's order claimed an automatic grant of his appeal, summary judgment was appropriately granted against him because his appeal was defective.

However, in Roberts v. Southwestern Bell Mobil Systems, Inc., 429 Mass. 478, 492 (1999), the special permit applicant filed an application with the planning board on March 17, 1997, but failed to file an application with the town clerk until April 7, 1997, two days before the scheduled public hearing of April 9, 1997. Residents were able to view the application in the town clerk's office, and abutters were not prejudiced by failure to file directly with the town clerk. The court upheld the special permit, observing that "not every failure to precisely follow the procedural requirements of Chapter 40A is a jurisdictional defect." Roberts v. Southwestern Bell Mobil Sys., Inc., 429 Mass. at 493.

Improper filing of an application, petition, or appeal may be grounds for denial of the requested relief or grounds for appeal from a decision granting relief. An improperly filed application, petition, or appeal may also fail to start the running of the statutory time periods within which the municipal board must act and, consequently, may preclude the applicant from receiving constructively granted relief in the event that the board fails to act within the specified period. See § 5.21, Constructive Grant of Relief, below.

§ 5.6 WHEN TO FILE

An original application or petition for a special permit or a variance may be filed at any time unless barred by the prohibition on reapplication within two years after denial, which is discussed below under § 5.20, Reapplication/Withdrawal.

As noted above, in § 5.5, Where to File, a request for a variance, or for a special permit as to which the board of appeals or zoning administrator is designated as the SPGA, may properly be made in the form of an appeal, under G.L. c. 40A, § 8, from the denial of a building permit. General Laws Chapter 40A, § 10 expressly allows variances to be granted "upon appeal or upon petition." Although there is no parallel language concerning special permits in the Zoning Act, Old Chapter 40A was construed to allow special permits to be requested by an appeal from the denial of a
building permit. Shoppers’ World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63, 68 (1967) (appeal from denial of building permit treated as application for special permit). Section 15 of the Zoning Act requires an appeal from an action of a building inspector to be taken within thirty days from the date of the order or decision that is being appealed. This requirement is strictly applied to appeals from the grant of a building permit in order to place a definite limit on the period during which the permit is vulnerable to attack. See Greeley v. Zoning Bd. of Appeals of Framingham, 350 Mass. 549, 551-52 (1966) (decided under similar provision of prior law). The time period should not be so strictly construed, however, when a request for a variance or a special permit is brought before the board of appeals in the form of an appeal from the denial of a building permit. Failure to file such an appeal within the thirty-day period should be regarded as a ministerial matter, not a jurisdictional defect. See also Balcam v. Town of Hingham, 41 Mass. App. Ct. 260 (1996) (failure to take appeal under Sections 8 and 15 from refusal of building inspector to grant occupancy permit did not preclude later application to board of appeal for relief from constraining by-law); cf. Lynch v. Bd. of Appeal of Boston, 1 Mass. App. Ct. 353, 357 (1973) (construing Boston Zoning Enabling Act). The board should simply treat the appeal as a direct petition or application to the board for the variance or special permit. Shoppers’ World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. at 68 (appeal from denial of building permit treated as application for special permit). The converse is not true. See Pelletier v. Bd. of Appeals of Leominster, 4 Mass. App. Ct. 58 (1976) (application for variance could not be treated as appeal from denial of building permit).

If an order of the building inspector requiring that an application for a special permit be filed is not appealed but instead an application for a special permit is filed, the applicant cannot on appeal challenge the validity of the order or the requirement for a special permit. See Cumberland Farms, Inc. v. Zoning Bd. of Appeals, 61 Mass. App. Ct. 124 (2004). “The failure to exhaust administrative remedies is jurisdictional in nature, and the court may not hear the matter if it was not applied to the local board of appeals.” Cumberland Farms, Inc. v. Zoning Bd. of Appeals, 61 Mass. App. Ct. at 129 (citation omitted).

Section 13 of the Zoning Act requires an appeal to the board of appeals from a decision of the zoning administrator to be taken within thirty days after the decision of the zoning administrator is filed with the municipal clerk. If the zoning administrator has not issued a decision within thirty-five days from the date any appeal, application, or petition was filed, said filing is deemed denied, and an appeal must be taken within thirty days to the board of appeals. G.L. c. 40A, § 13. This provision requires strict compliance because the zoning administrator’s decision operates as the final grant or denial of the requested zoning relief unless it is so appealed. Failure to commence a timely appeal from the zoning administrator’s decision should constitute a jurisdictional defect in subsequent proceedings before the board of appeals and should subject the applicant to the two-year prohibition on reapplication discussed under § 5.20, Reapplication/Withdrawal, below.

In Elio v. Zoning Board of Appeals of Barnstable, 55 Mass. App. Ct. 424 (2002), the Appeals Court upheld a trial court judgment annulling decisions of a zoning board where appeals of refusals to take enforcement action were taken in the absence of
any written decision of the building inspector. The Appeals Court confirmed that, in an appeal of a building inspector’s enforcement decision under G.L. c. 40A, §§ 8 and 15, the written decision of the building inspector is the “operative event for purposes of an aggrieved person’s right of appeal and, hence, those rights would not expire until thirty days after the inspector had rendered such a written decision even when the inspector did not in fact do so until after the fourteen day response period set forth in [G.L. c. 40A ] § 7 had expired.” Elio v. Zoning Bd. of Appeals of Barnstable, 55 Mass. App. Ct. at 429 (citations omitted). In Elio, there was no written decision from which an appeal could lie. While this defect in procedure “could be waived if it was not timely raised or objected to,” Elio v. Zoning Bd. of Appeals of Barnstable, 55 Mass. App. Ct. at 430, there was no waiver in this case. The fact that the appellant relied on the mistaken advice of the building inspector in taking the appeal does not change the result. “[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.” Elio v. Zoning Bd. of Appeals of Barnstable, 55 Mass. App. Ct. at 432.

§ 5.7 WHAT TO FILE

When filing an application for a special permit or variance, practitioners must comply with the format and substantive requirements of the Zoning Act.

§ 5.7.1 Form of Application, Petition, or Appeal

The Zoning Act sets forth no specific requirements concerning the form of an application for a special permit or a petition for a variance except that there must be one and that it must be in the form specified by the rules of the board empowered to grant the requested relief. G.L. c. 40A, §§ 9, 12; see also § 5.4.1, Board Rules and Customs, above. An application to a zoning administrator must comply with the rules of the board of appeals because his or her powers are delegated from that board. G.L. c. 40A, §§ 12, 13. General Laws Chapter 40A, § 9, ¶ 12 provides that special permits will be issued only following public hearings held within sixty-five days after filing of an application. General Laws Chapter 40A, § 10, ¶ 1 permits a PGA to grant a variance “upon appeal or upon petition.” General Laws Chapter 40A, § 14 empowers boards of appeals to hear and decide “applications” for special permits and “petitions” for variances; this terminology is consistent with that used in Sections 9, 10, and 16. The two terms are used interchangeably in Section 11, however, and there appears to be no substantive difference between an “application” and a “petition.”

Section 15 of the Zoning Act requires that an appeal to a PGA under Section 8 be commenced by the filing of “a notice of appeal specifying the grounds thereof,” G.L. c. 40A, § 15, but the form of such a notice of appeal is governed only by the rules of the board of appeals. See G.L. c. 40A, § 12. Whether or not the applicable board has adopted formal rules, the applicant should ask the clerk whether the board has a printed form or a preferred format for applications, petitions, and notices of appeal.
§ 5.7.2 Substance of Application, Petition, or Appeal

Although the Zoning Act does not explicitly so require, an applicant should include in the application, petition, or notice of appeal the information about the request for relief that is required by G.L. c. 40A, § 11 to be included in notices of public hearings and notices of decisions:

- the name and address of the petitioner and of the owner, if different;
- a description of the area or premises to which the relief relates;
- the street address, if any, or other adequate identification of the location of the area or premises;
- the subject matter of the application, petition, or appeal; and
- the nature of the action or relief requested.

A request for a special permit should specify the provision of the ordinance or bylaw that authorizes the requested relief. It is not necessary, however, for an application, petition, or appeal to state facts sufficient to satisfy the requirements of the ordinance or bylaw, or of the Zoning Act, for granting the requested relief; it is sufficient for such information to be presented at the hearing.

It is important for the application to clearly and correctly frame the request for zoning relief. A zoning board’s decision “must be confined to the matter pending before the board and cannot validly determine matters not pending before the board.” Pelletier v. Bd. of Appeals of Leominster, 4 Mass. App. Ct. 58, 62 (1976). Under Old Chapter 40A, for example, a board of appeals that had before it an appeal from a building inspector’s refusal of a building permit for five apartments on the second floor of an existing building could not grant permission for four apartments with an altered floor plan. Garelick v. Bd. of Appeals of Franklin, 350 Mass. 289, 292–93 (1966); see also Fish v. Bldg. Inspector of Falmouth, 357 Mass. 774 (1970) (rescript) (exception for “stone crushing plant” was different relief from requested variance or exception for “mixing, batching and processing plant”); Pelletier v. Bd. of Appeals of Leominster, 4 Mass. App. Ct. 58 (1976) (application for variance could not be treated as appeal from denial of building permit). But cf. Shoppers’ World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63, 68 (1967) (appeal from denial of building permit treated as application for special permit, and zoning board held to have authority to allow petitioner to amend petition to request relief actually required). Although the inherent authority of PGAs and SPGAs to allow technical corrections of pending zoning petitions may be viewed more broadly under the Zoning Act, care should be taken to request relief broadly, unambiguously, and completely so as to ensure that all necessary relief may be granted. Cf. Wolfman v. Bd. of Appeals of Brookline, 15 Mass. App. Ct. 112 (1983) (special permit granted by board of appeals upheld as variance where all requisite findings to support variance had been made). This is especially important in view of the fact that the application will itself become the operative document embodying the grant of zoning relief if it is deemed automatically granted by reason of the board’s failure to act within the required time period. G.L.
§ 5.7 Reservation of Rights

If an applicant for zoning relief wishes to preserve a claim that the use or structure in question does not require zoning relief, or wishes to preserve his or her right to rely on a previously granted special permit or variance if additional relief is denied or appealed, the application should explicitly reserve his or her right to pursue such an alternative theory. Although courts have held that “[w]aiver of a statutory right in proceedings before an administrative board will not be easily inferred as a matter of law,” Sisters of the Holy Cross of Mass. v. Brookline, 347 Mass. 486, 495 (1964), an applicant before a municipal zoning authority “may be held to the waiver of a right, if its conduct reasonably declares such intention and the hearing then proceeds as though the right had been given up or was not relied on.” Cities Serv. Oil Co. v. Bd. of Appeals of Bedford, 338 Mass. 719, 725 (1959) (applicant did not waive rights under special permit by applying for new permit); see also Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 670 (1999) (court acknowledged propriety of board’s reclassification of nature of relief sought from request for special permit to an interpretation that applicant’s proposed use was permitted under zoning bylaw as matter of right).

§ 5.8 Payment of Local Taxes

Under G.L. c. 40, § 57, any municipality that accepts the provisions of said section may adopt a bylaw or ordinance that authorizes the denial, revocation, or suspension of “a building permit, or any local license or permit” for nonpayment of “any local taxes, fees, assessments, betterments or any other municipal charges.” While this provision is not explicitly directed at variances or special permits, its potential applicability to the zoning context should be considered.

§ 5.9 Advisory Review by Other Boards: Special Permits

Under G.L. c. 41, § 81I, a city or town with a planning board “may, by ordinance, bylaw or vote, provide for the reference of any . . . matter or class of matters to the planning board before final action thereon, with or without provision that final action shall not be taken until the planning board has submitted its report or has had a reasonable fixed time to submit such report.” General Laws Chapter 40A, § 11 contains a similar provision with respect to special permits:

Zoning ordinances or by-laws may provide that petitions for special permits shall be submitted to and reviewed by one or more of the following and may further provide that such reviews may be held jointly: — the board of health, the planning board or department, the city or town engineer, the conservation commission or any other town agency or board. Any such
board or agency to which petitions are referred for review shall make such recommendations as they deem appropriate and shall send copies thereof to the [SPGA] and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto.

The applicant’s attorney should ensure that reviewing boards have been afforded the requisite time in which to comment and, if possible, should secure favorable comments from such boards. In some cases, it is advisable to schedule a meeting with the other boards during the thirty-five-day period to address concerns prior to the submission of comments to the SPGA.

§ 5.10 PGA OR SPGA EMPLOYMENT OF OUTSIDE CONSULTANTS

General Laws Chapter 44, § 53G strongly implies that PGAs and SPGAs may adopt rules under G.L. c. 40A, §§ 9 and 12 that require permit applicants to pay the reasonable costs of outside consultants. Pursuant to G.L. c. 44, § 53G, such rules may also provide for those funds to be deposited into a special municipal treasury account and spent at the direction of the board without further appropriation. The rules must allow for an administrative appeal to the city council or board of selectmen for the purposes of determining whether the consultant has a conflict of interest or lacks minimum qualifications as defined by the statute.

§ 5.11 NOTICE OF HEARING

Section 10 of the Zoning Act states that a PGA “shall have the power [to grant a variance] after public hearing for which notice has been given by publication and posting as provided in [G.L. c. 40A, § 11] and by mailing to all parties in interest.” Section 15 of the Zoning Act requires the board of appeals to “hold a hearing on any appeal, application or petition” and to “cause notice of such hearing to be published and sent to parties in interest as provided in section eleven.” Section 9 provides that “[t]he special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven.”

Section 11 of the Zoning Act further describes the three types of required notice:

In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other
agencies is required, notice shall be sent by mail, postage prepaid. [Emphasis added.]

Newspaper publication and public posting of notice are intended to inform the public at large of the hearing. Mailed notice is intended to inform specific individuals and planning boards who may have an interest in the proceedings.

The importance of compliance with the statutory notice requirement was articulated long ago in Kane v. Board of Appeals of Medford, 273 Mass. 97, 104 (1930), as follows:

[T]he essential and dominating design of any zoning law . . . is to stabilize property uses in the specified districts in the interests of the public health and safety and the general welfare, and not to permit changes, exceptions or relaxations except after such full notice as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair presentation and consideration of all aspects of the proposed modification. This is not a technical requirement difficult of performance by the unwarly. It is dictated by common sense for protection of an established neighborhood to be subject to change only after fair notice.

As noted above in § 5.2, Consequences of Procedural Defects, failure to give notice as required by Old Chapter 40A was considered a “jurisdictional” defect, which rendered the board’s decision void. Under G.L. c. 40A, § 17, defects in published, posted, or mailed notices are now cured if no appeal is commenced within ninety days after the decision is filed with the municipal clerk, unless there has been a total failure to provide notice, as required by G.L. c. 40A, § 11, and a plaintiff acts promptly to challenge the special permit after learning of it. Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186, 194–95 (2005).

§ 5.11.1 Contents of Notice

Section 11 of the Zoning Act sets forth the minimum required contents for published, posted, and mailed notices of a public hearing. Notices must contain

- the name of the petitioner;
- a description of the area or premises;
- the street address, if any, or other adequate identification of the location of the area or premises that is the subject of the petition;
- the date, time, and place of the public hearing;
- the subject matter of the hearing; and
- the nature of the action or relief requested, if any.

Old Chapter 40A was less specific, requiring only “notice of the time and place of such hearing and of the subject matter, sufficient for identification.” Old Chapter
40A, § 6. An even less exacting standard was applied under Old Chapter 40A to notices of planning board hearings concerning proposed amendments to zoning ordinances or bylaws because the planning board’s role in that context was merely advisory. Crall v. City of Leominster, 362 Mass. 95 (1972); Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971). These cases should not be relied on with respect to the contents of notice of a public hearing concerning a variance or a special permit.

The form of notice “should be sufficient to warn neighboring landowners of proposed action that may affect them injuriously.” Carson v. Bd. of Appeals of Lexington, 321 Mass. 649, 653 (1947). Cases decided under the less exacting notice requirements of Old Chapter 40A upheld fairly general notices. For example, failure to name one of the two petitioners was not fatal where the names of both petitioners were made known at the public hearing. Johnson v. Bd. of Appeals of Wareham, 360 Mass. 872, 873 (1972) (rescript). An inaccurate description of the land subject to the petition was found sufficient where no one could have been misled. Carson v. Bd. of Appeals of Lexington, 321 Mass. at 652-53 (“44–49 Bedford Street” instead of “on Carmelia Place”). A notice stating that both a variance and a special permit were sought was not defective when only a special permit was needed. Fish v. Bldg. Inspector of Falmouth, 357 Mass. 774 (1970) (rescript). A notice failing to indicate that a variance was sought was not defective where it was clear from the terms of the notice that a variance was needed. Dion v. Bd. of Appeals of Waltham, 344 Mass. 547, 554 (1962). A notice of a hearing concerning a request for permission “to construct and operate a nursing home” was not defective by reason of its failure to indicate the size of the proposed building or the number of patients it was designed to serve. Moore v. Cataldo, 356 Mass. 325, 327 (1969). Likewise, notice of a hearing for “erection and maintenance of garage” was adequate for the board of appeals to authorize the petitioner to “erect and maintain a garage . . . to be used for the storage of not more than sixteen buses for light repair.” Carson v. Bd. of Appeals of Lexington, 321 Mass. at 653.

However, amendment of a petition to ask for a “stone crushing plant” instead of the originally requested “mixing, batching, and processing plant” required a new notice and hearing. Fish v. Bldg. Inspector of Falmouth, 357 Mass. 774 (1970) (rescript). Similarly, a notice with respect to a variance proceeding for a proposed gasoline station stating only that the petition was for a “variance . . . as applied to the erection of alterations in a proposed building” was inadequate:

From this notice alone it could not be determined with reasonable certainty whether the petition was to the end that a new building could be erected, or that a building could be altered. Further, the notice contains no intimation of the use to which the proposed building was to be put. The location was in an area zoned as a “single residence district.” The notice ought to have contained some reference to this subject so as to indicate in a general way whether the proposed building or alteration was for a residence other than a single residence or whether it was for business, or if for business, what was its nature.
The foregoing suggests that applications for zoning relief should be accompanied by a proposed form of notice for publication, posting, and mailing in a format with which the board will feel comfortable. Where the board insists on drafting the notice, the applicant should ask to review the form for compliance with Section 11 before it is published, posted, or mailed.

§ 5.11.2 Publication

Publication of notice of a hearing must be made in a newspaper of general circulation in the municipality once in each of two successive weeks, the first publication being not less than fourteen days before the hearing. G.L. c. 40A, § 11, ¶ 1. When calculating the fourteen-day period, the day of publication is counted, but the day of the hearing is excluded. Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971); Roman Catholic Archbishop v. Bd. of Appeal of Boston, 268 Mass. 416, 417 (1929) (notice of planning board hearing on zoning amendment). The day of publication is the day when the newspaper is “actually published and available on the street,” even if the edition bears a different date. Hallenborg v. Town Clerk of Billerica, 360 Mass. at 514–15. The two publications need not be a full seven days apart, as long as one falls within one calendar week and the second falls within the next subsequent calendar week. Crall v. City of Leominster, 362 Mass. 95, 98–99 (1972). The newspaper need not be published in the city or town as long as it is in general circulation there. Smith v. Bd. of Appeals of Plymouth, 340 Mass. 230, 232–33 (1960).

§ 5.11.3 Posting

Posting must be “in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of [the] hearing.” G.L. c. 40A, § 11, ¶ 1. This ineffectual public notice is a technical trap for the unwary and is often overlooked. The applicant’s attorney may wish to verify posting fifteen or more days before the hearing so that any failure to post can be corrected without the need to delay the hearing. Posting of notice is also required, in somewhat different terms, by the open meeting law, discussed below in § 5.13.2, Notice of Meetings: Posting and Filing.

§ 5.11.4 Mailing

Notice of the hearing must be “sent by mail, postage prepaid” to all “[p]arties in interest.” G.L. c. 40A, § 11. Sections 9 (special permits), 9A (adult entertainment special permits), 10 (variances), and 15 (appeals, petitions, and applications to boards of appeals) all require such notice. See § 5.11.4(a), Parties in Interest, below. Unlike notice by publication and posting, notice by mail need not be given fourteen days before the hearing. The period of notice must be “reasonable . . . depend[ing] upon the facts and circumstances of each case.” Rousseau v. Bldg. Inspector of Framingham, 349 Mass. 31, 37 (1965). Notices must be mailed early enough to afford those notified sufficient time to prepare for the hearing. Rousseau v. Bldg. Inspector of Framingham, 349 Mass. at 37. Notice mailed and received on a Friday of a hearing
on the following Tuesday evening has been held unreasonable, Rousseau v. Bd.
Inspector of Framingham, 349 Mass. at 37, while actual notice twelve days before
the hearing has been held to be sufficient. Kasper v. Bd. of Appeals of Watertown,
3 Mass. App. Ct. 251 (1975) (appellant not prejudiced by absence of mailed notice
where appellant had actual notice).

The petitioner’s attorney must be careful not to infringe on the responsibility of
the municipal board to mail notice to “parties in interest.” Planning Bd. of Peabody v.
Bd. of Appeals of Peabody, 358 Mass. 81, 83 (1970) (notice mailed by petitioner’s
attorney); Kane v. Bd. of Appeals of Medford, 273 Mass. 97, 102-03 (1930) (the fact
that the notice list was prepared by the petitioner and that notice was actually mailed
by the petitioner was one of several grounds upon which the court relied to annul the
zoning relief granted); Kramer v. Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186,
190 (2005) (“notice must be provided by the board or its agent, and the task
of providing it cannot be delegated to the interested petitioner”). Although the peti-
tioner’s attorney might assist the PGA or SPGA by preparing mailing labels and
submitting a proposed list of “parties in interest,” the PGA or SPGA must itself en-
sure that the list of parties in interest is complete, that the mailing labels are accurate,
and that the envelopes contain the proper notice. The PGA or SPGA or its clerk
should also deposit the envelopes in the mail.

(a) Parties in Interest

The “parties in interest” to whom notice must be mailed are defined by Section 11 of
the Zoning Act to be

• the petitioner (this should of course be construed to include an applicant or an
  appellant, as the case may be; notice to the landowner, where the petitioner
does not own the land, is not expressly required, but such a requirement was
inferred by Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304,
308 (1986); compare the requirement in Section 11, ¶ 5 that a copy of a deci-
sion granting a variance or special permit be sent to the owner if other than the
petitioner);

• abutters (owners of all parcels of land that are adjacent to the parcel to which
the zoning relief relates);

• owners of land directly opposite on a public or private street or way (it seems
prudent to construe this to include land diagonally across an intersection);

• abutters to the abutters owning land within 300 feet of the property line of the
petitioner (notice is not required to be given, under this clause, to an abutter to
an abutter if all of his or her land is more than 300 feet from the property line
of the locus or to an owner of land within 300 feet whose land does not touch
either locus or a parcel that abuts locus);

• the planning board of the city or town, see Medeiros v. Bd. of Aldermen of Wo-
burn, 350 Mass. 767 (1966) (rescript) (alternative holding, under Old Chapter
40A, that relief was subject to appeal on the basis of failure to notify planning
board of hearing); and
• the planning board of every abutting city or town.

The context of the requirement for notice to planning boards of “abutting” cities and towns—immediately following the phrase “the planning board of the city or town,” and not a reference to the locus to which the zoning relief relates—implies that the planning boards of all cities or towns that abut the municipality must be notified. This interpretation is buttressed by comparison with other provisions of the Zoning Act referring to planning boards of other municipalities. For example, G.L. c. 40A, § 5 requires notice of planning board hearings on zoning amendments to be mailed to “the planning boards of all abutting cities and towns.” This language clearly contemplates notice to the planning board of every city or town that abuts the municipality in which the zoning amendment is being considered. Similarly, G.L. c. 40A, § 8 grants standing to appeal from decisions of a local building inspector to a “board of the city or town, or of an abutting city or town.” Again, the reference seems to include boards of cities or towns abutting the municipality. General Laws Chapter 40A, § 15 requires boards of appeals to give notice of hearings to the planning board of every abutting city or town by referring to “parties in interest” as defined by Section 11. The context of this requirement indicates that planning boards of cities or towns abutting the municipality are required to receive notice. The legislature apparently intended planning boards to play a role in the zoning affairs of neighboring municipalities by commenting on proposed zoning changes under Section 5, appealing from zoning enforcement determinations under Section 8 and commenting on variance and special permit proceedings of which they are to be notified under Section 11. Planning boards of neighboring municipalities are not expressly granted the right to appeal from decisions granting or denying zoning relief, but in light of the requirement of notice to such boards, the provisions of G.L. c. 40A, §§ 13 and 17, allowing “any municipal officer or board” to appeal such a decision, could be construed to grant such a right. However, in Planning Board of Marshfield v. Zoning Board of Appeals of Pembroke, 427 Mass. 699 (1998), the Supreme Judicial Court decided that the Marshfield Planning Board lacked standing under G.L. c. 40A, § 17 to appeal the special permit and site plan approval granted by the Pembroke Zoning Board of Appeals. Although the proposed development of a movie complex at the border of Marshfield would “have a greater impact on the health, safety, and general welfare of the inhabitants of Marshfield than on their counterparts in Pembroke,” Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke, 427 Mass. at 700, the court nonetheless concluded that the legislature did not intend “to grant standing to the planning board of one town to challenge a decision of another town’s zoning board.” Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke, 427 Mass. at 702.

The names and addresses of abutters, owners of land directly opposite on a street or way, and abutters of abutters within 300 feet are all determined with reference to the most recent tax list; such persons are “parties in interest” even if their land lies in another city or town. G.L. c. 40A, § 11, ¶ 1. By making reference to the real estate tax list, the legislature has settled on an accessible, but by no means perfect or up-to-date, list of property owners. Regardless of discrepancies between the names appearing on the tax list and the names of the actual owners, notice given to the names and addresses shown on the tax list is sufficient. If condominium units are separately
assessed, each unit owner in a condominium, as well as the association of unit own-
ers, should be mailed a separate notice when notice is required to be given to the
owner of any portion of the condominium, since the unit owners hold undivided in-
terests in the common areas and facilities. G.L. c. 183A, § 5; cf. Jack v. Bd. of Appeal
of Boston, 15 Mass. App. Ct. 311 (1983) (“uncertainties” as to need for notice to unit
owners under Boston Zoning Enabling Act noted but not resolved). Conversely, a
single notice to the property tax address of a cooperative housing corporation should
be sufficient, because that entity holds title to all of the cooperative’s real estate. Par-
ticular care is needed when a street, railroad right of way, watercourse, or body of
water is within the notice area. The possibility that title is not in the abutters must be
considered— examples being the municipality, with respect to a street that was laid
out in fee, or the Commonwealth, with respect to the bed of the ocean or of a great
pond. Alternatively, title to the locus, or to abutting lots, may extend beneath a street,
railroad right of way, watercourse, or body of water, in which event the 300-foot ra-
dius should be measured from the actual property line of the locus. It may be ques-
tioned whether all owners of units in a condominium should receive notice if any part
of the common areas is within the specified radius, or whether notice to the owners’
association would be sufficient so long as no units are within that radius.

Under Old Chapter 40A, an applicant was at risk in relying on the municipality to
prepare the list of parties in interest. Municipal officials lacked incentive to ensure
that the list was complete and accurate; accordingly, lists of parties in interest pre-
pared by municipalities were rarely free of error. Section 11 of the Zoning A ct reme-
dies this problem by providing that “[t]he assessors maintaining any applicable tax
list shall certify to the [PGA] or [SPGA] the names and addresses of parties in inter-
est and such certification shall be conclusive for all purposes.” Absent collusion be-
tween the assessor and the applicant to exclude a party in interest, this provision
should protect the applicant against appeals based on errors and omissions in the
certified list. An applicant would be well advised, however, to call the board’s atte-
nention to any error or omission of which he or she is aware because the courts may
construe the “conclusiveness” of the assessor’s certification narrowly in such a case
so as to protect a party in interest who would otherwise be deprived of the opportu-
nity to be heard. Note that the assessors’ list should include the petitioner and the ap-
propriate planning boards, as well as owners of land within the specified area. Note
also that if the zoning petition does not accurately and precisely identify the bounda-
ries of the petitioner’s property or contain sufficient information to allow the assessor
to do so, the benefit of this protection may be lost.

There may be occasions on which the assessor fails to certify the names and addresses
of “parties in interest,” or does not so certify until after the mailed notice has been
sent. To provide against such eventualities and to assist the assessor in fulfilling his
or her duties, it is good practice for the applicant to independently verify the names
and addresses of the parties in interest before applying for zoning relief and to sub-
mitt a list of parties in interest to the assessor for certification simultaneously with
submitting of the request for zoning relief.
(b) Waiver of Notice and Special Notice

Section 11 of the Zoning Act provides that

The [PGA] or [SPGA] may accept a waiver of notice from, or an affidavit of actual notice to any party in interest or, in his stead, any successor owner of record who may not have received a notice by mail, and may order special notice to any such person, giving not less than five nor more than ten additional days to reply.

This provision is designed to allow a zoning board to deal with the situation where it has become aware of a defect in mailed notice of a hearing. The petitioner may be requested to cure the defect by procuring a waiver of notice or an affidavit of actual notice, from the party in interest inadvertently overlooked or his or her successor owner of record. In the event that such a waiver or affidavit is not forthcoming, the board may order a special notice to such person, allowing him or her from five to ten days to submit a “reply.” G.L. c. 40A, § 11. This provision could be construed to allow a board to cure a failure to notify a party in interest by giving him or her an opportunity to submit written comments on the proposed relief, even where he or she did not have an adequate opportunity to appear and comment at the public hearing.

(c) Nonprejudicial Defect

Lack of mailed notice to a party in interest is not necessarily a fatal defect. A party in interest may implicitly waive mailed notice by appearing at the public hearing without objecting to the sufficiency of notice. Compare Pitman v. Medford, 312 Mass. 618, 623 (1942) (attending hearing and filing written objections to passage of zoning amendment without objecting to sufficiency of notice constituted waiver of lack of notice by mail), with Rousseau v. Bldg. Inspector of Framingham, 349 Mass. 31, 36 (1965) (sufficiency of notice objected to at hearing).

Appeals of Watertown, 3 Mass. App. Ct. 251 (1975); see also Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 492 (1999) (no jurisdictional defect where applicant filed its application for a special permit with the planning board but not directly with the town clerk because the application was thereafter made available in the town clerk’s office in advance of the public hearing). In this respect, mailed notice to which particular individuals or boards are entitled under the Zoning Act is treated differently from notice to the public at large given by posting and publication. A defect in the general notice to the public cannot be overcome by the appearance of some citizens and the absence of objections to the notice. “All citizens are entitled to the statutory notice and the opportunity to be heard after it is given.” Gallagher v. Bd. of Appeals of Falmouth, 351 Mass. 410, 414 (1966).

§ 5.12  PUBLIC HEARING

Practitioners should pay careful attention to the procedural requirements for public hearings.

§ 5.12.1  Timing

An SPGA, other than a board of appeals, must hold a public hearing within sixty-five days after the filing of an application for a special permit. G.L. c. 40A, § 9, ¶ 12. A board of appeals, whether acting as a PGA or an SPGA, must hold a public hearing within sixty-five days after receipt of notice of the application or petition by the board. G.L. c. 40A, § 15, ¶ 3; see also Brennan v. Bd. of Appeals of Bourne, 13 Mass. App. Ct. 1082 (1982) (rescript). Absent “excessive and unjustified” delay or prejudice to some party, Casasanta v. Zoning Bd. of Appeals of Milford, 377 Mass. 67, 69 n.3 (1979); cf. Noe v. Bd. of Appeals of Hingham, 13 Mass. App. Ct. 103, 104 (1982) (two-month delay), these requirements are “directory,” not mandatory. Compare Cullen v. Bldg. Inspector of N. Attleboro, 353 Mass. 671, 679–80 (1968), with Crosby v. Bd. of Appeals of Weston, 3 Mass. App. Ct. 713, 713–14 (1975) (rescript) (both decided under Old Chapter 40A). Because the SPGA or PGA must take “final action” or “act” within certain time limits (see § 5.21, Constructive Grant of Relief, below), failure to hold a hearing on a timely basis may lead ultimately to “deemed” zoning relief. See Kenrick v. Bd. of Appeals of Wakefield, 27 Mass. App. Ct. 774 (1989) (noting that constructive relief may be granted where SPGA fails to take final action within ninety days of close of public hearing). The time for decision may be extended by written agreement, filed with the municipal clerk, between the applicant and the board. G.L. c. 40A, §§ 9, ¶ 12, and 15, ¶ 5. It is not clear whether a hearing commenced within the stated period may properly be continued to a date outside of that period, or whether a board should complete its hearing within the specified period if possible.

§ 5.12.2  Black-Out Days

No such public hearing may be held on any day on which a state or municipal election, caucus, or primary is held in the municipality. G.L. c. 40A, § 11, ¶ 2.
§ 5.12.3 Quorum

A board member not present at the public hearing lacks authority to vote on or sign the decision. Sesnovich v. Bd. of Appeal of Boston, 313 Mass. 393, 398 (1943); Mullin v. Planning Bd. of Brewster, 17 Mass. App. Ct. 139 (1983); cf. Barbaro v. Wroblewski, 44 Mass. App. Ct. 269 (1998) (special permit not rendered invalid where special permit required site plan approval and, on remand for site plan approval, board member who approved special permit was no longer member of board); Krafchuk v. Planning Bd. of Ipswich, 453 Mass. 517, 534 (2009) (participation in the vote by those members who missed hearing “seriously undermined validity of an adjudications hearing on this subdivision”). However, if the municipality has accepted G.L. c. 39, § 23D, which was inserted by Chapter 79 of the Acts of 2006, a board member may miss one session of the hearing and still vote if the board member certifies, in writing, that he or she has examined all evidence that the board received at the missed session, which evidence shall include an audio- or videorecording of the missed session or a transcript thereof. A new public hearing is required if a member of the board resigns and the number of remaining members who attended the hearing is not sufficient to grant the relief requested. Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215, 218–19 (1982). It follows that a quorum of a board necessary to conduct a statutory public hearing must include

- all members of a board consisting of three members,
- four out of five members of a board consisting of five members, and
- two-thirds of a board with more than five members.

G.L. c. 40A, § 9, ¶ 12 (with respect to SPGAs other than boards of appeals) and G.L. c. 40A, § 15, ¶ 4 (with respect to boards of appeals). Note that boards of appeals are composed of either three or five regular members, G.L. c. 40A, § 12, unless otherwise provided by municipal charter. See Cottone v. Cedar Lake, 67 Mass. App. Ct. 464, 469–70 (2006).

All members must be present in the case of an SPGA with three members. City councils with more than five members may, however, appoint a committee of such council to hold the statutory public hearing when the city council is acting as an SPGA. G.L. c. 40A, § 9, ¶ 12.

In the case of boards of appeals, Section 12 of the Zoning Act allows municipal by-laws or ordinances to provide for associate members:

[1] If provision for associate members has been made the chairman of the board may designate any such associate member to sit on the board in case of absence, inability to act or conflict of interest on the part of any member thereof, or in the event of a vacancy on the board until said vacancy is filled in the manner provided in [G.L. c. 40, § 11].
Similar provisions are made for associate members when the planning board is the SPGA. One associate member is authorized when there are five members of the planning board, and two associate members are authorized when there are more than five members of the planning board. G.L. c. 40A, § 9, ¶ 11.

The Zoning Act contains no provisions concerning the alternate members of SPGAs other than boards of appeals and planning boards. It has been held that the right to office of a member of a municipal board whose term has expired cannot be challenged in a direct appeal from a zoning decision under G.L. c. 40A, § 17, but that the member’s “title” to the office must be challenged in a separate proceeding against him or her. Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 74–76 (1977); Reynolds v. Bd. of Appeals of Springfield, 335 Mass. 464, 467–68 (1957). It is unclear whether these cases would be construed to apply to a board member who is deemed to have vacated his or her office because he or she moved away from the town in violation of a residency requirement, as contemplated by the last clause of G.L. c. 41, § 109.

An applicant for a variance or special permit should determine in advance the number and names of the members of the PGA or SPGA and should count the members present to ensure that a quorum exists. If a quorum does not exist, the applicant should request that the hearing be adjourned to a later date. The applicant who overlooks this detail is vulnerable to appeal, followed by another public hearing. See Mullin v. Planning Bd. of Brewster, 17 Mass. App. Ct. 139 (1983). If a quorum exists, but less than a full board is present, an applicant may wish to seek a continuance until a full board can hear the matter.

§ 5.12.4 Conduct of Hearing


The usual practice at a zoning hearing is for the applicant or his or her attorney to speak in favor of the relief sought, and for an opportunity to be then given to members of the public to speak in favor of or in opposition to the application. An applicant should investigate the customs and practices of the municipal board in advance of the public hearing. It is generally advisable for an applicant to arrange for as many parties in interest and other members of the public as possible to speak in favor of the application. When an application has many supporters, the applicant should attempt
to coordinate their efforts. A petition may be more effective than a long series of comments at the hearing. Short, varied statements are preferable. Comments by representatives of groups may have particular impact. The applicant should also make sure that sufficient evidence is presented, either in the application, petition, or appeal or at the hearing, to enable the board to make any findings required by the ordinance or bylaw or by the Zoning Act itself. See generally § 5.14.4, Form of Decision, below.

The board may vote at the hearing or may close the hearing and defer its decision until a subsequent public meeting. Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981). Alternatively, the board may adjourn or continue the hearing.

§ 5.12.5 Combined Subdivision Control Law/Special Permit Hearings

Chapter 239 of the Acts of 2008 amended G.L. c. 40A, § 11 and G.L. c. 41, § 81T to permit a planning board to hold a consolidated hearing when it is exercising both zoning authority as a special permit-granting authority with respect to a subdivision and approval authority under the subdivision control law with respect to the same subdivision.

Although 2008 Mass. Acts c. 239 authorizes a consolidated hearing process, nothing in the amendment affects the holding of Wall Street Development Corp. v. Planning Board of Westwood, 72 Mass. App. Ct. 844 (2008), in which the Appeals Court invalidated a municipal zoning bylaw that required issuance of a special permit under the Zoning Act as a precondition to applying for subdivision approval under the Subdivision Control Law.

§ 5.12.6 Adjournment

The board may continue or adjourn the hearing to a subsequent date by publicly announcing the specific date, time, and place of the continued hearing before the close of the previous hearing. Kenrick v. Bd. of Appeals of Wakefield, 27 Mass. App. Ct. 774 (1989). The applicant's attorney may wish to remind the board to make such an announcement because in its absence it would seem that new notice of the continued hearing must be given in accordance with G.L. c. 40A, § 11. But see Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 623 (1986) (public notice in accordance with open meeting law sufficed for adjourned sessions).

Cases decided in the related context of comprehensive permits granted under G.L. c. 40B have held that a hearing is in fact concluded, regardless of further purported continuances, on “the date of the last session at which interested persons presented information and argument,” Pheasant Ridge Assocs. Ltd. P’ship v. Town of Burlington, 399 Mass. 771, 783 (1987); Milton Commons Assocs. v. Bd. of Appeals of Milton, 14 Mass. App. Ct. 111, 115 (1982), and that “[t]he date may be even earlier if a board of appeals has not conducted the public hearing expeditiously, scheduling
adjourned sessions at reasonable intervals in the circumstances.” Pheasant Ridge Assocs. Ltd. P’ship v. Town of Burlington, 399 Mass. at 783.

The issue of excessive adjournments does not arise in the variance context because the constructive grant period runs from filing of the application. This issue does arise in the context of a special permit, however, because the constructive grant period is measured “ninety days following the date of such public hearing.” G.L. c. 40A, § 9. See § 5.21, Constructive Grant of Relief, below.

§ 5.12.7 Ex Parte Communications

Although Massachusetts courts have not squarely addressed the issue, decisions from other jurisdictions hold that undisclosed ex parte contacts with members of a municipal board may provide a basis for annulling a zoning decision:

[If an ex parte communication does take place, it must be placed on the public record to enable interested persons to rebut the substance of the communication. . . . [A]n ex parte contact between a zoning board and an interested party which is neither revealed to other interested parties nor made a part of the public record is a ground for reversing a decision of a zoning board.

Peterson v. City Council of Lake Oswego, 574 P.2d 326, 331–32 (Or. Ct. App. 1978); see also Caruso v. Pastan, 1 Mass. App. Ct. 28, 31 (1973) (private meeting between SPGA and another town board did not invalidate decision where “there is nothing to suggest that the merits of the pending case were discussed or that the basic decision of the board of appeals to grant the permit was influenced in any respect”).

As a function of its quasi-judicial authority to adjudicate property rights, a zoning board is constitutionally required to afford an applicant for a variance or special permit and other interested parties a measure of procedural due process prior to formulating an adverse decision. Cf. Vitale v. Planning Bd. of Newburyport, 10 Mass. App. Ct. 483, 487 (1980) (“Due process does not require that an agency must bind itself to an error in perpetuity. . . . But an agency cannot revoke an approval without notice to, and an opportunity to be heard by, the parties affected.”); Fairbairn v. Planning Bd. of Barnstable, 5 Mass. App. Ct. 171, 182 (1977) (developer who seeks subdivision approval is entitled to hearing regarding board of health recommendations). See also § 5.4.2, Due Process, above. The applicant and other interested persons are entitled to know the facts and other material in the board’s possession on which it intends to rely in formulating its decision. Accordingly, communications with the board should be confined to

• documents on file with the board as public records prior to the public hearing,
• information presented to the board at the public hearing, and
documents filed with the board as public records subsequent to the public hearing pursuant to a request for additional information made by the board at the public hearing.

The most common way in which this problem arises is the submission of additional material after the close of the hearing, without a request having been made for the information at the hearing and without affording opposing parties an opportunity for rebuttal. This misstep generally will require that the decision be remanded for reconsideration by the board if an appeal is filed within the twenty-day appeal period. Lovaco, Inc. v. Zoning Bd. of Appeals of Attleboro, 23 Mass. App. Ct. 239 (1986). But see Fandel v. Bd. of Zoning Adjustment of Boston, 280 Mass. 195 (1932) (fact that board read and considered several communications received after public hearing was not enough to show substantial injustice, and was not sufficient grounds to invalidate proceedings under former version of Boston Zoning Enabling Act).

§ 5.12.8 Mootness

In Fitch v. Board of Appeals of Concord, 55 Mass. App. Ct. 748 (2002), the Appeals Court determined that an enforcement appeal by neighbors was not moot where the building permit at issue had lapsed and no construction had begun. The Appeals Court reversed a Land Court judgment dismissing the complaint as premature, and instead concluded that it “would be a reproach of justice to refuse to answer the issue they have placed before the court and to send them back to ‘Go’ on the game board, there to begin all over again the laborious and expensive process of seeking enforcement, going to the board, and filing a new complaint in court.” Fitch v. Bd. of Appeals of Concord, 55 Mass. App. Ct. at 753.

§ 5.13 OPEN MEETING LAW REQUIREMENTS

Meetings of a municipal board are subject to the requirements of the open meeting law, G.L. c. 39, §§ 23A and 23B, repealed by 2009 Mass. Acts c. 28, § 20 (effective July 1, 2010), replaced by G.L. c. 30A, §§ 18–25. See, e.g., Yaro v. Bd. of Appeals of Newburyport, 10 Mass. App. Ct. 587 (1980). Open meeting law requirements do not, however, apply to views of the site or certain other gatherings so long as board members do not deliberate. G.L. c. 30A, § 18 (definition of “meeting”); see Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215, 222 (1982) (site visit by board chairman not improper). All of the board’s hearings and/or meetings at which it deliberates on the variance or special permit petition must comply with the open meeting law. See the attorney general’s implementing regulations at 940 C.M.R. pt. 29.00; Open Meeting Law FAQs (http://www.mass.gov/ago/government-resources/open-meeting-law/oml-faqs); and Open Meeting Law Guide (http://www.mass.gov/ago/docs/government/oml/oml-guide.pdf).

§ 5.13.1 Executive Sessions Prohibited

All meetings, other than executive sessions, shall be open to the public. See G.L. c. 30A, § 20. Before an executive session may be called, the municipal board must
vote to go into executive session by a roll call vote of a “majority of members” at a
convened open session for which notice has been given in accordance with the open
meeting law, and the chairman must “state the purpose of the executive session, stat-
ing all the subjects that may be revealed without compromising the purpose for
which the executive session was called,” and announce whether the open session will
resume after the executive session. G.L. c. 30A, § 21(b). Executive sessions are per-
mitted only for one of the ten reasons specified in G.L. c. 30A, § 21(a), which are
generally not applicable to zoning proceedings.

§ 5.13.2 Notice of Meetings: Posting and Filing

Under the open meeting law, except in an emergency, a notice of every public meet-
ing must be printed in “a legible, easily understandable format,” stating the “date,
time and place” of such meeting and “listing of topics that the chair reasonably antic-
ipates will be discussed at the meeting.” The notice must be (a) filed with the munici-
pal clerk and (b) posted in a manner conspicuously visible to the public at all hours
in or on the municipal building in which the clerk’s office is located, at least forty-
eight hours prior to the meeting, excluding Saturdays, Sundays, and legal holidays.

Notice of a zoning hearing given in compliance with G.L. c. 40A, § 11 would meet
the requirements of the open meeting law as to the matter covered by the zoning
hearing if it is also

- filed with the municipal clerk before the hearing,
- posted in or on the municipal building containing the office of the municipal
  clerk where it can be viewed “at all hours,” and
- printed in a legible, easily understandable format.

§ 5.13.3 Conduct of Meeting

“No person shall address a meeting of a public body without permission of the
law confers no right upon those in attendance to address the board. Yaro v. Bd. of
§ 23B). Indeed, after the close of the statutory public hearing in a zoning case, it
would appear to be improper for the board to accept further comment on the zoning
petition. Any person in attendance may make a video- or audiorecording of the hear-
ing and subsequent deliberative sessions on the zoning petition, “subject to reasona-
ble requirements of the chair as to the number, placement, and operation of equip-
ment used so as not to interfere with the conduct of the meeting.” G.L. c. 30A,

§ 5.13.4 Recordkeeping Requirements

With respect to any public hearing held under the Zoning Act, as well as subsequent
meetings held with respect to the zoning petition, including executive sessions, the
open meeting law requires the municipal board to “maintain accurate minutes . . .
§ 5.13 Setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken . . . , including the record of all votes." G.L. c. 30A, § 22(a), added by 2009 Mass. Acts c. 28, § 18. "Documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session." G.L. c. 30A, § 22(d), added by 2009 Mass. Acts c. 28, § 18.

§ 5.13.5 Preparation of Decision

The open meeting law “do[es] not require a board to hold a public hearing for [the] purpose of reducing to writing a decision reached at a meeting which was open to the public and where accurate records of the meeting are kept and the substance of the decision was made known to the public.” Yaro v. Bd. of Appeals of Newburyport, 10 Mass. App. Ct. 587 (1980). The case of J. & C. Homes, Inc. v. Planning Board of Groton, 8 Mass. App. Ct. 123, 124 (1979), held invalid a vote that approved a subdivision plan subject to “such conditions which would show due regard for the concerns expressed at the public hearing.” The court reasoned that “[a]t the time of adjournment of the public meeting, neither the developer nor the public knew the substance of all of the conditions which were to be imposed on the developer, and in fact at that time the decision of the board had not yet been reached.” J. & C. Homes, Inc. v. Planning Bd. of Groton, 8 Mass. App. Ct. at 124.

§ 5.13.6 Remedy for Violation

Under the post-July 1, 2010 open meeting law, enacted by 2009 Mass. Acts c. 28, § 18, the attorney general now occupies the central statutory role in interpreting and enforcing the open meeting law. G.L. c. 30A, § 23(a). Within thirty days of the date of an alleged violation, a complainant must file a written complaint with the public body setting forth the circumstances that constitute the alleged violation and giving the body an opportunity to remedy the alleged violation. Within fourteen days of its receipt of the complaint, the public body shall send a copy of the complaint to the attorney general and notify the attorney general of any remedial action taken. After thirty days have expired following the filing of the initial complaint with the public body, the complainant may file a complaint with the attorney general. If the attorney general thereafter determines that a violation of the open meeting law has occurred, he or she may issue an order that may, among other things, “nullify in whole or in part any action taken at the meeting.” G.L. c. 30A, § 23(c)(3). Standing to challenge the attorney general order through certiorari is limited to a “public body or any member of a body aggrieved by any order” and does not include an applicant for zoning relief. G.L. c. 30A, § 23(d). The certiorari petition must be filed “in superior court within 21 days of receipt of the order.” G.L. c. 30A, § 23(d).

General Laws Chapter 30A, § 23(f) also provides that the attorney general or three or more registered voters have the right, without following the administrative process described above, to directly initiate a civil action to enforce the open meeting law. The remedies available in such an action may include, among other things, nullification.
in whole or in part of any action taken in violation of the open meeting law. No statute of limitations is prescribed for such actions.

The same tensions that existed under the pre–July 1, 2010 open meeting law with the "exclusive" remedy language of G.L. c. 40A, § 17 continue to exist under the post–July 1, 2010 open meeting law. General Laws Chapter 40A, § 17, ¶ 2 states that "[t]he foregoing remedy shall be exclusive." In order to preserve certainty and finality of zoning decisions, and to protect innocent third parties who act in reliance on such decisions, the exclusive remedy provided under G.L. c. 40A, § 17 should be interpreted to preclude the ability of the attorney general, or three or more registered voters, to seek nullification of zoning decisions outside of the exclusive process established by G.L. c. 40A, § 17. When acting apart from G.L. c. 40A, § 17’s exclusive remedy, the attorney general or three or more registered voters should be limited to the other significant remedies available to redress open meeting law violations, and should not be allowed to seek nullification of zoning decisions.

§ 5.14 DECISION

The Zoning Act and related case law set forth the specifications for decisions on special permits and variances.

§ 5.14.1 Time Frames for “Action”

The Zoning Act sets time frames for action:


• a board of appeals must “act” on a petition or appeal for a variance within 100 days after the filing with the municipal clerk of a petition for a variance, G.L. c. 40A, § 15, ¶ 5.

Note that the time period for action on a variance begins to run when the petition or appeal is filed with the board of appeals, while the time period for decision on a special permit begins after the public hearing.

If a municipality has adopted G.L. c. 43D (expedited permitting) a 180-day decision period generally applies for “priority development sites.”

By written agreement filed with the municipal clerk, the applicant and the board may extend the time for decision. See G.L. c. 40A, § 15, ¶ 5.

A board’s failure to act within the stated period results in a deemed grant of the relief applied for, as discussed in § 5.21, Constructive Grant of Relief, below. See, e.g., Board of Appeals of Westwood v. Lambergs, 42 Mass. App. Ct. 411 (1997) (decision, filed within the 100-day action period, denying requested relief from one provision of zoning bylaw, but silent concerning a second request for relief, resulted in
§ 5.14.2 Vote

(a) Voting Requirements in General

A board member not present at the public hearing lacks authority to vote on or sign the decision. Sesnovich v. Bd. of Appeal of Boston, 313 Mass. 393, 398 (1943); Mullin v. Planning Bd. of Brewster, 17 Mass. App. Ct. 139 (1983); cf. Barbaro v. Wroblewski, 44 Mass. App. Ct. 269 (1998) (special permit not rendered invalid where it required site plan approval and, on remand for site plan approval, board member who approved special permit was no longer member of board); Krafchuk v. Planning Bd. of Ipswich, 453 Mass. 517, 534 (2009) (participation in the vote by those members who missed hearing “seriously undermined validity of an adjudications hearing on this subdivision”). However, if the municipality has accepted G.L. c. 39, § 23D, which was inserted by 2006 Mass. Acts c. 79, a board member may miss one session of the hearing and still vote if the board member certifies, in writing, that he or she has examined all evidence that the board received at the missed session, which evidence shall include an audio- or videorecording of the missed session or a transcript thereof.

The board’s vote need not be taken at the statutory public hearing, but it must be taken at a public meeting held in conformity with the requirements of the open meeting law by members of the board who were present at the public hearing. Sesnovich v. Bd. of Appeal of Boston, 313 Mass. 393, 398 (1943); Mullin v. Planning Bd. of Brewster, 17 Mass. App. Ct. 139 (1983). As noted above, it is not necessary for the board to write the decision in public, so long as the substance of the decision is made known at a public meeting. After a decision is made at a public meeting, the board may not make a substantive amendment without complying with the public notice and hearing requirements. Tenneco Oil Co. v. City Council of Springfield, 406 Mass. 658 (1990); Barlow v. Planning Bd. of Wayland, 64 Mass. App. Ct. 314, 319 (2005).

Variances and special permits may be granted only by a unanimous vote of a three-member board, the concurring vote of four members of a five-member board, and a two-thirds vote of an SPGA with more than five members. G.L. c. 40A, § 9, ¶ 12; G.L. c. 40A, § 15, ¶ 4; Cottone v. Cedar Lake, LLC, 67 Mass. App. Ct. 464, 470–71 (2006). Boards of appeals have either three or five regular members, G.L. c. 40A, § 12, unless otherwise provided by municipal charter, but no limit is imposed by the Zoning Act on the number of members of an SPGA other than a board of appeals. In Cottone, a two-thirds vote (five out of seven) of the seven-member board of appeals established by the Sturbridge Town Charter was sufficient to carry the vote to grant zoning relief.

Vote requirements relate to the number of members of a board established by statute or municipal bylaw or ordinance; the resignation of one member of a five-member board does not transform it into a four-member board for this purpose. Gamache v.

The ambiguous status of site plan approval has led to confusion regarding whether a municipality may impose the vote requirements for special permits on site plan approvals. See Osberg v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 59–60 (1997) (“Without deciding whether a municipality, without statutory authority, may impose the vote requirements of G.L. c. 40A, § 9, to approval of site plans,” the court stated that the planning board was not obliged to follow the supermajority vote requirement of § 9 where it “did not invoke or attempt to exercise the discretionary powers inherent in the special permit process”). The Land Court invalidated a provision in a zoning bylaw requiring the concurring vote of four members of a five-member board for approval of a site plan, holding instead that a simple majority vote was sufficient to grant site plan approval. Clean Harbors of Braintree v. Parsons, 17 M.L.W. 1166 (Land Court 1989). Caution is warranted until this point is clarified either by further case law or legislation.

(b) Change in Board Membership After the Vote to Grant

In Cameron v. DiVirgilio, 55 Mass. App. Ct. 24 (2002), the Appeals Court dealt with a special permit approved by a three-member zoning board at a public meeting on January 7, 1999. There was a dispute about whether one of the board members had resigned as of February 1, 1999, the date the written decision was filed with the municipal clerk. Instead of signing the decision on that date, the board member authorized the board’s administrative assistant by telephone to sign her name. The Appeals Court concluded that “the relevant date for ascertaining the validity of the permit [was] the date when the board approved the special permit at a public hearing.” Cameron v. DiVirgilio, 55 Mass. App. Ct. at 27. The filing of the written decision thereafter is a “necessary but ministerial act.” Cameron v. DiVirgilio, 55 Mass. App. Ct. at 27. The decision filed “with her approval, was not infirm even if [she] was not at the time an active board member.” Cameron v. DiVirgilio, 55 Mass. App. Ct. at 28.

§ 5.14.3 Preparation of Decision

The practice of the municipal board may require the applicant to prepare a written decision for the board reflecting the board’s vote and meeting all statutory requirements as to form. Such is the practice in Boston, Worcester, Waltham, and many other municipalities. Even where this is not the local practice, the applicant may wish to provide the board with a draft form of the decision to help ensure not only that the decision will be proper in form, but also that the conditions stated in the decision will be clearly and artfully worded. Any showing of “wholesale adoption” of the applicant’s draft decision by the board, or a “lack of independent analysis of the facts by the board,” is “neutralized totally” by the fact that the case is heard de novo by the trial judge in an appeal filed under G.L. c. 40A, § 17. Wolfman v. Bd. of Appeals of
Brookline, 15 Mass. App. Ct. 112, 120 (1983). Care should be taken in following this approach, however, because some boards may take offense at an offer to prepare a draft decision.

§ 5.14.4 Form of Decision

Section 11 of the Zoning Act provides that a decision granting a special permit or a variance must

• be “certified” by the PGA or SPGA (it would seem that the decision may be certified by the board members themselves, by the chairman, or by the clerk of the board because the decision principally serves as a record of the board’s vote; there is no need for all board members personally to sign the decision, Cameron v. DiVirgilio, 55 Mass. App. Ct. 24, 28 (2002) (the fact that a board member did not personally sign the decision, but instead verbally authorized the board administrative assistant to sign on her behalf, is not fatal, “especially given the lack of any statutory edict that the decision be signed by all members”);

• contain the name and address of the owner (of course, the name and address of the petitioner, if other than the owner, should also appear);

• identify the land affected (because G.L. c. 40A, § 11 requires the decision to be recorded, it is desirable to include a title reference);

• set forth compliance with the statutory requirements for issuance of the variance or special permit; and

• certify that copies of the decision and all plans referred to in the decision have been filed with the planning board and the city or town clerk.

The decision should also, of course, state that a special permit or variance is being granted. Planning Bd. of Nantucket v. Bd. of Appeals of Nantucket, 15 Mass. App. Ct. 733, 738 (1983) (“There was no mention of variance in either the hearing notice or at the hearing, and the board’s decision [granting a special permit] made no reference to a variance, to [the requirement alleged to be impliedly varied] or to the concepts (such as hardship . . . ) which are necessarily invoked when variances are sought or granted.”).

Conversely, a decision must state that a special permit or variance is being denied. See Board of Appeals of Westwood v. Lambers, 42 Mass. App. Ct. 411 (1997).

A written vote of the board, which does not on its face purport to be a decision granting a variance or special permit, is not an appealable decision and does not commence the running of the appeal period under G.L. c. 40A, § 17. See Spaulding v. Bd. of Appeals of Leicester, 334 Mass. 688, 692 (1956) (paper filed by zoning board that stated only that favorable vote of board on petition to construct open air theater had been recorded was not decision of board because there was no recital that variance was granted and the word “variance” did not appear); Planning Bd. of Falmouth v. Bd. of Appeals of Falmouth, 5 Mass. App. Ct. 324, 327 (1977) (board of appeals decision that granted a variance subject to certain conditions is present grant of variance
and appealable decision because it does not contemplate further discretionary action by board). The appeal period will begin to run, however, on the filing of a writing that “purports to be the decision of the board with respect to an application for a special permit or variance,” Planning Bd. of Falmouth v. Bd. of Appeals of Falmouth, 5 Mass. App. Ct. at 328; see also Maria v. Bd. of Appeals of Lowell, 348 Mass. 798 (1965) (rescript) (board’s decision sufficient as it incorporated brief statement of facts and reasons for decision); cf. Board of Aldermen of Newton v. Maniace, 429 Mass. 726, 730 (1999) (filing of draft approval order with vote of the board and words “Failed to Carry” noted at bottom, constituted “final action” within the meaning of G.L. c. 40A, § 9 such that applicant was not entitled to constructive grant of special permit). The appeal period will begin to run even if the decision is in some respect unlawful. It is possible for a decision to be construed as granting a variance so long as the necessary findings are made to support the type of relief that is, in fact, needed. Wolfman v. Bd. of Appeals of Brookline, 15 Mass. App. Ct. 112 (1983).

(a) Detailed Record of Proceedings; Reason for Decision

Section 15 of the Zoning Act provides, with respect to boards of appeals, that “[t]he board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions.”

Section 9 of the Zoning Act was amended in 1986 to impose the same requirement on SPGAs. 1986 Mass. Acts c. 471 (effective Jan. 20, 1987). Although Section 9A, relating to adult entertainment, was not similarly amended, it would be reasonable to infer that the same procedural requirements should apply to special permits granted under that provision. Similar language of Old Chapter 40A was construed as follows:

[T]hese words mean that there must be set forth in the record substantial facts which rightly can move an impartial mind acting judicially, to the definite conclusion reached. This requirement is not satisfied by a mere repetition of the statutory words. Minute recitals may not be necessary, but there must be a definite statement of rational causes and motives, founded upon adequate findings.

Brackett v. Bd. of Appeal of the Bldg. Dep’t of Boston, 311 Mass. 52, 54–55 (1942). While the requirements for findings that support the grant of a variance or special permit are rigorous, “less is necessary when relief is refused.” Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215 (1982) (board’s stated reason for denying variance was based on town’s policy against trailer parks, and this was “sufficient explanation for denial of a variance, especially on a record which falls well short of establishing facts which would have authorized the board to grant a variance”). Indeed, the mere filing of a record of a vote to deny within the required time period may suffice. See Board of Aldermen of Newton v. Maniace, 429 Mass. 726 (1999) (filing of draft approval order with votes of individual board members noted at conclusion of document along with notation “Failed to Carry” sufficient to meet timely filing requirement and avoid constructive grant).
In Security Mills Ltd. Partnership v. Board of Appeals of Newton, 413 Mass. 562 (1992), the Supreme Judicial Court considered the provision of G.L. c. 40A, § 15 requiring a board of appeals to state “the reason for its decision.” In that case, the Newton Board of Appeals nullified the grant of a building permit in a decision stating that “[a]lthough a consensus was not reached among the various members,” there were three alternative reasons for nullification of the building permit. Security Mills Ltd. P’ship v. Bd. of Appeals of Newton, 413 Mass. at 564.

The Security Mills court explained:

We agree with the defendants that the provision in G.L. c. 40A, § 15, requiring a concurring vote of four members of a board of appeals consisting of five members means only that four members must agree on the result. Agreement as to reasoning is not required by that provision. On the other hand, we agree with the Land Court judge that § 15’s requirement that the board clearly set forth “the reason” for its decision means that four board members must agree on why they have reached a particular result.

Security Mills Ltd. P’ship v. Bd. of Appeals of Newton, 413 Mass. at 566. A majority of the court found that the alternative reasons stated in the board’s decision could be reconciled to elucidate a single basis on which the members of the board reached their decision. Specifically, the court found that each of the “reasons” stated in the board’s decision formed a basis for the conclusion that a special permit had not been exercised in a timely manner.

It is difficult to reconcile the conclusions that “[a]greement as to reasoning” is unnecessary and that the members “must agree on why they have reached a particular result.” Justice Lynch, in a concurring opinion joined by Chief Justice Liacos, says as much. Nevertheless, Security Mills apparently stands for the proposition that if the required supermajority of a board agrees on a result, different reasons forming the basis for the result stated in a written decision will suffice under Section 15 if they can be synthesized to state a single basis for the result. As noted in § 5.21.1, below, an SPGA’s decision is a “final action” even if it does not contain the reasons for the decision. See Board of Aldermen of Newton v. Maniace, 429 Mass. at 730.

(b) Required Findings in Variance Decisions

Ct. 555, 558 n.5 (1974); see also McNeely v. Bd. of Appeal of Boston, 358 Mass. 94, 103 (1970) ("bare recital" of statutory language is not enough); Allen v. Bd. of Appeals of Fall River, 351 Mass. 714 (1967) (rescript); Barnhart v. Bd. of Appeals of Scituate, 343 Mass. 455, 457 (1962) (board made no finding of hardship); Spaulding v. Bd. of Appeals of Leicester, 334 Mass. 688, 692 (1956) (no finding of substantial hardship); Callahan & Sons, Inc. v. Bd. of Appeals of Lenox, 30 Mass. App. Ct. 36, 40 (1991) (hardship finding had hollow ring). However, the courts should recognize that the members of the PGA are usually not lawyers or paid professionals but rather volunteers who cannot be held to the same exacting standards that appellate courts apply to trial judges. Accordingly, variance decisions written by local boards should pass judicial muster if they fairly disclose the reasoning behind the board's decision and arrive at the conclusions required by G.L. c. 40A, § 10. See, e.g., Sherman v. Bd. of Appeals of Worcester, 354 Mass. 133 (1968) (the board, "after somewhat meager subsidiary findings, made the necessary findings to meet the statutory requirements"); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 293 (1972) ("[a]lthough the findings of the board as to the loading bay were meager, we conclude that they were legally sufficient in that they found compliance with [Old Chapter 40A] § 15 cl. 3, both in terms of the statutory language and in a recitation of the applicable facts concerning the property here concerned").

(c) Required Findings in Special Permit Decisions

A decision granting a special permit must include any findings required by the municipal ordinance or bylaw, as well as the findings required by the applicable provisions of the Zoning Act. Sheehan v. Zoning Bd. of Appeals of Plymouth, 65 Mass. App. Ct. 52, 56 (2005); see Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 621 (1986) ("the detailed conditions imposed by the zoning board do double duty as findings that the special permit applied for might be exercised in harmony with the general purpose and intent of the zoning by-law as the statute requires").

§ 5.14.5 Conditions

Conditions that accompany special permits and variances often raise issues of scope of authority to impose conditions and reasonableness of the imposed conditions.

(a) Authority to Impose Conditions

Section 9 of the Zoning Act provides that special permits may "impose conditions, safeguards and limitations on time or use." See, e.g., Shoppers' World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63 (1967) (many restrictions on cinema); Board of Selectmen of Stockbridge v. Monument Inn, Inc., 14 Mass. App. Ct. 957 (1982) (rescript) (permit subject to conditions set forth in letter that were omitted from decision due to clerical error); Garvey v. Bd. of Appeals of Amherst, 9 Mass. App. Ct. 856 (1980) (rescript) (condition of termination of permit for parking in the event that nearby lot ceased to be used for commercial purposes); Board of Appeals of Dedham v. Corp. Tifereth Israel, 7 Mass. App. Ct. 876 (1979) (rescript) (condition that private way not be used). Section 4 of Old Chapter 40A provided that special permits "may
be subject to general or specific rules therein contained” and could be granted “subject to appropriate conditions and safeguards.” Cases decided under this language may generally be relied on in connection with interpreting the similar language of the present Section 9. Presumably G.L. c. 40A, § 9A, concerning adult bookstores and motion picture theaters, will be construed to imply a similar power to impose conditions, safeguards, and limitations with respect to special permits granted under that section. Section 10 of the Zoning Act provides that variances may “impose conditions, safeguards and limitations both of time and of use, including the continued existence of any particular structures but excluding any condition, safeguards or limitation based upon the continued ownership of the land or structures to which the variance pertains by the applicant, petitioner or any owner.”

A zoning code enforcement officer has the authority and duty to enforce a condition, even if it appears to be for the benefit of a private party. Wyman v. Zoning Bd. of Appeals of Grafton, 47 Mass. App. Ct. 635, 636 (1999) (violation of condition in nineteen-year-old variance that “drainage from [adjacent property] shall not be restricted” warrants enforcement attention of building inspector). In Wyman, the Appeals Court suggested that violation of such a condition might also give rise to a private action for damages. Wyman v. Zoning Bd. of Appeals of Grafton, 47 Mass. App. Ct. at 638 n.6.

(b) Invalid Conditions

The power to impose conditions is very broad but not unlimited.

In Dolan v. Tigard, 512 U.S. 374 (1994), the U.S. Supreme Court struck down an Oregon municipal board’s imposition of conditions on the issuance of a building permit as an unconstitutional taking in violation of the Fifth Amendment. The Town of Tigard, Oregon, conditioned a permit to demolish an existing commercial structure and redevelop the property on requirements that the owner dedicate a portion of its land located in a floodplain for purposes of improving storm drainage and set aside another portion of its land for a pedestrian and bicycle pathway. Holding that there must be a “rough proportionality” between the impact of the project and the conditions imposed, the Court placed the burden of proving that a connection exists between the project’s impact and the conditions imposed on the government.

In V.S.H. Realty, Inc. v. Zoning Board of Appeals of Plymouth, 30 Mass. App. Ct. 530, 534 (1991), the Appeals Court struck down two conditions that were imposed in the context of site plan approval and would have required alterations to public ways on the grounds that such alterations were “beyond the control” of the applicant. See also Sullivan v. Planning Bd. of Acton, 38 Mass. App. Ct. 918 (1995) (planning board conditions on subdivision approval relating to work in state highway invalid).

In Middlesex & Boston Street Railway Co. v. Board of Aldermen of Newton, 371 Mass. 849 (1977), it was held under Old Chapter 40A that a condition to a special permit requiring solid waste to be removed from an apartment house by a private rubbish collector was valid but that a condition requiring five of fifty-four units to be leased to the Newton Housing Authority at below-market rent was beyond the board’s power. Although this case held a condition requiring low-income housing to
be invalid, the provision of low- or moderate-income housing is now expressly men-
tioned in the second paragraph of G.L. c. 40A, § 9 as a type of amenity that may be
required by an ordinance or bylaw as a prerequisite to the grant of a special permit
for increased density or intensity. Subsequent to Middlesex & Boston Street Railway
Co., the City of Newton amended its zoning ordinance to require inclusion of a simi-
lar condition in any special permit granting increased residential density. The validity
of this provision was raised in Iodice v. City of Newton, 397 Mass. 329 (1986), but
the merits were not reached because the action was not timely commenced under
Section 17 of the Zoning A ct.

Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530
(1956) indicated that a charity could not properly be required to waive its exemption
from real estate tax in connection with the grant of a variance:

A property owner may or may not be entitled to a variance. Many factors have to be considered. But those relating to the
subject of taxation and exemptions have no relevancy. If a
board of appeals upon consideration of the relevant factors
concludes that a property owner is entitled to a variance, it
should grant it. It has no right in doing so to attach conditions
by contract or otherwise touching the subject of taxes or ex-
emptions. These are matters outside its jurisdiction.

1766604) (agreement requiring construction and maintenance of public park next to
Shoppers World in Framingham unenforceable because town planning board had no
authority to enter into contract).

(c) Conditions Relating to Ownership

Subject to limitations discussed below, conditions making special permits personal to
particular applicants “are not prohibited by G.L. c. 40A, § 9.” Solar v. Zoning Bd. of
207, 212–13 (1960) (each decided under Old Chapter 40A)). However, Section 10 of
the Zoning Act explicitly prohibits the conditioning of variances on ownership based
on the view that “the practice of some local boards of appeals to condition the grant
of a variance on the continued ownership of property by a particular person” is im-
proper because the hardship necessary to issue the variance “must be unique to the
land or building and not merely to an individual.” M. H. R. 6200, 1973 Sess. at
20; see also Huntington v. Zoning Bd. of Appeals of Hadley, 12 Mass. App. Ct. 710
(1981). Although the grant of a special permit may be made personal to the appli-
cant, “the considerations on which the grant is based still relate to the land rather
(1977); see also Solar v. Zoning Bd. of Appeals of Lincoln, 33 Mass. App. Ct. at 402
(condition making special permit for accessory residential structures personal to
applicant invalid in part because personal nature of permit bore no relationship to

(d) Conditions Requiring Further Approvals

A zoning board has broad latitude to “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.” Weld v. Bd. of Appeals of Gloucester, 345 Mass. 376, 378 (1963) (dictum). However, Weld annulled a special permit because a condition that “the water situation must be arranged to the satisfaction of all concerned” was held to “necessarily impl[y] that the board must make a further determination of substance before the permit [could] issue.” Weld v. Bd. of Appeals of Gloucester, 345 Mass. at 378; see also Potter v. Bd. of Appeals of Mansfield, 1 Mass. App. Ct. 89, 94 (1973) (decision “to disapprove the application until revised plans are submitted” and approved construed as unqualified denial of special permit); cf. J. & C. Homes, Inc. v. Planning Bd. of Groton, 8 Mass. App. Ct. 123, 124–25 (1979) (open meeting law violated by failure to state conditions at hearing under subdivision control law).

In Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147 (1976), the court went
toward overruling Weld by upholding the grant of two special permits for a tennis club subject to the following condition:

[T]he building plans, the facility for off street parking, the
buffer areas surrounding the building, the size, type and loca-
tion of signs and the location of the building on the land shall
be approved by a majority vote of the Planning Board and this
Zoning Board of Appeals before construction is started.

Kiss v. Bd. of Appeals of Longmeadow, 371 Mass. at 152 n.3.

The court reasoned as follows:

The board did not abdicate its powers as it appears to have
done in the Weld case. It might have been preferable if the
board had itself passed on the matters in question, perhaps af-
after consultation with the planning board, if necessary, but
without purporting to give the planning board any power of
approval or disapproval of the items in question, ... The
board’s action was not merely an expression of an intent to is-
sue the two special permits at some future date on the occur-
rence of some contingency; rather the action constituted the
grant of the two permits with language which required and
compelled the applicants therefor to comply with specified
lawful “conditions and safeguards.”

The Appeals Court has held that the holding in Weld should be limited to “cases which invoke wholly ‘undefined standards,’” Balas v. Bd. of Appeals of Plymouth, 13 Mass. App. Ct. 995, 996 (1982) (rescript) (environmental design conditions). But see Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624 (1986) (Weld is often distinguished, however, its “core” remains: a board may not delegate to another board, or reserve to itself for future decision, the determination of an issue of substance). Courts have had little difficulty finding standards sufficiently definite to allow the imposition of conditions requiring further approvals. Kiss v. Bd. of Appeals of Longmeadow, 371 Mass. at 158 (condition that plans, signs, etc., be approved by planning board and board of appeals); Board of Appeals of Hanover v. Hous. Appeals Comm., 363 Mass. 339, 372–75 (1973) (comprehensive permit under G.L. c. 40B, § 21 properly conditioned on approval of drainage and sewer systems by appropriate state authorities); Zartarian v. Minkin, 357 Mass. 14, 18 (1970) (condition of additional parking “as the Board may require”); Shoppers’ World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63, 69–70 (1967) (condition of compliance with recommendations of planning board with regard to ingress and egress); Wolfman v. Bd. of Appeals of Brookline, 15 Mass. App. Ct. 112, 119–20 (1983) (conditions not stated in opinion); Ranney v. Bd. of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981) (condition requiring SPGA approval of roof color where the criteria for judgment and color choices were before the board at the time it issued its permit); Chambers v. Bldg. Inspector of Peabody, 40 Mass. App. Ct. 762, 765 (1996) (condition requiring community development department review of “final design and building plans” limited by Appeals Court to “minor details . . . amounting to final touches”); Shalbev v. Bd. of Appeal of Norwood, 6 Mass. App. Ct. 521, 528–29 (1978) (condition requiring “adequate drainage”); Planning Bd. of Falmouth v. Bd. of Appeals of Falmouth, 5 Mass. App. Ct. 324, 325–27 (1977) (condition requiring new plan submission differing in specified respects from earlier plan was proper even though description of required modifications was “vague”). A decision granting a special permit may be conditioned on future approval by another board, so long as the decision-making authority reserves explicitly or by implication the ultimate right to determine, on its own motion, whether or not the condition is satisfied. Kiss v. Bd. of Appeals of Longmeadow, 371 Mass. at 158; Shoppers’ World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. at 69–70; Balas v. Zoning Bd. of Appeals of Plymouth, 13 Mass. App. Ct. 995 (1982) (planning board approval of plans required by board of appeals). A special permit may be issued subject to the condition that it be reviewed periodically if circumstances warrant. Hopengarten v. Bd. of Appeals of Lincoln, 17 Mass. App. Ct. 1006 (1984) (review every three years of safety of metal radio tower). However, a board may not include new conditions in a permit that has been renewed pursuant to such periodic review unless such conditions were contemplated in the original permit or relate to factors properly considered in the grant of the permit. Solar v. Zoning Bd. of Appeals of Lincoln, 33 Mass. App. Ct. 398, 401 (1992). A distinction may also be made between a condition that contemplates a further determination by the board and a condition that is simply vague. Planning Bd. of Falmouth v. Bd. of Appeals of Falmouth, 5 Mass. App. Ct. at 326 (variance validly granted subject to requirement of submission of further plan showing “a staggered line of trees” and “adequate but shielded lights”). The latter type of condition does not present the difficulty seen in Weld, although it may give rise to difficulties of interpretation.
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(e) Conditions Requiring Security for Performance

Lovaco, Inc. v. Zoning Board of Attleboro, 23 Mass. App. Ct. 239 (1986) involved a special permit allowing the owner of a golf course to remove earth and gravel necessary for constructing an extension to the course, where the zoning bylaw authorized the special permit to be granted only as an accessory to the golf course principal use. In these circumstances, the Appeals Court held that it was appropriate to require a bond to secure completion of the golf course expansion, although the case was remanded to the SPGA to correct a procedural defect concerning how the amount of the bond was to be set. The court pointed out that “[t]he removal of gravel would necessarily precede construction of the new holes. The danger was manifest that an unscrupulous developer could propose a golf course expansion as a pretext to engage in earth removal that would be unlawful otherwise.” Lovaco, Inc. v. Zoning Bd. of Attleboro, 23 Mass. App. Ct. at 242-43.

This case leaves open the question of whether a bond for completion is appropriate absent the peculiar risk presented by these facts.

(f) Conditions Not Disclosed on Face of Decision

In Board of Selectmen of Stockbridge v. Monument Inn, Inc., 14 Mass. App. Ct. 957 (1982) (rescript), the Appeals Court held that the original applicant for a special permit was subject to conditions that were unintentionally omitted from the permit itself due to a clerical error. This holding may be justified where, as in Monument Inn, it is shown that the applicant was aware of the conditions the board intended to impose and that their omission from the special permit or variance was an oversight. Conditions that do not appear on the face of a recorded decision should not, however, be held to bind a mortgagee or purchaser who acquires an interest in the affected property without notice or knowledge of the error. See Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 205 (2005) (“purchasers of property or their attorneys are not expected or required to look behind the face of recorded variance decisions to ascertain their effective scope”); cf. Gamer v. Zoning Bd. of Appeals of Newton, 346 Mass. 648, 650 (1964) (“there are strong, controlling reasons for so construing [zoning requirements] that an innocent owner’s right to build on his land is determined by matters ascertainable of record”); Belmont v. Mass. Amusement Corp., 333 Mass. 565, 571 (1956) (oral representation regarding use of land not enforceable against bona fide purchaser). See generally § 5.19, Modification of Decisions, below.

In Lussier v. Zoning Board of Appeals of Peabody, 447 Mass. 531 (2006), the Supreme Judicial Court interpreted a variance that allowed construction of a twenty-two-by-twenty-two-foot garage within one foot of the sideline, granting relief from the twenty-foot setback required by the ordinance. The garage was built in accordance with the variance. Several years later the homeowner built a second floor on the garage as living space. The second-story building envelope exceeded the twenty-two-by-twenty-two-foot footprint of the garage.

The Supreme Judicial Court determined that the original variance contained two conditions that were violated by the addition. First, the variance was granted for a
garage, not for additional living space. Second, the variance was granted for a structure with a footprint of twenty-two by twenty-two feet, and the second-story addition exceeded that footprint.

The Supreme Judicial Court reviewed the general principles for construing variance decisions:

- A variance “is to be construed against the individual requesting the variance, rather than against the granting authority.” Lussier v. Zoning Bd. of Appeals of Peabody, 447 Mass. at 534 (quoting DiGiovanni v. Bd. of Appeals of Rockport, 19 Mass. App. Ct. 339, 347 (1985) (“Where there is ambiguity on the face of a variance decision, it should be resolved against the holder of the variance.”)).

- In order for conditions on a variance to be binding, they must be set forth in the variance decision itself. Lussier v. Zoning Bd. of Appeals of Peabody, 447 Mass. at 535 (citing Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 205 (2005) (“Purchasers of property or their attorneys are not expected or required to look behind the face of recorded variance decisions to ascertain their effective scope . . . .”)).

- “[W]hen 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 the bulk of buildings are concerned.” Lussier v. Zoning Bd. of Appeals of Peabody, 447 Mass. at 534 (quoting DiGiovanni v. Bd. of Appeals of Rockport, 19 Mass. App. Ct. at 346-47).

In Lussier, while not explicitly called out as “conditions,” the variance did specify the intended size and use of the structure, and those words were “sufficient to constitute limitations on the variance.” Lussier v. Zoning Bd. of Appeals of Peabody, 447 Mass. at 536.

Spear v. Board of Appeals of Danvers, 77 Mass. App. Ct. 220 (2010), involved a claim that a variance imposed implied conditions. The plaintiff owned property (“locus”) containing a residence and a barn in a residential zoning district. The locus had been in the plaintiff’s family for several generations and had long been used as a farm. In 1975, the property consisted of about four acres, and the plaintiff’s grandfather obtained a variance to use the barn and adjacent land for commercial storage. The variance was granted with certain conditions. Since 1975, the barn had been rented out as commercial storage space. In 1987, the plaintiff’s parents proposed to subdivide the property into two lots and obtained a frontage variance for the lot containing the barn. The variance was conditioned on the commercial activity ceasing upon execution of the deed separating the property into two parcels, but the property was not divided and the variance lapsed. In 1994, the property was divided into two lots. Lot 2 contained the barn, and fully conformed with the dimensional requirements, but Lot 1 required a frontage variance, which was granted with the condition that Lot 1 be used for a single-family dwelling and without any condition eliminating the commercial activity. In 2000, the planning board endorsed an approval not required (ANR) plan to redivide the property, which was accomplished by shifting the lot lines. The barn was located on Lot 2A of the subdivided property, and conformed
to the applicable zoning regulations. None of the various divisions of the property intensified the nonconforming commercial use that existed since the 1975 variance was issued. Spear v. Bd. of Appeals of Danvers, 77 Mass. App. Ct. at 223 n.2. The building inspector issued a cease and desist order prohibiting the commercial use in 2007, the board upheld the order, and the Land Court granted summary judgment in favor of the board because it found that the subdivision effectively cancelled the variance.

The Appeals Court reversed, reasoning that “[c]onditions [on a variance] must be sufficiently definite to apprise both the applicant and interested landowners of what can and cannot be done with the land,” Spear v. Bd. of Appeals of Danvers, 77 Mass. App. Ct. at 222, but that the 1975 variance did not contain a prohibition on subdividing the land. The court also reasoned that

> [i]f, as the board now contends, preservation of the lot in the same configuration or size as it was at the time of the 1975 variance grant was an inherent or implicit condition of the 1975 variance, the board’s action approving the 1994 variance stands in irreconcilable conflict with that contention. . . . In order for such a significant condition to apply, it must be readily apparent either on the face of the variance or in a document incorporated in the variance by reference.


Likewise, in E & J Properties, LLC v. Medas, 464 Mass. 1018 (2013) (rescript), the Supreme Judicial Court declined to imply conditions not explicitly stated in the variance. E & J Properties involved a variance that allowed the locus to be divided into twenty lots and a single-family dwelling to be constructed on each lot. The variance was conditioned on the removal of a building from the locus, but the plaintiff had not completely removed the building. The Fall River building inspector ordered the landowner to remove the building; the city’s zoning board of appeals reversed, finding that the variance imposed no time limit on the building’s removal. The Land Court affirmed the board’s decision. The Appeals Court, in a Rule 1:28 decision, reversed the Land Court, ruling that

- although the variance did not identify any particular time period by which the building had to be removed, it was reasonably inferable that the building had to be eliminated within a “reasonable time” and
- the locus owner’s partial demolition of the building prevented the variance from lapsing.

On further appellate review, the Supreme Judicial Court affirmed the Land Court’s decision, reasoning that “[t]he terms of a variance must appear on its face” and the variance imposed no particular time period by which the building must be removed. The Supreme Judicial Court also noted that, while the variance required that “‘rights authorized by the [variance decision]’ be exercised within one year, demolition was not a ‘right’ authorized by the variance per se” because, if it were, it would be subject to lapse after one year, a result that would make no sense.
(g) **Conditions Required by Ordinance or Bylaw**

A decision granting a special permit should include any conditions that are required by the bylaw or ordinance, and if the decision fails to do so, a court may modify the decision to include such conditions. Wizansky v. Bd. of Appeals of Brookline, 21 Mass. App. Ct. 915 (1985).

(h) **Conditions Are Not Subject to the Thirty-Year Limitation on Restrictions**

In Killorin v. Zoning Board of Appeals of Andover, 80 Mass. App. Ct. 665 (2011), the Appeals Court decided that the thirty-year time limitation on property restrictions imposed by G.L. c. 184, § 23 does not apply to conditions imposed by a special permit decision.

(i) **Conditions Are Preconditions to Enjoyment of Relief Granted**

In Rosenfeld v. Zoning Board of Appeals of Mendon, 78 Mass. App. Ct. 677, 679 (2011), the Appeals Court observed that “[t]he variances furnished relief from otherwise applicable requirements of the zoning by-law, and the conditions imposed by the variances operate as preconditions to the enjoyment of that relief. However, they do not operate independently to limit the permissible use of the property.”

§ 5.15 **FILING THE DECISION**

Boards of appeals under G.L. c. 40A, § 15, ¶ 5 and (since 1987) SPGAs under G.L. c. 40A, § 13 are directed by the Zoning Act to file a copy of the zoning decision “within fourteen days in the office of the city or town clerk.” Sometimes this requirement has been treated as if it began to run when the board voted on the matter before it. However, the fourteen-day period would appear to begin to run not from the vote of the board, but from the date it has “cause[d] to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing such vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions.” G.L. c. 40A, § 15, ¶ 5.

Both SPGAs and PGAs also are implicitly required, by the requirement in Section 11 that such decisions so certify, to file decisions granting zoning relief and plans to which they refer with the planning board. Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109, 111 (1981) (“Even though there is no clear exhortium to the [special] permit granting authority to file its decision with the city clerk, such a duty is strongly implied when the statute is read in its entirety and when its requirements are compared with similar statutes”). Absent a showing of prejudice, failure to file the decision and referenced plans with the planning board is not grounds to annul the zoning decision. Burwick v. Zoning Bd. of Appeals of Worcester, 1 Mass. App. Ct. 739, 744–45 (1974).
NOTICE OF THE DECISION

If a PGA or SPGA grants the relief requested, it must contemporaneously issue a copy of the decision to the owner and to the applicant, if other than the owner. G.L. c. 40A, § 11, ¶ 5. The same requirement applies to any extension, modification, or renewal of a variance or a special permit. It would seem, however, that failure to so notify would neither result in a constructive grant, see Zuckerman v. Zoning Bd. of Appeals of Greenfield, 394 Mass. 663 (1985), nor give rise to a procedural defect that may be challenged for ninety days. See Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. 304 (1986). Notice to owner and applicant is not required for a decision denying relief; it is up to the petitioner to check periodically for the filing of such a decision in the office of the municipal clerk. See Massachusetts Bread Co. v. Brice, 13 Mass. App. Ct. 1053 (1982) (rescript) (appeal under G.L. c. 40B untimely where filed two days late due to misinformation by city official as to date of filing of decision).

Additionally, the board of appeals or SPGA is required, under Sections 9 and 15 of the Zoning Act, to give notice of the decision by mail, whether or not the requested relief is granted. Notice of the decision is to be mailed “forthwith” to

- the petitioner, applicant, or appellant, including the owner of the land if different, Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. at 308 (construing Section 15); cf. Del Grosso v. Bd. of Appeal of Revere, 330 Mass. 29, 32–33 (1953) (Old Chapter 40A);
- all “parties in interest” as defined in G.L. c. 40A, § 11; and
- “every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent.”

G.L. c. 40A, §§ 9, 15. Failure to mail notice of the decision “forthwith” may presumably be asserted as a procedural defect in an action brought within the normal twenty-day appeal period, but such action does not benefit from the ninety-day appeal period provided in Section 17 because the longer period applies only to defects relating to the hearing. Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. at 310 (construing Section 15). It also appears that the board’s failure to give mailed notice does not defer commencement of the appeal period. But compare the discussion in § 5.21.3, Procedural Requirements for Perfecting a Constructive Grant, below, of the applicant’s failure to give notice of a deemed grant pursuant to Section 9 or Section 15.

The notice of the decision must “specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date” of filing of such notice in the office of the city or town clerk. G.L. c. 40A, § 15.

Use of the language of Section 15 in a notice of decision could mislead a potential appellant as to the time when the appeal must be filed, although adherence to the statutory language should not constitute a notice defect that would allow an appellant to avail himself or herself of the ninety-day statute of limitations under G.L. c. 40A,
§ 17. This problem may be avoided by including the following (admittedly cumbersome) language in a notice of a board of appeals’ decision:

Section 15 of Massachusetts General Laws Chapter 40A (the “Zoning Act”) requires this notice to specify that appeals, if any, shall be made pursuant to Section 17 of the Zoning Act and shall be filed within twenty days after the date of filing of this notice with the city or town clerk. Section 17 of the Zoning Act requires any such appeal to be filed within twenty days after the filing of the decision with the city or town clerk.

Note also that the ninety-day limitation period of G.L. c. 40A, § 17 need not be mentioned in the statutory notice of decision.

§ 5.17  RECORDING/EFFECTIVE DATE OF THE DECISION

No variance granted after the Zoning Act took effect, and no special permit granted after the Zoning Act took effect and before August 3, 2006, “take[s] effect” until the following conditions have been satisfied:

- the city or town clerk certifies on a copy of the zoning decision “that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied”;
- the certified decision is “recorded in the registry of deeds for the county and district in which the land is located”; and
- the decision is “indexed in the grantor index under the name of the owner of record” or “recorded noted on the owner’s certificate of title.”


These recording requirements similarly apply to “an extension, modification or renewal” of a variance or special permit, and in the case of a constructively granted application, for recording a certificate issued by the municipal clerk and a copy of the application. The applicant is responsible for recording at his or her own expense. G.L. c. 40A, § 11, ¶ 5; see also § 5.21.3, Procedural Requirements for Perfecting a Constructive Grant, below.

In McDermott v. Board of Appeals, 59 Mass. App. Ct. 457 (2003), the Appeals Court confirmed that a special permit issued in 1990 but not recorded until 2000 did not...
§ 5.17  Massachusetts Basic Practice Manual


In Chapter 205 of the Acts of 2006, G.L. c. 40A, § 11 was amended to allow special permits issued after August 2, 2006 to be recorded and become effective even if an appeal of the special permit has been filed under G.L. c. 40A, § 17. The result is that project proponents are allowed to proceed with construction under the special permit “at risk” unless project opponents are able to obtain a judicial injunction. The amendment provides that a “person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone” and that “[t]his section shall in no event terminate or shorten the tolling, during the pendency of any appeals, of the 6-month periods provided under the second paragraph of section 6.”

§ 5.18  LAPSE OF SPECIAL PERMITS AND VARIANCES

§ 5.18.1  Lapse of Special Permits

The Zoning Act sets forth differing provisions regarding lapse of special permits and variances issued under Sections 9 and 10, respectively. Zoning ordinances or bylaws are required to specify a period of time, not exceeding three years, “which shall not include such time required to pursue or await the determination of an appeal . . . from the grant thereof,” in which special permits shall lapse “if a substantial use thereof has not sooner commenced except for good cause or, in the case of [a] permit for construction, if construction has not begun by such date except for good cause.” G.L. c. 40A, § 9, ¶ 14 (as most recently amended by 2016 Mass. Acts c. 219, § 30).

(a)  Commencement of Construction

(b) Multiple Buildings Authorized by One Special Permit

In Bernstein v. Chief Building Inspector of Falmouth, 52 Mass. App. Ct. 422 (2001), the court gave comfort in the context of a multiphased condominium project that utility infrastructure work relating to the later phases of the condominium was enough to prevent the special permit from lapsing for the later phases of the condominium even after a number of years of intervening inaction.

In Bernstein, a 1986 special permit authorized “Building Five” as the last phase of a condominium project. By 1989, the first four buildings had been constructed. Modifications to the special permit were granted three times; the second modification required commencement of construction of Building Five by October 1991, but the final modification to the special permit, granted in 1993, did not contain a deadline by when Building Five must have been constructed. Because the developer had previously installed the infrastructure, including a septic system, to support Building Five, no appeal had been taken from the 1993 modification that imposed no time limit on construction, and the plaintiffs were on notice of the possibility for future development because of language in the condominium master deed, the court found that “where a developer anticipates completing work in stages, has begun construction within two years [now three], and a ‘substantial use’ has commenced, authority to complete the project continues absent express language to the contrary in the permit.” Bernstein v. Chief Bldg. Inspector of Falmouth, 52 Mass. App. Ct. at 427. Therefore, the special permit remained valid for Building Five, “despite the extended pause in construction.” Bernstein v. Chief Bldg. Inspector of Falmouth, 52 Mass. App. Ct. at 428.

In Lobisser Building Corp. v. Planning Board of Bellingham, 454 Mass. 123 (2009), the holding in Bernstein was extended to protect later phases authorized by a phased special permit against the risk of lapse. In Lobisser, the Bellingham zoning bylaw at issue specified a one-year lapse period for special permits. The Lobisser special permit authorized an eighty-four-unit townhouse condominium to be built in multiple buildings, and “with no more than twenty-one units being built in any given year,” and with site plans to be submitted annually. Lobisser Bldg. Corp. v. Planning Bd. of Bellingham, 454 Mass. at 125.

The building inspector issued the first building permit, for phase I, in April 1986. In March 1987, the first occupancy permit was issued, and a condominium association was established. The master deed was amended in September 1987 to include the units of phase II. In the spring of 1988, an issue arose with respect to the town sewerage system, and the condominium trust requested an extension of time in which to submit plans for phase II. The planning board and the condominium trust agreed that a written extension would be unnecessary if the trust chose to delay phases III and IV, and that construction would resume when the municipal sewer became available. However, no further construction occurred beyond phase II, even after the sewer system became available. Nothing further happened until the fall of 2005, when the plaintiff entered into an agreement regarding the purchase and development of the association’s phasing rights, and the master deed was amended.
In December 2006, the plaintiff applied to the planning board for a modification of the special permit and for development plan approval. The planning board denied the application on the ground that the special permit had lapsed. The plaintiff appealed, and the Land Court entered summary judgment that the special permit had lapsed.

The Supreme Judicial Court reversed the Land Court’s judgment, ruling that both G.L. c. 40A, § 9 and the Bellingham zoning bylaw provide that either substantial use or construction must commence within the applicable time period (in this case, one year); that “[t]here is no question that construction commenced within that period,” even though it was only for phase I and for attendant common areas and roadways; and that “nothing in the statute suggests that substantial use or construction for each phase of the project had to begin within one year.” Lobisser Bldg. Corp. v. Planning Bd. of Bellingham, 454 Mass. at 129. The Supreme Judicial Court further noted that condominium phasing serves a valid purpose, and “[o]nce a special permit for a project, phased or otherwise, has been approved, all that the statute requires is that substantial use or construction commence within the applicable lapse period, which cannot exceed two years [now three].” Lobisser Bldg. Corp. v. Planning Bd. of Bellingham, 454 Mass. at 130.

The Supreme Judicial Court found that the special permit conditions requiring the developer to submit plans for site plan review annually, even when read together with the language relating to phasing, did not require that the project be completed in four years (one year for each phase). The court also held that, although the permit holder failed to submit annual reports for site plan review after phase II, there was no need for it to have complied with that requirement.

The court noted that the municipality may take steps to prevent a special permit from being “warehoused indefinitely.” For instance, the special permit–granting authority could have “impose[d] conditions, safeguards, and limitations on time or use,” but had not done so in this case. Lobisser Bldg. Corp. v. Planning Bd. of Bellingham, 454 Mass. at 133.

The Lobisser court also observed that G.L. c. 40A, § 6 requires that “construction or operations under a . . . special permit . . . conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than six months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.” Lobisser Bldg. Corp. v. Planning Bd. of Bellingham, 454 Mass. at 132 n.12. Accordingly, after a hiatus in construction as in Lobisser, unbuilt phases of a special permit development need to conform to subsequently adopted changes in the zoning bylaw.

(c) Commencement of “Substantial Use”

Commencement of construction under a special permit authorizing a use, within the specified period, should be sufficient to prevent lapse of a special permit, even though the use does not commence until after the period has expired. Otherwise, the
statute would effectively frustrate projects requiring more than three years to complete, regardless of how promptly commenced and diligently pursued.

(d) Extension for “Good Cause”

Failure to commence use or begin construction within the applicable period will not cause the special permit to lapse where “good cause” for the delay exists. G.L. c. 40A, § 9, ¶ 14. The Zoning Act does not expressly require a determination by the SPGA as to the existence of “good cause,” nor does it provide that such a determination would be conclusive. It would appear that the question could properly be brought before the board of appeals by an appeal under G.L. c. 40A, § 8 from denial by the building inspector of a building permit or occupancy certificate. See Rinaudo v. Zoning Bd. of Appeals of Plymouth, 383 Mass. 885 (1981) (rescript) (appeal concerning applicability of zoning freeze under G.L. c. 40A, § 6). Neither the Zoning Act nor any decided case addresses the question of whether the SPGA could make a finding of good cause for extension at the time when a special permit is issued; the Zoning Act is silent on whether the period in which a variance must be exercised is similarly tolled by pending litigation or other “good cause.” However, the case law supports the position that pending litigation challenging a variance tolls the period. Belfer v. Bldg. Comm’r of Boston, 363 Mass. 439, 444–45 (1973); see also Woods v. City of Newton, 351 Mass. 98, 104 (1966) (delays due to litigation should not prejudice party who had right to proceed immediately under legal permit). Likewise, good-faith pursuit of other required permits can constitute “good cause” preventing the lapse of a special permit. Ware Real Estate, LLC v. Town of Ware, 81 Mass. App. Ct. 1120 (2012) (Rule 1:28 decision).

In Ware Real Estate, the Appeals Court upheld the trial court’s finding that the plaintiffs’ special permit had not lapsed as the result of a nine-year delay in recording it because

- a Town of Ware bylaw provided that a showing of good cause for nonuse avoided a lapse;
- the board’s chairman testified that the diligent pursuit of additional permits may constitute good cause; and
- the trial judge’s findings that the plaintiffs were diligent in pursuing additional approvals had evidentiary support (the plaintiffs had received a Massachusetts Environmental Policy Act Certificate from the Executive Office of Environmental Affairs on August 20, 2002; a site plan assignment from the board of health on June 18, 2004; a building permit from the building inspector on August 13, 2004; and an authorization-to-construct permit from the Department of Environmental Protection on January 25, 2005).

See also Iappini v. Dakota Partners, LLC, 87 Mass. App. Ct. 1103 (2015) (unpublished decision; text available at 2015 WL 522721) (applicant seeking other permits necessary to start construction was delayed by litigation; court deferred to SPGA construction of the term “good cause” under the ordinance).
(e) Extension During Appeal

The period in which action must occur is explicitly lengthened with respect to special permits during the “time required to pursue or await the determination of an appeal . . . from the grant thereof.” G.L. c. 40A, § 9, ¶ 14. This provision originally read: “not more than two years, including such time required to pursue or await the determination of an appeal” (emphasis added). This language was “clarified” in 1985 to read: “not more than two years, which shall not include such time” (emphasis added). In 2016, the lapse period was extended to “not more than three years,” 2016 Mass. Acts c. 219, § 30, which is the time necessary to resolve an appeal. Note, finally, that the original version of this language still appears in Section 9A of the Zoning Act. That should be attributed to legislative oversight.

§ 5.18.2 Variances

Variances granted under the Zoning Act lapse by operation of law “[i]f the rights authorized . . . are not exercised within one year of the date of grant of such variance.” G.L. c. 40A, § 10, ¶ 3.

(a) When Does the Year Begin?

The period in which the “exercise” must occur is measured from the date of the “grant.” In Town of Tewksbury Board of Appeals v. Tremblay, 11 Land Ct. Rptr. 206 (Aug. 28, 2003), the Land Court concluded that the one-year period during which a variance must be exercised begins to run on the date the board of appeals votes to grant the variance, not the date the decision is filed with the municipal clerk. This interpretation fails to consider that the “grant” is necessarily tentative and is subject to reconsideration at any time prior to the filing of a written decision with the municipal clerk and/or the running of the time period for a constructive grant. Only after the board’s written decision is filed with the municipal clerk is there a final grant. Therefore, the date upon which the decision is filed with the municipal clerk, rather than the date of the board vote, may be a more appropriate date from which to measure permit lapse periods. Likewise, since a variance does not “take effect” until recorded and cannot be recorded at least until the municipal clerk certifies that the twenty-day appeal period has expired without any appeal having been taken, G.L. c. 40A, § 11, ¶ 6, an argument could be made that the one-year lapse period should not commence until at least the twenty-day appeal period has expired without any appeal having been taken.

(b) Reinstatement

Section 10 of the Zoning Act expressly provides that a lapsed variance may be reinstated only after notice and a new hearing; this has been construed to mean that new findings of the statutory criteria are necessary and that the board is not obligated to renew the relief simply because there has been no change in circumstances. Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne, 14 Mass. App. Ct. 76 (1982); see also Lopes v. Bd. of Appeals of Fairhaven, 27 Mass. App. Ct. 754, 756 (1989)
(after lapse of variance, new findings were required even though initial grant of variance was approved judicially). When a variance that is valid only for a specific, limited period expires, renewal of the variance requires new findings of the statutory criteria. See Callahan & Sons, Inc. v. Bd. of Appeals of Lenox, 30 Mass. App. Ct. 36, 40 (1991). Although there is no parallel provision relating to special permits, the same result is likely.

(c) Pre-1975 Variances

Variances granted prior to the effective date of 1975 Mass. Acts c. 808 were not subject to lapse under the terms of Old Chapter 40A. Hogan v. Hayes, 19 Mass. App. Ct. 399, 403-05 (1985); Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne, 14 Mass. App. Ct. 76, 81 (1982) (discussing legislative history of Zoning Act, § 10). Accordingly, unless a deadline for exercise was specified in the municipality’s ordinance or bylaw or in the variance itself and absent a material change in circumstances, such a variance could continue in force without limit of time although not exercised. Hogan v. Hayes, 19 Mass. App. Ct. at 410 (dictum).

In Hogan and Asack v. Board of Appeals of Westwood, 47 Mass. App. Ct. 733, 735 (1999), the Appeals Court declined to decide whether the obligation to exercise a variance within a limited time period required by the 1975 amendments to the Zoning Act should be applied retroactively. In Hogan, decided in 1985, the court considered a pre-1975 variance to subdivide a lot that already contained a single-family residence in order to allow the construction of a second residence on the newly created lot. Wishing to avoid an “inequitable” result, the court held that the variance was exercised when the subdivision occurred and the lot with the existing house was sold; construction of a new house in 1982 was permitted under the pre-1975 variance.

In Asack, decided in 1999, the court considered a factual situation similar to the one in Hogan, and reached a different result. In Asack, the vitality of a 1970 variance to construct a dwelling on “Lot 7” was at issue, where both Lots 7 and 8 were held in common ownership at the time of the grant of the variance. Lot 8 was subsequently sold to a third party, but prior to any construction on Lot 7, title to Lots 7 and 8 became vested again in a single owner, and that owner and his successors were unaware of the 1970 variance. The court held that even if the sale of Lot 8 was an exercise of the variance (as the analogous act had been found to be in Hogan), the subsequent merger of title nullified the exercise. Asack v. Bd. of Appeals of Westwood, 47 Mass. App. Ct. at 735. The court was guided in part by its desire to “foster the creation of conforming lots” and by the lack of equitable considerations that had influenced it in Hogan. Asack v. Bd. of Appeals of Westwood, 47 Mass. App. Ct. at 736.

(d) “Exercise” of Rights Under a Variance

General Laws Chapter 40A, § 10 provides that if the rights authorized by a variance are not “exercised within one year of the date of grant of such variance such rights shall lapse.” In Cornell v. Board of Appeals of Dracut, 453 Mass. 888 (2009), the
Supreme Judicial Court addressed the issue of what constitutes sufficient “exercise” of a variance to prevent it from lapsing after one year.

In Cornell, a variance was granted on March 7, 2002, to subdivide a fourteen-acre parcel into two building lots, one of which would have 150 feet of frontage instead of the 175 feet of frontage required by the zoning bylaw. During the one-year “exercise” period, the plaintiff hired a land surveyor to prepare and submit an “approval not required” (ANR) plan to the planning board showing the two lots. He obtained the planning board’s ANR endorsement on August 14, 2002, and recorded the ANR plan on August 30, 2002. Next, the plaintiff hired an engineering firm to prepare a subsurface septic plan and wetlands delineation for the property. In November 2002, soil testing began, and on February 14, 2003, the town board of health approved the septic design. However, after a number of continued meetings, the board of health did not issue the necessary final approval until June 12, 2003. The plaintiff also obtained an order of conditions from the conservation commission, which was issued on May 7, 2003. The planning board approval, the board of health approval, and the conservation commission approval were each prerequisites to obtaining a building permit.

When his building permit application was denied in June 2003, on the ground that the variance had lapsed, the plaintiff filed for a six-month extension of the variance. This request was denied as untimely because it was not filed prior to expiration of the one-year period in accordance with G.L. c. 40A, § 10, ¶ 3. The plaintiff then applied for a new variance and was denied. He then filed a complaint in the Land Court seeking a declaration that he had taken sufficient steps to “exercise” the variance and prevent it from lapsing.

The Land Court judge reasoned that (1) since the variance was never recorded and could not “take effect” until it was recorded, it could not have been exercised; and (2) irrespective of the failure to record the variance within the one-year period, the actions taken by the plaintiff within the one-year period were insufficient to “exercise” the variance. The Appeals Court agreed, and the Supreme Judicial Court granted further appellate review.

The Supreme Judicial Court agreed that a variance cannot be exercised unless it takes effect, and that, under G.L. c. 40A, § 11, ¶ 5, a variance does not take effect until it is recorded. Although the variance was recorded after the one-year exercise period expired, the court concluded that failure to record the variance within one year prevented the variance from being “exercised” in that period.

The Supreme Judicial Court also determined that even if the plaintiff had timely recorded his variance, he nonetheless failed to exercise it within one year. The Supreme Judicial Court agreed with the Appeals Court that the ANR endorsement did not constitute an “exercise” of the variance because it “conferred no right on [the plaintiff] to use the variance” and “serve[d] merely to permit the plan to be recorded.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 892 “[L]ike an approval from a board of health, conservation commission, or similar entity,” the ANR endorsement is merely a prerequisite to getting a building permit. Cornell v. Bd. of Appeals of Dracut, 453
Mass. at 892–93. A building permit, in contrast, “authorizes a variance holder . . . to build on the nonconforming lot and thus is the culmination of the permitting process that allows him to utilize that lot in a way that otherwise does not conform with the applicable zoning provisions.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 893. Accordingly, “it was necessary for [the plaintiff] to have obtained a building permit or convey one of the lots to realize the benefits of the variance.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 893.

The Supreme Judicial Court acknowledged that “[c]ircumstances beyond a variance holder’s control may make obtaining a building permit within one year of the grant of a variance impossible and thus warrant equitable tolling of the one-year period.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 893. Nonetheless, “[i]n order to demonstrate that equitable tolling is warranted, a variance holder must show that the holder has timely sought an extension of the variance, and that delays clearly attributable to others have hampered the holder’s effort to obtain a building permit.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 893 (citations omitted). In Cornell, nothing in the record explained why “the delays in obtaining the approvals necessary for a building permit were not reasonably avoidable.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 894.

The Supreme Judicial Court cautioned that its decision is not intended to resolve all questions concerning timely exercise of a variance. “For example, a ‘use’ variance may not require any construction or excavation, and a building permit may not be necessary to exercise such a variance. Evidence of such ‘use’ within one year of issuance of the variance may be sufficient to exercise such a variance.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 894 n.9. Also, the court noted that although G.L. c. 40A, § 9 requires the commencement of construction authorized by the special permit to prevent a special permit from lapsing, Section 10 does not require that construction occur for a variance to be “exercise[d].” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 894 n.9. Finally, the court chose to leave for “another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied.” Cornell v. Bd. of Appeals of Dracut, 453 Mass. at 891 n.7; see also E & J Props., LLC v. C.B.L. Realty Trust, 81 Mass. App. Ct. 1118 (2012) (variance conditioned on demolition of existing structure; partial demolition prevented variance from lapsing).

In Grady v. Zoning Board of Appeals of Peabody, 465 Mass. 725 (2013), the Supreme Judicial Court addressed the issue reserved in Cornell concerning the effect of failure to record the variance within one year.

The Supreme Judicial Court noted that Grady involved a number of “unusual circumstances,” including but not limited to the following:

- the variance holder had substantially relied on the variance within one year after it had been filed with the city clerk by, among other things, obtaining a construction loan for the project authorized by the variance, drawing a substantial amount of funds from that loan, and commencing preconstruction activities; and
• the plaintiff, who had brought an enforcement action to revoke a building permit that had issued for the project authorized by the variance, had not appealed the variance within twenty days after it was filed with the city clerk and was not harmed by the failure to record the variance at the registry of deeds.

The Supreme Judicial Court stated that the purpose of the recording requirement set forth in G.L. c. 40A, §§ 10 and 11 is “to prevent lapse” and “ensure that recording occurs in a timely fashion and that subsequent purchasers and others with an interest in the status of land have notice of the grant to a land owner of a limited right to deviate from the requirements of the zoning code.” In this case, the zoning board’s decision to deny the plaintiff’s request to revoke the building permit did not “derogate from the purpose and intent of the recording requirement of G.L. c. 40A, § 11.” However, the court repeated its admonition in Cornell that “it is preferable to record a variance with the appropriate registry of deeds before exercising one’s rights thereunder.”


Practice Note
Variance holders would do well to follow the court’s advice, as the holding in Grady may be largely confined to its unusual facts.

§ 5.18.3 Extension of Variances

The PGA has discretion to extend the one-year “exercise” period by up to six months if the grantee of the variance applies for such an extension within the one-year period and the PGA grants the extension within thirty days after the application. 1984 Mass. Acts c. 195. It would seem that the extension may be granted at any public meeting of the PGA and without notice or a hearing. Alternatively, no reason appears why the extension could not be granted at the same time as the initial variance. There is no provision for appeal from such an extension, and there is no stated requirement for issuance or recording of a written decision. However, an extension must be recorded, G.L. c. 40A, § 11, ¶ 5, and therefore must be in writing. It is too late to request an extension of a variance after the variance has already lapsed. See G.L. c. 90A, § 10, ¶ 3 (application for extension must be filed “prior to the expiration of such one year period”).

§ 5.18.4 The Permit Extension Act

Section 173 of 2010 Mass. Acts c. 240, as amended by 2012 Mass. Acts c. 238, §§ 74–75, extends regulatory approvals issued by municipal, regional, and state entities for use or development of real property for four years if the permit or approval was “in effect or existence” during the period August 15, 2008, through August 15, 2012. Comprehensive permits issued under G.L. c. 40B and permits issued by the Massachusetts Division of Fisheries and Wildlife under G.L. c. 131 are not covered by the Permit Extension Act.
§ 5.19 MODIFICATION OF DECISIONS

§ 5.19.1 Reconsideration Before the Final Decision Is Filed with the Municipal Clerk

Before the board’s decision is filed with the municipal clerk, the board retains jurisdiction to reconsider, revoke, and remake its decision in accordance with its governing procedures, subject to open meeting law requirements and to the time and other limitations of the Zoning Act.

§ 5.19.2 Modification to Correct Errors After the Final Decision Has Been Filed with the Municipal Clerk

In Board of Selectmen of Stockbridge v. Monument Inn, Inc., the Appeals Court summarized the inherent power of a zoning board to amend its decisions as follows:

[The] law is clear that the board has the inherent power, without holding a further public hearing, to correct an inadvertent or clerical error in its decision so that the record reflects its true intention . . . so long as the correction does not constitute a "reversal of a conscious decision" . . . does not grant relief different from that originally sought, and does not change the result of the original decision . . . and so long as no one relying on the original decision has been prejudiced by the correction.


Under Old Chapter 40A, the zoning board’s inherent power allowed it to amend its decisions to add a statement of further reasons that did not change the result, Dion v. Bd. of Appeals of Waltham, 344 Mass. 547, 553 (1962), or a “supplemental statement” reflecting the substance of the initial vote. Shuman v. Bd. of Aldermen of Newton, 361 Mass. 758, 763 n.8 (1972); cf. Balas v. Bd. of Appeals of Plymouth, 13 Mass. App. Ct. 995 (1982) (rescript) (board’s “certification” as to required finding, made after remand from Superior Court). The board must exercise that power within a “reasonable period.” Dion v. Bd. of Appeals of Waltham, 344 M ass. at 553 (modification filed and ratified within twenty-day period), and its action must not cause prejudice; Shuman v. Bd. of Aldermen of Newton, 361 Mass. at 765 (modification filed outside appeal period but within a month of filing of original decision). However, the “reasonableness” of a board’s delay will be measured from when the error is discovered, not when the original, erroneous decision was filed. See Board of Selectmen of Stockbridge v. Monument Inn, Inc., 8 Mass. App. Ct. at 164 (board acted within reasonable time of discovery of clerical error, even though correction made approximately four years after original decision).

A board may also amend a decision “to correct an inadvertent (and essentially clerical) error in the form of [the] decision . . . so that the record would reflect the true
intention of the board,” even if the change modifies the conditions and safeguards set forth in the original decision. Board of Selectmen of Stockbridge v. Monument Inn, Inc., 14 Mass. App. Ct. 957, 958 (1982) (rescript) (amendment was “within a reasonable time of its discovery” although seven years after original decision); see also Board of Selectmen of Stockbridge v. Monument Inn, Inc., 8 Mass. App. Ct. 158 (1979), appeal after remand, 14 Mass. App. Ct. 957 (1982); Burwick v. Zoning Bd. of Appeals of Worcester, 1 Mass. App. Ct. 739, 742 (1974) (amendment signed thirty-five days after original decision). Similarly, a zoning board may have inherent authority to waive “insubstantial” conditions in a variance or special permit decision that the holder, through no fault of his or her own, cannot satisfy. Shuman v. Bd. of Aldermen of Newton, 361 Mass. at 767 n.12 (1972) (noting that board may waive special permit condition requiring permit holder to establish housing committee with representation from neighbors, if such condition is impossible to perform); Huntington v. Zoning Bd. of Appeals of Hadley, 12 Mass. App. Ct. 710 (1981) (allowing board to remove condition that restricted duration and transferability of variance).

On the other hand, an amendment that purports to change the intended result of the original decision without a new hearing is not valid. See Tenneco Oil Co. v. City Council of Springfield, 406 Mass. 658 (1990); Fish v. Bldg. Inspector of Falmouth, 357 Mass. 774 (1970) (rescript) (petition seeking special permit or variance for “mixing, batching, and processing plant” was not sufficiently broad enough to allow board of appeals to amend its original decision to allow petitioner to “construct and install a stone crushing plant” without new public notice and a new public hearing); Pelletier v. Bd. of Appeals of Leominster, 4 Mass. App. Ct. 58 (1976); cf. Cassani v. Planning Bd. of Hull, 1 Mass. App. Ct. 451, 456 (1973) (“reversal of a conscious decision” to endorse subdivision approval-not-required (ANR) plan invalid). This is true even if the amendment is made within the appeal period. Potter v. Bd. of Appeals of Mansfield, 1 Mass. App. Ct. 89 (1973) (Old Chapter 40A).

In Board of Appeals of Westwood v. Lambergs, 42 Mass. App. Ct. 411 (1997), the Appeals Court rejected an attempt by a board of appeals to correct a defective decision after expiration of the 100-day automatic grant period set forth in Section 9 of the Zoning Act. In this case, an applicant requested variances from lot width and frontage requirements of the zoning bylaw; subsequently determined and disclosed to the board that the lot width variance was unnecessary; and received a decision from the board addressing only the lot width variance request. After expiration of the 100-day period for the board’s decision, the applicant claimed a constructive grant of the frontage variance. The board then filed an amended decision denying the frontage variance request and sought a declaratory judgment that the board’s amended decision corrected an inadvertent clerical error in the original decision. In rejecting the board’s request, the court held that “the board’s second decision . . . cannot stand as an amendment of its original decision because it changes the original decision substantively.”

Here, the consequences of the second decision would differ in a crucial respect from the result of the original decision. The initial denial of a variance from [the lot width requirement] alone would not have precluded the construction of a building
because the lot complied with those requirements. The second
decision’s denial of a variance from [the frontage requirement]
would, however, have precluded the construction of the pro-
duced building.

Board of Appeals of Westwood v. Lambergs, 42 Mass. App. Ct. at 415. The principle
that emerges from these cases is that a decision may be amended, without the need
for a new public hearing, so as to more accurately or completely reflect the board’s
original vote and the reasons for it— but amending a decision to change the intended
result of the original decision requires a new public hearing after notice given in accord-
ance with Zoning Act Section 11.

Several decisions addressing the inherent power of zoning boards to correct their
decisions have used rather broad “no prejudice” language. See, e.g., Board of Select-
ten of Stockbridge v. Monument Inn, Inc., 8 Mass. App. Ct. at 164 (“so long as no
one relying on the original decision has been prejudiced by the correction”). How-
ever, the actual appellants in these cases seem to have qualified as parties in interest.
at 164 (permittee and board brought cross-complaints, abutters moved to intervene).
Only parties in interest are presumed to be “persons aggrieved” with standing under
Section 17 of the Zoning Act to appeal a special permit or variance decision— and
this presumption of standing is rebuttable. Marashlian v. Zoning Bd. of Appeals of
Newburyport, 421 Mass. 719, 721 (1996). Consequently, it seems unlikely that the
Supreme Judicial Court would allow anyone not a party to the original decision to
challenge a board’s corrective amendment to that decision absent a clear showing of
prejudice to property interests protected by the Zoning Act. To hold otherwise would
allow a challenge to the correction of a clerical error by a tangentially interested party
who lacked standing to challenge the original decision that contained the error.

1134 (2012), the Appeals Court stated that, although an SPGA has the inherent dis-
cretion to reconsider its decisions on the basis of fraud, serious mistake, and gross
negligence, such discretion should be exercised sparingly. Because the SPGA had no
obligation to reconsider its decision to issue the special permit, the SPGA did not err
in confining the new hearing on the plaintiffs’ petition to reconsider the original spe-
cial permit decision to the issue of whether the special permit applicant committed
fraud when it informed the board that the abutters had agreed to the special permit.
Moreover, the SPGA’s decision to reopen the hearing on the special permit did not
“restart” the limitations period for purposes of appealing the original special permit,
as “[a] party who fails to file an appeal of a special permit within the limitations pe-
riod of [Section] 17 cannot appeal a subsequently denied motion to revoke the spe-
cial permit in order to dispute the merits of its original issuance.”
§ 5.19.3 Modification of Zoning Decision upon Reapplication and Rehearing

Substantive amendments to special permit conditions are subject to the same procedural requirements for notice and public hearing, and the same substantive decision-making standards, as the original grant. Barlow v. Planning Bd. of Wayland, 64 Mass. App. Ct. 314, 321 (2005).

In Chiuchiollo v. Hopedale Zoning Board of Appeals, 84 Mass. App. Ct. 1111 (2013) (unpublished decision; text available at 2013 WL 5309745), the Appeals Court addressed a challenge by variance holders to a decision by the Hopedale zoning board of appeals to deny their request to modify a restriction that the variance imposed on ownership. The variance, which the board issued in 2007 (one year before the plaintiffs filed their request to modify the variance restriction), had allowed the plaintiffs to tear down an existing, lawfully nonconforming two-family home on their property and replace it with a new two-family home, subject to an ownership restriction. The board denied the plaintiffs’ request to remove the restriction. A Superior Court judge took jurisdiction over the case, but the Appeals Court disagreed, ruling that the plaintiffs should have appealed the variance that imposed the restriction, if at all, within twenty days after the variance issued, and that their failure to do so barred them from challenging the condition thereafter. The court further noted that, while changed circumstances may, in certain instances, warrant application of an exception to the twenty-day limitations period, no such instances existed in this case. Finally, the court stated that it need not decide whether the plaintiffs could have pursued a claim for declaratory relief under G.L. c. 30A, § 14 instead of a G.L. c. 40A, § 17 appeal, because the plaintiffs had asserted no such claim. Cf. Huntington v. Zoning Bd. of Appeals of Hadley, 12 Mass. App. Ct. 710 (1981) (condition limiting variance to one owner, which was deemed by court to be inconsistent with zoning principles relating to variances, could properly be deleted after notice and public hearing without findings that would have been required for granting of new variance).

Any modification of the initial decision takes effect only upon filing, certification, and recording in accordance with the last paragraph of G.L. c. 40A, § 11, whether or not a new public hearing was held. See generally § 5.15, Filing the Decision and § 5.17, Recording/Effective Date of the Decision, above.

§ 5.20 REAPPLICATION/WITHDRAWAL

The Zoning Act places certain limits on reapplication following a final “unfavorable action.”

§ 5.20.1 Prohibition of Reapplication

The first paragraph of Section 16 of the Zoning Act imposes a two-year moratorium on certain reapplications for zoning relief:
No appeal, application or petition which has been unfavorably and finally acted upon by the [SPGA or PGA] shall be acted favorably upon within two years after the date of final unfavorable action unless said [SPGA or PGA] finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

The purpose of this requirement is "to give finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue." Ranney v. Bd. of Appeals of Nantucket, 11 Mass. App. Ct. 112, 115 (1981). The two-year period runs from the filing with the city or town clerk of the unfavorable decision, cf. Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981) (construing "final action" in Zoning Act, § 9), and does not prohibit filing for reconsideration within the two-year period so long as "favorable action" on the refiled petition is delayed until the period has expired. The prohibition can evidently apply in a circumstance in which approval is granted with onerous conditions. Hall v. Zoning Bd. of Appeals of Edgartown, 40 Mass. App. Ct. 918 (1996) (rescript).

The prohibition does not apply where different or alternative forms of relief are requested. See, e.g., Halko v. Bd. of Appeals of Billerica, 349 Mass. 465, 473 (1965) (special permit denial does not preclude variance request within the two-year period). The prohibition also should not apply when a favorable or unfavorable decision of a PGA or SPGA is annulled by the courts or while an appeal from a favorable or unfavorable decision is pending because final action on the application has not been taken in either case. Additionally, the prohibition may not apply if a prior action was dismissed because it was untimely. See Griffith v. Bd. of Appeals of Framingham, 27 Mass. App. Ct. 227, 229–30 (1989) (interpreting provision in Framingham zoning law analogous to G.L. c. 40A, § 16).


Finally, Section 16 states that the prohibition does not apply if the planning board approves the resubmittal as discussed below.
§ 5.20.2 Planning Board Approval of Reapplication

The prohibition against reapplication can be lifted only if both

- the PGA or SPGA that granted the variance or special permit finds and describes on the record “specific and material changes in the conditions upon which the previous unfavorable action was based” and
- all but one of the members of the planning board consent, after notice to “parties in interest of the time and place of the proceedings when the question of such consent will be considered.”

G.L. c. 40A, § 16.

A case that has applied this provision of Section 16 of the Zoning Act is Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981). Provisions of Old Chapter 40A, and not Zoning Act, § 16, were held applicable in Shalbey v. Board of Appeal of Norwood, 6 Mass. App. Ct. 521 (1978), although the court found that the procedures that would have been required by Zoning Act, § 16 were not followed.

In Ranney, the Appeals Court upheld the determination by a planning board that “cosmetic” changes in the plans for a proposed addition to a motel that, when taken together, resulted in a less intrusive building, constituted “specific and material changes” within the meaning of Section 16. Ranney v. Bd. of Appeals of Nantucket, 11 Mass. App. Ct. at 116–17. The changes related to lighting, sound insulation, and landscaping. The court also found that the discovery that the prior decision was based on erroneous traffic information could permit a second application to be entertained. Likewise, in Lingerman v. 6 Mill Road, LLC, 88 Mass. App. Ct. 1108 (2015) (unpublished decision; text available at 2015 WL 5972603), the Appeals Court decided that a change in the way a municipality views the impact of previously awarded zoning relief for the property in question can constitute a “material change” that justifies a decision by the SPGA to grant an application for a special permit within two years of denying the same application. The SPGA had originally denied the permit because it found that a 1973 variance condition limited the property’s use to a single-family dwelling. The town’s zoning board of appeals subsequently ruled, in a different matter, that the 1973 variance no longer applied to the property. This change in legal status constituted a “specific and material change” that justified the SPGA’s decision to grant the second application before the expiration of two years (even absent explicit findings of “specific and material change”).

When a planning board is considering a reapplication, it apparently does not need to give notice of its “proceedings” by publication or posting under Section 11. Section 11 applies only to notice of “public hearings,” and the language of Section 16 suggests a public meeting rather than a hearing. However, notice of the proceedings must be given by mail to “parties in interest” as defined in Section 11; it would seem that the contents of such notice should meet the requirements of Section 11. See generally § 5.11, Notice of Hearing, above.
§ 5.20.3 Withdrawal

The second paragraph of Section 16 allows an applicant to avoid the two-year prohibition by withdrawing an application under certain circumstances:

Any petition for a variance or application for a special permit which has been transmitted to the [PGA or SPGA] may be withdrawn, without prejudice by the petitioner prior to the publication of the notice of a public hearing thereon, but thereafter [may] be withdrawn without prejudice only with the approval of the [SPGA or PGA].

The second paragraph of Section 16 should be construed to apply also to an appeal to a PGA from denial of a building permit that seeks a variance or a special permit, although it in terms makes no reference to withdrawal of an appeal. Withdrawal “with prejudice” means that the two-year moratorium will apply, presumably running from the date that notice of the withdrawal is filed with the municipal clerk. Cf. Schramm v. Zoning Bd. of Appeals of Cohasset, 81 Mass. App. Ct. 1124 (2012) (unpublished decision; text available at 2012 WL 1020397) (withdrawal “without prejudice” not subject to two-year moratorium). The Zoning Act provides no standards for a board to apply when considering withdrawal request, and no mechanism for court review of such a decision.

§ 5.21 CONSTRUCTIVE GRANT OF RELIEF


The purpose of the constructive grant provision is to induce boards to act promptly and to protect applicants when a decision is unduly delayed. See Noe v. Bd. of Appeals of Hingham, 13 Mass. App. Ct. 103, 110 (1982) (Dreben, J., dissenting). The 1987 amendment to Section 15, regarding variances, and Section 9, regarding special permits, harmonized the two provisions but introduced additional ambiguities, which continue the uncertainty in this area. 1987 Mass. Acts c. 498 (effective Feb. 15, 1988).

§ 5.21.1 Constructive Grant of Special Permit

Section 9 of the Zoning Act provides that failure by the SPGA to take “final action” on an application for a special permit within ninety days after the date of the public hearing “shall be deemed to be a grant” of the special permit. G.L. c. 40A, § 9, ¶ 13; see Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109, 111–12 n.2 (1981). General Laws Chapter 40A, § 9A (adult entertainment special permits).
contains substantially identical language. There is no similar provision in Section 9B (solar access special permits). Note that Section 9 controls even when the SPGA is a board of appeals.

This language in Section 9 appears to contemplate that the hearing will take place on a single date; it does not address whether the ninety days begins to run on the first day of the public hearing or the last day of a hearing that is adjourned one or more times. See, e.g., Shea v. Bd. of Aldermen of Chicopee, 13 Mass. App. Ct. at 1046 (1982) (rescript). The Appeals Court has held that the ninety days begin to run from the final day of a hearing, as reasonably continued. Kenrick v. Bd. of Appeals of Wakefield, 27 Mass. App. Ct. at 774 (1989). The Kenrick court acknowledged that legislative action would be required to accomplish the statutory objective of a timely decision, but it reiterated under Chapter 40A a warning previously made to dilatory boards under Chapter 40B: that the boards “conduct the public hearing expeditiously, scheduling adjourned sessions at reasonable intervals in the circumstances.” Kenrick v. Bd. of Appeals of Wakefield, 27 Mass. App. Ct. at 777 (citing Pheasant Ridge Assocs. Ltd. P’ship v. Town of Burlington, 399 Mass. 771, 783 (1987) (dictum)). The Chapter 40B cases also provide that the hearing is deemed closed on “the date of the last session at which interested persons presented information and argument.” Kenrick v. Bd. of Appeals of Wakefield, 27 Mass. App. Ct. at 776 (citing Milton Commons Assocs. v. Bd. of Appeals of Milton, 14 Mass. App. Ct. 111, 115 (1982)). Note, however, that Chapter 40B requires a decision “within forty days after the termination of the public hearing,” and the difference in wording could support a different interpretation of Zoning Act, §§ 9 and 9A.

Section 9 also requires that a hearing be held within sixty-five days after the filing of the application. Although the statute does not provide that failure to hold a hearing within sixty-five days causes a constructive grant, the purposes of Section 9 would be frustrated if an SPGA were allowed to delay its hearing indefinitely. No case addresses this situation. Courts may be drawn either to a case-by-case analysis of when delay in opening the hearing is so unreasonable as to cause a constructive grant, or to a bright-line rule that the decision must be filed within 155 days (sixty-five plus ninety days) after the filing of the special permit application.

The “final action” that must take place before the end of the ninety-day period to avoid the constructive grant of a special permit is the filing of a written decision with the city or town clerk, not simply the vote of the SPGA. Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981); Tanner v. Bd. of Appeals of Belmont, 27 Mass. App. Ct. 1181 (1989) (rescript); Waltham Dev. Trust v. City of Waltham, 17 M.L.W. 1827 (Land Ct. 1989) (“filing” means filing at office of city clerk and not mere personal delivery to clerk). In a 4–3 decision, the Supreme Judicial Court held that “final action” includes the timely filing of a document that states the board’s denial of a special permit, even if that document does not set forth the reasons for the board’s action, or sets forth reasons that would support a contrary vote. See Board of Aldermen of Newton v. Maniace, 429 Mass. 726, 730 (1999).

In Lingerman v. 6 Mill Road, LLC, 88 Mass. App. Ct. 1108 (2015) (unpublished decision; text available at 2015 WL 5972603), the SPGA voted 3–2 in favor of granting
an application for a special permit on August 16, 2012, which vote fell short of the supermajority requirement. However, an SPGA member who had voted against the special permit moved to reconsider the vote at an October 25, 2012, SPGA meeting. The SPGA then voted to reconsider and voted 5-0 in favor of issuing the special permit. The SPGA filed its decision with the town clerk on October 31, 2012. The Appeals Court reasoned that the board’s vote on August 16, 2012, was not a “final action,” as that term is used in G.L. c. 40A, § 9, because no decision on that vote was filed with the town clerk.

As noted in § 5.15, above, Section 9 requires that a decision be filed within fourteen days after the vote and that an SPGA give mailed notice of its decision. Failure to file a decision within the fourteen-day period, Zuckerman v. Zoning Bd. of Appeals of Greenfield, 394 Mass. 663 (1985) (decided under Section 15), and failure to mail notice of decision, Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. 304 (1986); Angelus v. Bd. of Appeals of Canton, 25 Mass. App. Ct. 994 (1988) (rescript), does not cause a constructive grant.

The applicability of the constructive grant provision of Section 9 to an application for approval of a site plan depends on whether site plan approval constitutes a special permit.

§ 5.21.2 Constructive Grant of Variance or Appeal

Section 15 of the Zoning Act requires that “[t]he decision of the board . . . be made within one hundred days after the date of the filing of an appeal, application or petition, except in regard to special permits,” and that failure by the board of appeals to “act” within the 100-day period shall be “deemed to be the grant of the appeal, application or petition.” But see Paquin v. Bd. of Appeals of Barnstable, 27 Mass. App. Ct. 577, 580 (1989) (the constructive grant provision is not applicable to repetitive petition under Section 16); Nasca v. Bd. of Appeals of Medway, 27 Mass. App. Ct. 47, 49 (1989) (constructive grant provision is not applicable to board of appeals acting pursuant to judicial remand). Under the version of Section 15 in effect prior to February 15, 1988 (when the board had seventy-five days to act after filing), the Appeals Court held that the seventy-five-day period commenced on filing of the petition with the city or town clerk but that the sixty-five-day period within which the public hearing is to be held did not commence until the petition is transmitted to the board of appeals by the municipal clerk. Noe v. Bd. of Appeals of Hingham, 13 Mass. App. Ct. 103 (1982) (decision period commenced on filing petition for variance with clerk despite two-month delay between filing with clerk and clerk’s transmission of petition to board of appeals). It appears that the holding in Noe would apply in the context of the current 100-day period. The Appeals Court has addressed what constitutes filing of a petition with a municipal clerk. See Pasquallino v. Bd. of Appeals of Wareham, 14 Mass. App. Ct. 989 (1982) (rescript) (period for constructive grant had not run because there was no evidence that the variance application was filed with the town clerk); Racette v. Zoning Bd. of Appeals of Gardner, 27 Mass. App. Ct. 617, 619 (1989) (a variance petition filed with building inspector instead of the municipal clerk did not start constructive grant period); Nasca v. Bd. of Appeals of Medway, 27
Mass. App. Ct. at 49 (letter not addressed to the town clerk did not start the constructive grant period). Section 15 also provides (as does Section 9) that a written decision is to be filed within fourteen days after the board’s vote, although this requirement is not expressly linked to the constructive grant provision.

When no vote is taken on the matter within the 100-day period, the requested relief is constructively granted, subject, since February 15, 1988, to additional procedural requirements discussed below. See Rinaudo v. Zoning Bd. of Appeals of Plymouth, 383 Mass. 885 (1981) (rescript) (appeal from refusal of building inspector to extend or renew building permits); Brennan v. Bd. of Appeals of Bourne, 13 Mass. App. Ct. 1082 (1982) (rescript) (appeal from refusal of building inspector to certify property for use as seasonal condominium colony). There is no constructive grant when both the vote and filing of the decision occur within the 100-day period, even if the decision is filed more than fourteen days after the vote—in this context, at least, the fourteen-day requirement is considered directory and not mandatory. Zuckerman v. Zoning Bd. of Appeals of Greenfield, 394 Mass. 663 (1985); DeMello v. Bd. of Appeals of Acushnet, 21 Mass. App. Ct. 974 (1986) (board failed to file its decision within fourteen days of decision, but court held that there was no constructive grant because decision was announced to plaintiff at time of board action so there was no “lack of actual notice” to plaintiff).

Difficulty in interpretation arises when a vote is taken within the 100-day period, but the written decision is not filed until after the end of that period. If the requirement that the board “act” within 100 days was found to be satisfied by the vote regardless of how long the filing of the decision were delayed, the concept of constructive grant would be vitiolated. But if it were held that the decision must be filed within the 100-day period, the board might not be allowed the full fourteen days after the vote for preparation of the decision. Two variations on this theme must be considered:

- The Supreme Judicial Court has held that a constructive grant results when the decision is filed more than fourteen days after the vote and more than fourteen days after the end of the then-applicable seventy-five-day period. Capone v. Zoning Bd. of Appeals of Fitchburg, 389 Mass. 617 (1983); see also Cameron v. Bd. of Appeals of Yarmouth, 23 Mass. App. Ct. 144 (1986) (appeal from determination by building inspector that use is lawful).

- Where the decision is filed more than fourteen days after the vote but within fourteen days after the end of the 100-day period, the Appeals Court has ruled that there is no constructive grant. O’Kane v. Bd. of Appeals of Hingham, 20 Mass. App. Ct. 162 (1985) (filed within fourteen days of seventy-five-day period).

In Burnham v. Town of Hadley, 53 Mass. App. Ct. 479 (2003), the Appeals Court dealt with the constructive grant provisions of G.L. c. 40A, § 15, as amended by 1987 Acts c. 498, § 3. The amendment extended from seventy-five to 100 days the time period for the board to “act” on the appeal, and added a requirement that within fourteen days thereafter, an applicant claiming a constructive grant must provide written notice of the constructive grant. Burnham applies the O’Kane rule to the 1987 amendment as follows:
the board must “act” on the appeal by making its decision within the 100-day
limit, or there is an automatic grant; and

• the board must file its written decision within a 114-day limit, or there is an
automatic grant.

Failure to do either results in an automatic grant.

The O’Kane/Burnham rule, which gives the PGA fourteen days after the end of the
100-day period to file its decision regardless of when the vote occurred, has the vir-
tue of simplicity and the merit of allowing additional time for the PGA to complete
Ct. 1125 (2011) (a Rule 1:28 decision) (vote within 100 days; decision filed after 100
days but within fourteen days of vote).

The Supreme Judicial Court might, however, reject this rule and find a constructive
grant of a variance when a decision is filed more than 100 days after the application,
whether or not the decision is filed within fourteen days after the vote. Capone found
a constructive grant where the board voted within the then-applicable seventy-five-
day period, but filed its decision 110 days after the petition was filed. In Capone, the
decision was filed more than fourteen days after the vote and more than fourteen
days after the end of the seventy-five-day period. The court specifically reserved the
question of “whether a constructive grant occurs if the board fails to file within fou-
teen days of its decision or only if it fails to file within fourteen days of the last day
of the period during which board action is permitted (seventy-five days).” Capone v.
Zoning Bd. of Appeals of Fitchburg, 389 Mass. at 622 n.7. In Zuckerman, the court
found no constructive grant where the vote and filing of the decision were both with-
in the seventy-five-day period even though the decision was not filed within fourteen
days after the vote. The court specifically reserved the question of whether a decision
filed “within fourteen days after the seventy-five-day period has elapsed” would be
Burnham v. Town of Hadley, 53 Mass. App. Ct. 479 (2003) may have resolved this
question by determining under the February 15, 1988, procedural requirements that a
PGA must “act” by voting within the 100-day limit and must file its written decision
within the 114-day limit; otherwise, the variance is automatically granted. However,
the O’Kane/Burnham rule gives rise to a catch-22 for those seeking to perfect the
automatic grant of a variance or appeal as described in the following section.

§ 5.21.3 Procedural Requirements for Perfecting a Constructive
Grant

Prior to February 15, 1988, a constructive grant occurred automatically when the
specified period expired. The Zoning Act did not specify a recording requirement, so
constructively granted relief was presumably exempt from the provision of G.L.
c. 40A, § 11, which states that a variance or special permit does not “take effect”
until the decision is recorded in the registry of deeds. See Building Inspector of
Sections 2–4 of 1987 M. A. C. 498 set forth procedures that an applicant must follow in order to perfect a constructive grant: In the case of a variance or appeal to the zoning board, within fourteen days “from the expiration of said one hundred days,” G.L. c. 40A § 15, ¶ 5, or, in the case of a special permit, within fourteen days “from the expiration of said ninety days,” G.L. c. 40A, § 9, ¶ 13, the applicant must mail notice of the deemed approval to all parties in interest and notify the municipal clerk that the application, petition, or appeal has been deemed approved and that notice has been sent to parties in interest. After the expiration of twenty days without an appeal or after submission of court records evidencing final approval after an appeal, the municipal clerk is required to send the applicant a certificate stating the date of approval, the fact that the board failed to take final action, and the fact that the approval has become final. G.L. c. 40A, § 15, ¶ 5 (variances and appeals to a zoning board); G.L. c. 40A, § 9, ¶ 13 (special permit). The applicant must then record this certificate, together with a copy of the application, at the registry of deeds. G.L. c. 40A, § 11, ¶¶ 6, 7. Although the statute does not expressly require that the recorded copy of the application be certified by the clerk, this would be desirable. The best practice would be for the clerk to endorse the required certification on a copy of the application, which then serves the same function as a certified decision. Section 11 provides that the special permit or variance does not “take effect” until the application and certificate are indexed in the grantor index under the name of the owner of record or noted on the owner’s certificate of title. See § 5.17, Recording/Effective Date of the Decision, above.

In Uglietta v. City Clerk of Somerville, 32 Mass. App. Ct. 742, 744 (1992), the Appeals Court held that the requirements that notice be given within fourteen days after the constructive grant are mandatory rather than directory. Therefore, failure to give the required notices within the fourteen-day period nullifies any constructive grant. Uglietta v. City Clerk of Somerville, 32 Mass. App. Ct. at 747. The existing case law presents a conundrum for parties seeking to perfect an automatic grant. If the automatic grant occurs on day 100, the claim of automatic grant and accompanying notice must be given by day 114. However, where a zoning board votes within the 100-day period and no automatic grant is considered to occur until day 114 (100 days plus fourteen days to file the written decision), claiming the automatic grant on day 114 is premature. Yet, under Uglietta, failure to perfect the automatic grant within fourteen days “from the expiration of said one hundred days” is fatal. This conundrum should be resolved by establishing a bright-line test for automatic grants of variances and appeals (i.e., 100 days after application to file a written decision with the municipal clerk) and not extending that bright line by a fourteen-day “bonus” period.

The question of when the appeal period begins to run from a constructive grant is discussed under § 5.21.6, Appeal from Constructive Grant, below.

§ 5.21.4 Waiver of Statutory Periods

Prior to February 15, 1988, it was open to question whether an applicant for a variance or a special permit had authority to waive the respective requirements for “action” and “final action” prescribed by Zoning Act, §§ 15 and 9. Although no Massachusetts
court has decided whether an applicant had the power to waive a constructive grant under prior law, the Appeals Court held that a board of appeals could not rely on a waiver that was not filed with the municipal clerk within the time period for filing of a decision. Elder Care Servs., Inc. v. Zoning Bd. of Appeals of Hingham, 17 Mass. App. Ct. 480 (1984).

The statute now explicitly allows applicants to waive the time within which a hearing is to be held or the time when a decision must be made by a written agreement with the board, which is filed with the municipal clerk. G.L.c. 40A, §§ 9, 15. The implication of this provision is that an agreement that does not fit this description is ineffective.

§ 5.21.5 Nature of Constructive Relief

The application, petition, or appeal is the operative document that defines the scope and terms of a constructively granted special permit or variance. See § 5.7, What to File, above. This makes it vitally important that the application clearly state the relief requested. If the application is "too vaguely worded," constructive relief may be ineffective, cf. DiGiovanni v. Bd. of Appeals of Rockport, 19 Mass. App. Ct. 339, 345 (1985) (request for modification of variance could not be construed as appeal from building inspector's stop order), or be limited to a portion of the desired relief. Cf. Cameron v. Bd. of Appeals of Yarmouth, 23 Mass. App. Ct. 144 (1986). Cameron concerned an appeal to the board of appeals from a building inspector's refusal to issue an enforcement order against certain uses of a parcel of land. The appeal requested (1) an order that the owner seek a special permit and (2) a determination (in substance) that the uses in question were unlawful. The court held that "nothing more precise than a general order to enforce the bylaw may be all that can be directed intelligibly unless, perhaps, the original request for enforcement was framed in sufficiently specific form to enable the building inspector to know exactly what he is commanded to do." Cameron v. Bd. of Appeals of Yarmouth, 23 Mass. App. Ct. at 148. Accordingly, the court construed the constructive grant as requiring the building inspector to enforce the bylaw but not as determining the lawfulness of the owner's use of his land on the merits.

When an application clearly requests relief from multiple provisions of a zoning ordinance, failure to address any one provision in a written decision of a board may trigger a constructive grant of relief from the omitted provision. In Board of Appeals of Westwood v. Lambergs, 42 Mass. App. Ct. 411 (1997), the Appeals Court addressed the case where an applicant requested variances from lot width and frontage requirements of a zoning bylaw and the board's decision addressed only the lot width request. The board denied the lot width variance in a timely decision but was silent with respect to the request for a frontage variance. After expiration of the 100-day period for the board's decision, the applicant claimed an automatic grant of the frontage variance. The board then filed an amended decision and sought a declaratory judgment that its amended decision was effective. The Appeals Court rejected the board's contention and upheld constructive grant of the frontage variance.
§ 5.21.6 Appeal from Constructive Grant


Since the introduction of the constructive grant concept in 1975 Mass. Acts c. 808, both the courts and the legislature have gradually clarified the law regarding the appeal period from a constructive grant. Although Section 17 of the Zoning Act provides that the period for commencing an appeal from a variance or a special permit begins to run on the filing of the decision with the municipal clerk, when zoning relief is constructively granted, there is by definition no decision, or at least no timely decision. Initially, the Appeals Court held that an appeal from the constructive grant of a special permit or variance could be brought by an aggrieved party, other than the municipal authorities, at any time before a decision was filed, Girard v. Bd. of Appeals of Easton, 14 Mass. App. Ct. 334 (1982); cf. Tanzilli v. Casassa, 324 Mass. 113 (1949) (appeal under prior law properly filed after vote but before board filed copy of decision with municipal clerk), or within twenty days after the filing of a decision granting the requested variance or special permit, if and when this occurs. Noe v. Bd. of Appeals of Hingham, 13 Mass. App. Ct. 103 (1982). In Noe, Judge Dreben persuasively argued in dissent that this rule fails to effectuate the statutory purpose of placing “an applicant whose application is not acted upon by the board within the requisite period . . . on a par with a successful applicant,” since it leaves such an applicant vulnerable to appeal “for what may be an unlimited period of time.” Noe v. Bd. of Appeals of Hingham, 13 Mass. App. Ct. at 110–11 (Dreben, J., dissenting). In 1983, the Supreme Judicial Court adopted Judge Dreben’s analysis, stating that “the applicable judicial appeal period must be limited to a definite time even when a board does not timely file its decision in the office of the city or town clerk.” Capone v. Zoning Bd. of Appeals of Fitchburg, 389 Mass. 617, 624 (1983). Although our highest court did not have occasion to decide exactly what that “definite time” was, the Appeals Court subsequently held, in an opinion written by Judge Dreben, that the appeal period from a constructive variance begins to run when the constructive grant occurs and is not extended by the later filing of a decision. Judge Dreben wrote: “To permit the board to create for itself a new appeal period by choosing to file its decision late would undermine the legislative intent as construed in these opinions.” Elder Care Servs., Inc. v. Zoning Bd. of Appeals of Hingham, 17 Mass. App. Ct. 480, 482 (1984); see also Milton Commons Assocs. v. Bd. of Appeals of Milton, 14 Mass. App. Ct. 111 (1982) (appeal from constructive grant of comprehensive permit under G.L. c. 40B, § 21 must be filed within twenty days after constructive grant).

The 1987 amendment took another step in clarifying this issue by requiring the notice of the deemed grant that is mailed to parties in interest to state that “appeals, if any, shall . . . be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the [SPGA or board of appeals] failed to act within the time prescribed.” G.L. c. 40A, § 9, ¶ 13; G.L. c. 40A, § 15, ¶ 5.
In Uglietta v. City Clerk of Somerville, 32 Mass. App. Ct. 742 (1992), the Appeals Court held that the constructive grant of a special permit is nullified if the petitioner fails to deliver to the appropriate parties within fourteen days after the constructive grant the notices required by the 1987 amendment, reasoning, in part, that such failure would leave “a challenger to the grant . . . uncertain as to whether or where to initiate an appeal.” Uglietta v. City Clerk of Somerville, 32 Mass. App. Ct. at 746. Although this holding strongly suggests that appeals from constructive grants must be taken within twenty days from the date the city or town clerk receives notice of the constructive grant and notice that interested parties have been similarly notified, the court in Uglietta did not reach the question of whether failure to file an appeal within such time period results in a waiver of the right to challenge. Uglietta v. City Clerk of Somerville, 32 Mass. App. Ct. at 747. It might, therefore, be argued that the language added to Section 17 by the 1987 amendment to the effect that an appeal may be taken by any person aggrieved “by the failure of the [board of appeals or SPGA] to take final action . . . within the required time . . . by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk” would create a still longer appeal period. The better interpretation, however, is that the provision of Sections 9 and 15—to the effect that constructive approval is “final” if there is no appeal within twenty days after delivery of the aforesaid notice to the city or town clerk—makes clear that the only appeal period from such approval expires at the end of the twenty-day period following the applicant’s notice to the municipal clerk of the automatic grant.

In Guaranteed Builders & Developers, Inc. v. Bylinski, No. WOCV200902052B, 2012 WL 676222 (Mass. Super. Ct. Feb. 2, 2012), the plaintiff locus owner challenged a constructive approval by the Town of Douglas zoning board of appeals of an abutter’s appeal from the denial of an enforcement request. Although the board held a timely hearing on the abutter’s administrative appeal, it failed to act on the abutter’s application within the 100-day period required under G.L. c. 40A, § 15. The abutter filed a notice of constructive grant with the Douglas town clerk on June 9, 2009, and the town clerk thereafter notified the plaintiff of the constructive grant. The plaintiff filed an appeal in Superior Court pursuant to G.L. c. 40A, § 17. The Superior Court ruled that the proper analysis in addressing the validity of the constructive grant is whether “facts exist which would have enabled the board to grant the relief,” Guaranteed Builders & Developers, Inc. v. Bylinski, 2012 WL 676222, at *5 (quoting DiGiovanni v. Bd. of Appeals of Rockport, 19 Mass. App. Ct. 339, 345 (1985)), and that the board would have been correct in revoking the permit because the plaintiff’s property is not eligible for grandfathering under the pertinent provisions in G.L. c. 40A, § 6 (the property had less than 50,000 square feet of area and fifty feet of frontage).
