Commonwealth of Massachusetts
DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT
Deval L. Patrick, Governor Timothy P. Murray, Lt. Governor Tina Brooks, Undersecretary

DECISION MAKING REQUIREMENTS OF THE ZONING ACT

November 30, 2009

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This outline gives limited information relative to certain procedural requirements of the Zoning Act. It is intended only for informational and reference purposes. When a question of legal interpretation arises, local officials should always seek the advice of their municipal counsel.

I SPECIAL PERMIT PROCESS

Note: The Zoning Act provides a specific process that a Special Permit Granting Authority must follow when reviewing a special permit application. For a detailed description regarding this process, please refer to MGL, Chapter 40A, Sections 9, 11 and 16.

A. FILING

1. All applications for special permits must be filed by the applicant with the municipal clerk.

2. The municipal clerk must certify the date and time of filing.

3. A copy of the application, including the certification by the municipal clerk must be filed forthwith by the petitioner with the Special Permit Granting Authority.

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 An application for a special permit that has been transmitted to the Special Permit Granting Authority may be withdrawn, without prejudice, by the petitioner prior to the publication of the notice of a public hearing. After publication of the public hearing notice, an application can only be withdrawn without prejudice with the approval of the Special Permit Granting Authority.

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

B. PUBLIC HEARING

1. The Special Permit Granting Authority must hold a public hearing within 65 days from the date of filing.

2. The required time limit for holding the public hearing may be extended by written mutual agreement between the petitioner and the Special Permit Granting Authority. A copy of such agreement must be filed in the office of the municipal clerk.

C. DECISION

1. Final action by the Special Permit Granting Authority must be made within 90 days following the date of the public hearing.

2. The required time limit for taking final action may be extended by written mutual agreement between the petitioner and the Special Permit Granting Authority. A copy of any such agreement must be filed in the office of the municipal clerk.

3. The Special Permit Granting Authority must make a detailed record of its proceedings indicating the vote of each member and the reasons for its decision.

4. Copies of the detailed record and proceedings must be filed with the municipal clerk within 14 days after the decision.

D. NOTICES AND CERTIFICATIONS

1. Notice of the decision must be mailed forthwith, by the Special Permit Granting Authority, to the petitioner, parties in interest and to every person at the public hearing that requested a notice. The notice must specify that any appeal must be made pursuant to MGL, Chapter 40A, Section 17 and filed within 20 days after the date the notice was filed with the municipal clerk.

2. Upon the granting of a special permit, or any extension, modification, or renewal, the Special Permit Granting Authority shall issue to the owner and the petitioner a certified copy of its decision containing the name and address of the owner, identifying the land affected, specifying compliance with the statutory requirements for the issuance of the special permit and certifying that copies of the decision have been filed with the Planning Board and the municipal clerk.

3. The municipal clerk must certify that 20 days have elapsed after the decision has been filed in the office of the municipal clerk and no appeal has been filed or if it has been filed that it has been dismissed or denied.

E. RECORDING AND LAPSE

1. No special permit, or any extension, modification or renewal thereof, can take effect until a copy of the decision bearing the certification of the municipal clerk is recorded in the registry of deeds or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

2. A special permit will lapse after two years, unless a shorter time period is specified in the zoning bylaw or ordinance, if a substantial use has not commenced except for good cause or, in the case of a permit for construction, if construction has not commenced except for good cause. Excluded from any lapse period is the time required to pursue or await the determination of any appeal taken pursuant to MGL, Chapter 40A, Section 17.

CASE NOTES:

Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478 (1999) (failure of an applicant to file application with town clerk for three weeks after filing application with planning board did not deprive the planning board of jurisdiction where the application was on file in the town clerk's office before a series of public hearings were held on the application).

Kenrick v. Board of Appeals of Wakefield, 27 Mass. App. Ct. 774 (1989) (when board continues hearing on special permit, the 90 day period within which the board must act runs from the close of the public hearing).

Board of Aldermen of Newton v. Maniace, 429 Mass. 726 (1999) (board took final action by recording with the city clerk the result of its vote on a special permit and was not compelled to file at the same time the reasons for its decision in order to avoid a constructive approval).

Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981); Shea v. Board of Alderman of Chicopee, 13 Mass. App. Ct. 1047 (1982) (the 90 day time period in which a board must take final action on a special permit includes filing the decision with the municipal clerk).

Angelus v. Board of Appeals of Canton, 25 Mass. App. Ct. 994 (1988) (final action on a special permit does not include mailing notice of decision to parties in interest).

Solar v. Zoning Board of Appeals of Lincoln, 33 Mass. App. Ct. 398 (1992) (if a board requires a special permit to be renewed, any renewal decision must be based in accordance with the terms of the original permit).

Tenneco v. City Council of Springfield, 406 Mass. 658 (1990) (a board has the inherent power to correct an inadvertent or clerical error in a decision but can not change the result of an original decision without complying with the relevant notice and hearing requirements).

Cohasset Heights, Ltd v. Zoning Board of Appeals of Cohasset, 53 Mass. App. Ct. 116 (2001) (the issuance of a special permit rather than the recording of the permit protects the use authorized by the special permit as a prior nonconforming use).

McDermott v. Zoning Board of Appeals of Melrose, 59 Mass. App. Ct. 457 (2003) (under the statute, it is the use that must commence within the two year period to prevent the lapse of a special permit and the failure to record the special permit is not fatal).

Lobisser Building Corp. v. Planning board of Bellingham, 454 Mass. 123 (2009) (we do not interpret the statute to mean that both substantial use and construction must commence to avoid lapse of a special permit).

II VARIANCE PROCESS

Note: The Zoning Act provides a specific process that a Zoning Board of Appeals must follow when entertaining a petition or an appeal for a variance. For detailed information regarding this process, please refer to Chapter 40A, Sections 10, 11, 15 and 16.

A. FILING

1. Any petition or appeal for a variance must be filed by the petitioner with the municipal clerk.

2. The municipal clerk must certify the date and time of filing.

3. A copy of the petition or appeal, including the certification by the municipal clerk must be filed forthwith by the petitioner with the Zoning Board of Appeals.

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

B. PUBLIC HEARING

1. The Zoning Board of Appeals must hold a public hearing within 65 days from the receipt of an appeal or petition for a variance.

2. The required time limit for holding the public hearing may be extended by written mutual agreement between the petitioner and the Zoning Board of Appeals. A copy of such agreement must be filed in the office of the municipal clerk.

C. DECISION

1. The Zoning Board of Appeals must make its decision on a variance within 100 days after the date of filing with the municipal clerk.

2. The required time limit for making the decision may be extended by written mutual agreement between the petitioner and the Zoning Board of Appeals. A copy of such agreement must be filed in the office of the municipal clerk.

3. The Zoning Board of Appeals must make a detailed record of its proceedings indicating the vote of each member and the reasons for its decision.

4. Copies of the detailed record and proceedings must be filed with the municipal clerk within 14 days after the decision.

D. NOTICES AND CERTIFICATIONS

1. Notice of the decision must be mailed forthwith, by the Zoning Board of Appeals, to the petitioner, parties in interest and to every person at the public hearing that requested a notice. The notice must specify that any appeal must be made pursuant to MGL, Chapter 40A, Section 17 and filed within 20 days after the date the notice was filed with the municipal clerk.

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

3. The municipal clerk must certify that 20 days have elapsed after the decision has been filed in the office of the municipal clerk and no appeal has been filed or if it has been filed that it has been dismissed or denied.

E. RECORDING AND LAPSE

1. No variance, or any extension, modification or renewal thereof, can take effect until a copy of the decision bearing the certification of the municipal clerk is recorded in the registry of deeds or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

2. The rights authorized by a variance must be exercised within one year from the date the variance was granted or the rights authorized by such variance will lapse.

F. EXTENSIONS

1. Upon written application by the grantee, the Zoning Board of Appeals may extend the one-year time period in which to exercise the rights authorized by a variance provided such extension does not exceed 6 months.

2. An application for such extension must be filed with the Zoning Board of Appeals prior to the expiration of the one-year lapse period.

3. If the Zoning Board of Appeals does not grant an extension within 30 days from the date of the application, the rights authorized by the variance will lapse upon the expiration of the original one-

year period and such rights may only be reestablished after giving notice and holding a new hearing.

CASE NOTES:

Dion v. Board of Appeals of Waltham, 344 Mass. 547 (1962) (board of appeals can grant a variance either upon appeal or upon direct petition to the board by the applicant).

Lopes v. Board of Appeals of Fairhaven, 27 Mass. App. Ct. 754 (1989); Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 78 (1982) (an applicant for reissuance of a lapsed variance must prove anew the existence of each of the statutory conditions for a variance).

Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985) (the rights granted by a variance to subdivide a parcel to create a substandard vacant lot and "erect a single- family dwelling on the vacant lot created" were exercised by conveyance of the lot within the one year period).

Alroy v. World Realty and Development Co., Misc. Case No. 230584 (December 22, 1997) (where Land Court judge noted that when the holder of a variance substantially changes his or her position in reliance upon a variance, it will be deemed to have been exercised for the purposes of the Zoning Act).

Cornell v. Board of Appeals of Dracut, 453 Mass. 888 (2009) (the recording of a variance within one year of its grant is necessary to exercise it and we leave for another day whether the failure to record a variance may void a variance on which a variance holder has substantially relied).

Cornell v. Board of Appeals of Dracut, 453 Mass. 888 (2009) (to exercise a variance, an applicant must take steps necessary to achieve the purpose for which it was granted or must substantially change his position in reliance thereon).

Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985) (the notion that variances more than one year old and which have not been exercised are destroyed wholesale by a retroactive application of Section 10, would appear quite drastic and hardly matches the text of that provision).

Alroy v. World Realty and Development Co., Misc. Case No. 230584 (December 22, 1997) (where Land Court judge ruled that the one year lapse provision of the Zoning Act applies prospectively and that variances granted under the old Zoning Enabling Act must be exercised within one year from the effective date of the Zoning Enabling Act in a municipality).

O'Kane v. Board of Appeals of Hingham, 20 Mass. App. Ct. 162 (1985) (requirement that a decision on a variance shall be filed within 14 days is merely directory, rather than mandatory, where zoning board of appeals makes a decision earlier than required by the statute).

Burnham v. Town of Hadley, 53 Mass. App. Ct. 479 (2003) (the statute allows the zoning board of appeals to file its decision within 14 days following the 100 day period in which the board must act).

Tremblay v. Board of Appeals of Tewksbury, 11 LCR 206 (2003) (the date of grant is the date the board votes to grant the variance).

III APPEAL PROCESS

Note: The Zoning Act provides a specific process that a Zoning Board of Appeals must follow when entertaining an appeal. For detailed information regarding this process, please refer to MGL, Chapter 40A, Sections 8 and 15.

A. PETITIONER

1. Any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer acting under the provisions of the Zoning Act.

2. A regional planning agency in whose area your community is located.

3. Any person, including any officer or board in your community, or of any abutting community aggrieved by an order or decision of the building inspector, or other administrative official, in violation of any provision of the Zoning Act or of the zoning bylaw or ordinance.

B. FILING

1. Any appeal to the Zoning Board of Appeals must be taken within 30 days from the date of the order or decision that is being appealed.

2. Such appeal, specifying the grounds thereof, must be filed by the appellant with the municipal clerk.

3. The municipal clerk must certify the date and time of filing.

4. A copy of the appeal, including the certification by the municipal clerk of the date and time of filing, must be filed forthwith by the appellant with the Zoning Board of Appeals and the officer or board whose order or decision is being appealed.

5. The officer or board whose order or decision is being appealed must, upon receiving such notice, immediately transmit to the Zoning Board of Appeals all documents and papers constituting the record of the case in which the appeal is taken.

C. PUBLIC HEARING

1. The Zoning Board of Appeals must hold a public hearing within 65 days from receipt of an appeal.

2. The required time limit for holding a public hearing may be extended by written mutual agreement between the appellant and the Zoning Board of Appeals. A copy of such agreement must be filed in the office of the municipal clerk.

D. DECISION

1. The Zoning Board of Appeals must make its decision on an appeal within 100 days after the date of filing with the municipal clerk.

2. The required time limit for making the decision may be extended by written mutual agreement between the appellant and the Zoning Board of Appeals. A copy of such agreement must be filed in the office of the municipal clerk.

3. The Zoning Board of Appeals must make a detailed record of its proceedings indicating the vote of each member and the reasons for its decision.

4. Copies of the detailed record and proceedings must be filed with the municipal clerk within 14 days after the decision.

E. NOTICE

1. Notice of the decision must be mailed forthwith, by the Zoning Board of Appeals, to the appellant, parties in interest and to every person at the public hearing that requested a notice. The notice must specify that any appeal must be made pursuant to MGL, Chapter 40A, Section 17 and filed within 20 days after the date the notice was filed with the municipal clerk.

CASE NOTES:

Jordan v. City Clerk of Northampton, 14 Mass. App. Ct. 916 (1982); Lane v. Board of Selectmen of Great Barrington, 352 Mass. 523 (1967) (a decision of a special permit granting authority is not a decision of an administrative official and therefore must be appealed to the court pursuant to section 17 of the zoning act rather than to the zoning board of appeals).

Quincy v. Planning Board of Tewksbury, 39 Mass. App. Ct. 17 (1995) (approval or denial of a site plan special permit for a use that is permitted by right constitutes a decision by a special permit granting authority which is appealable under G.L. c. 40A, s. 17).

Dufault v. Millennium Power Partners, L.P., 49 Mass. App. Ct. 137 (2000) (where there are no provisions in the Zoning Act or the local zoning bylaw providing an appeal process from the approval or denial of site plans for uses as of right, the issuance or denial of the building permit is the appealable decision).

Balcam v. Hingham, 41 Mass. App. Ct. 260 (1996) (the state building code does not give the building code appeals board jurisdiction to hear appeals of alleged zoning bylaw violations).

Board of Selectmen of Tewksbury v. Granfield, 17 Mass. App. Ct. 1011 (1984) (municipalities and their officials are not exempt from statutory requirement of exhaustion of administrative remedies).

Commonwealth v. A. Graziano, 35 Mass. App. Ct. 69 (1993) (zoning enforcement officer is not required to exhaust administrative remedies before filing criminal complaint for a zoning violation).

Green v. Board of Appeals of Provincetown, 404 Mass. 571 (1989) (in addition to persons who have rights to appeal to the board of appeals and to the courts, municipal officers and boards have such rights).

Green v. Board of Appeals of Provincetown, 404 Mass. 571 (1989) (a business competitor of persons seeking changes to their premises and a resident relying on an asserted general right to seek enforcement lacked standing to appeal to the board of appeals).

Chongris v. Board of Appeals of Andover, 17 Mass. App. Ct. 999 (1984) (voluntary association whose objective was to promote preservation, restoration and advancement of a village was not an aggrieved person entitled to challenge the issuance of a building permit).

Sherrill House, Inc. v. Board of Appeals of Boston, 19 Mass. App. Ct. 274 (1985) (owner of nonconforming nursing home lacked standing to challenge zoning board decision authorizing abutting property owner to change nonconforming use of his property to another nonconforming use).

Jaffe v. Zoning Board of Appeals of Newton, 34 Mass. App. Ct. 929 (1993) (standing to appeal to the board of appeals may also be established by a showing of a plausible claim of a definitive violation of a private right, a private property interest or a private legal interest).

Jaffe v. Zoning Board of Appeals of Newton, 34 Mass. App. Ct. 929 (1993) (a party need not reside in the same zoning district as the objected use to suffer a private right or interest).

Lanner v. Board of Appeals of Tewksbury, 348 Mass. 220 (1964) (issuance of building permit was an order or decision of building inspector which board of appeals had jurisdiction to hear).

Cumberland Farms, Inc. v. Planning Board of Bourne, 67 Mass. App. Ct. 67 (2006) (after denial of a site plan, the zoning board has no jurisdiction to hear an appeal until the building inspector formally denies a building permit application).

Maini v. MacDonald, Misc. Case No. 250542; 7 LCR 114 (1999) (an opinion by a building inspector that he would be inclined to deny a building permit was not a denial of a building permit and the lack of formal action by a building inspector is a jurisdictional defect which disappears if ignored by the board).

Goldman v. Planning Board of Burlington, 347 Mass. 320 (1964) (where the building inspector was acting under the zoning bylaw, revocation of a building permit is an order or decision from which an appeal would lie to the board of appeals).

Zuckerman v. Zoning Board of Appeals of Hingham, 394 Mass. 663 (1985) (requirement that a decision on an appeal shall be filed within 14 days is merely directory, rather than mandatory, where zoning board of appeals makes its decision earlier than required by the statute).

Burnham v. Town of Hadley, 53 Mass. App. Ct. 479 (2003) (the statute allows the zoning board of appeals to file its decision within 14 days following the 100 day period in which it must act).

IV CONSTRUCTIVE GRANT PROCESS

Note: The Zoning Act provides a specific process which a petitioner or appellant must follow in order to obtain a constructive grant of a special permit, variance or appeal. For a more detailed description regarding the constructive grant process, please refer to MGL, Chapter 40A, Sections 9, 11 and 15.

A. SPECIAL PERMITS

1. Failure to take final action within 90 days following the close of the public hearing, or any mutually extended time period, shall deemed to be a grant of the special permit.

2. Any petitioner who seeks constructive approval must give written notice to the municipal clerk within 14 days from the expiration of the 90 days, or extended time period, of the approval of the special permit due to the failure of the Special Permit Granting Authority to take final action.

3. The petitioner must inform the municipal clerk that he has notified parties in interest of the constructive grant and that any appeal of such grant must be made pursuant to Section 17 of the Zoning Act.

4. After the expiration of 20 days without notice of appeal, the municipal clerk must certify the date of the approval, the fact that the Special Permit Granting Authority failed to take final action and that the approval of the special permit by such failure has become final.

5. Such certification must be forwarded to the petitioner by the municipal clerk.

6. If a special permit has been approved by a failure of a Special Permit Granting Authority to act within the required time period, a copy of the special permit application, along with the certification of the municipal clerk of the constructive grant, must be recorded in the registry of deeds or recorded and noted on the owner's certificate of title before it takes effect. The fee for recording or registering shall be paid by the owner or applicant.

B. VARIANCES AND APPEALS

1. Failure of the Zoning Board of Appeals to make its decision on a variance or appeal within 100 days, or any mutually extended time period, shall deemed to be a grant of the variance or appeal.

2. Any petitioner or appellant who seeks constructive approval of a variance or appeal must give written notice to the municipal clerk within 14 days from the expiration of the 100 days, or extended time period, of the approval of the variance or appeal due to the failure of the Zoning Board of Appeals to make a decision.

3. The petitioner or appellant must also inform the municipal clerk that he has notified parties in interest of the constructive grant and that any appeal of such grant must be made pursuant to Section 17 of the Zoning Act.

4. After the expiration of 20 days without notice of appeal, the municipal clerk must certify the date of approval, the fact that the Zoning Board of Appeals failed to make a decision and that the approval of such variance or appeal by such failure has become final.

5. Such certificate must be forwarded to the petitioner or appellant by the municipal clerk.

6. If a variance has been approved by failure of the Zoning Board of Appeals to make its decision within the required time period, a copy of the variance petition, along with the certification of the municipal clerk of the constructive grant, must be recorded in the registry of deeds or recorded and noted on the owner's certificate of title before it takes effect. The fee for recording or registering shall be paid by the owner or applicant.

CASE NOTES:

Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981); Shea v. Board of Alderman of Chicopee, 13 Mass. App. Ct. 1047 (1982) (failure to make and file written decision on a special permit within the 90 day time period results in constructive grant).

Kenrick v. Zoning Board of Appeals of Wakefield, 27 Mass. App. Ct. 774 (1989) (90 day time period within which special permit granting authority must take final action on a special permit runs from the close of the public hearing).

Board of Aldermen of Newton v. Maniace, 429 Mass. 726 (1999) (board took final action by recording with the city clerk the result of its vote on a special permit and was not compelled to file at the same time the reasons for its decision in order to avoid a constructive approval).

Board of Appeals of Westwood v. Lambergs, 42 Mass. App. Ct. 411 (1997) (constructive approval of a variance occurred where the zoning board failed to act on the request for a variance within the 100 day time period and an amendment filed by the board after the 100 day period that changed the result of the constructively approved variance was of no effect).

Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663 (1985); O'Kane v. Board of Appeals of Hingham, 20 Mass. App. Ct. 162 (1985) (requirement that a decision on a variance or appeal be filed within 14 days is merely directory, rather than mandatory, where the zoning board of appeals makes a decision earlier than is required by the statute).

Burnham v. Town of Hadley, 53 Mass. App. Ct. 479 (2003) (the statute allows the zoning board of appeals to file its decision within 14 days following the 100 day period in which the board must act and leaves open the question of what happens if the zoning board acts within 100 days but fails to file its decision within the 114 days provided by the statute).

Pasqualino v. Board of Appeals of Wareham, 14 Mass. App. Ct. 989 (1982) (failure to file petition with municipal clerk gives the court no record of commencement of constructive grant period).

Korkuch v. Planning Board of Wareham, 22 Mass. App. Ct. 307 (1988) (developer not entitled to constructive grant of plan submitted to planning board under the subdivision control law where written notice of the submission of the plan was not given to the municipal clerk).

Racette v. Zoning Board of Appeals of Gardner, 27 Mass. App. Ct. 617 (1989) (filing of a petition with the building inspector pursuant to a community's standard procedure does not start the running of the constructive grant period where the zoning act specifies that such period starts when the petition is filed with the municipal clerk).

Uglietta v. City Clerk of Somerville, 32 Mass. App. Ct. 742 (1992) (failure of the petitioner or appellant to follow the process to obtain constructive grant in a timely manner results in loss of constructive grant).

Windsor v. Planning Board of Wayland, 26 Mass. App. Ct. 650 (1988) (the occurrence of a constructive approval of a subdivision plan renders any subsequent filing of a decision under the subdivision control law, whether it is an approval or disapproval of the plan, a nullity).

V REPETITIVE PETITIONS

Note: The Zoning Act authorizes reapplication to the Special Permit Granting Authority and the Zoning Board of Appeals. However, the statute is not clear as to the process a community should follow when entertaining a reapplication. The process recommended in this outline is based partly on remarks made by the court when dealing with the repetitive petition issue. For the exact statutory language, please refer to MGL, Chapter 40A, Section 16.

A. PROHIBITION ON REAPPLICATION

1. No appeal, application or petition that has been unfavorably and finally acted upon by a Special Permit Granting Authority or the Board of Appeals can be acted upon favorably within two years after the date of final unfavorable action unless approved pursuant to the repetitive petition process.

B. PURPOSE

1. The purpose of the repetitive petition provision, as stated in Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981), 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.

C. PLANNING BOARD CONSENT

1. An appellant or petitioner must first submit his appeal, application or petition that has been unfavorably acted upon to the Planning Board. As was noted by the court in Paquin v. Board of Appeals of Barnstable, 27 Mass. App. Ct. 577 (1989), the language of MGL, Chapter 40A, Section 16 "leaves it unclear whether a Planning Board's function is simply to approve reconsideration by a Zoning Board of Appeals or to endorse favorable action. It is the former, which appears likely, the Board of Appeals could not even consider the merits of the repetitive petition until the Planning Board approved."

2. The Planning Board gives notice to parties in interests of the time and place of the proceedings where the Board will consider the question of consenting to a repetitive petition.

3. At the public meeting, it is assumed that the Planning Board would consider whether the appellant or petitioner has submitted sufficient information that could lead to a finding that there has been a specific and material change in the conditions upon which the previous unfavorable action was based.

4. All but one member of the Planning Board must vote in favor of allowing the appellant or applicant to resubmit the appeal, application or petition.

D. REVIEW BOARD FINDINGS

1. Upon obtaining Planning Board consent, the appellant or applicant files his repetitive petition with the Special Permit Granting Authority or Zoning Board of Appeals in the same manner as the original appeal, application or petition.

2. The Special Permit Granting Authority or Zoning Board of Appeals holds a public hearing on the repetitive petition in the same manner as the original appeal, application or petition.

3. In addition to what is normally required to be contained in the public hearing notice, the notice should also specify that the appeal, application or petition is a repetitive petition and that the Special Permit Granting Authority or Zoning Board of Appeals will be considering the question of whether there has been a specific or material change in the conditions upon which the previous unfavorable action was based.

4. Before acting favorably on any repetitive petition, the Special Permit Granting Authority or Zoning Board of Appeals must find, by a unanimous vote of three member board, by a vote of four members of a five member board or by a 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. Such changes must be specified in the record of its proceedings.

5. The Special Permit Granting Authority or Zoning Board of Appeals must then find that all the statutory requirements have been met before granting any special permit or variance.

CASE NOTES:

Paquin v. Board of Appeals of Barnstable, 27 Mass. App. Ct. 577 (1989) (the constructive grant provisions of the Zoning Act do not apply to repetitive petitions).

Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981) (whether the plans or the surrounding conditions have changed sufficiently to justify a reapplication is for the local board to determine).

Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981) (a hearing on a second application is not limited to evidence received at the hearing on the first application and a repetitive petition is warranted where the board regards itself as having acted on erroneous information).

Griffith v. Board of Appeals of Framingham, 27 Mass. App. Ct. 227 (1989) (where the relief requested is different, the repetitive petition provisions do not apply).

Klein v. Planning Board of Wrentham, 31 Mass. App. Ct. 777 (1992) (a board is prohibited from acting favorably on a petition where no finding is made by the board that there has been a specific and material change).

Klein v. Planning Board of Wrentham, 31 Mass. App. Ct. 777 (1992); Hall v. Zoning Board of Appeals of Edgartown, 40 Mass. App. Ct. 918 (1996) (property owner's pursuit to eliminate a condition through courts under the repetitive petition provision was the equivalent of an appeal, and could not be pursued where property owner failed to take timely appeal from initial grant of the special permit with conditions).

Hall v. Zoning Board of Appeals of Edgartown, 40 Mass. App. Ct. 918 (1996) (where conditional approval was subject to the repetitive petition provisions).

VI PUBLIC HEARINGS

Note: The public hearing requirements for Special Permit Granting Authorities and Zoning Boards of Appeals can be found in MGL, Chapter 40A, Sections 11 and 15.

A. PURPOSE

1. The purpose of the public hearing is to provide an opportunity for interested persons to appear and express their views pro and con. Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111 (1982).

B. NOTICE

1. Notice of a public hearing must be published in a newspaper of general circulation in the community.

2. The notice must be published once in each of two successive weeks and the first publication in the newspaper must be at least 14 days before the day of the public hearing.

3. The public hearing notice must also be posted in the city or town hall for a period of not less than 14 days before the day of the public hearing.

CASE NOTES:

Smith v. Board of Appeals of Plymouth, 340 Mass. 230 (1960) (statute does not require that notice be published in a newspaper in the town but in a newspaper of general circulation in the city or town).

Roman Catholic Archbishop v. Board of Appeals of Boston, 268 Mass. 416 (1929); Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971) (do not count the day of the public hearing when determining the 14 day time period).

Booker v. Chief Engineer of Fire Department of Woburn, 324 Mass. 264 (1949) (the word "day" when not qualified means a "calendar day" which is the space of time that elapses between two successive midnights).

Crall v. Leominster, 362 Mass. 95 (1972) (requirement that notice be published in a newspaper once in each of two successive weeks means calendar weeks and not at least one full week apart).

Lane v. Board of Selectmen of Great Barrington, 352 Mass. 523 (1967) (notice is defective if the first publication of notice was less than 14 days before the hearing).

C. CONTENTS OF PUBLIC HEARING NOTICE

1. The public hearing notice must contain the following information:

    a. The name of the petitioner;

    b. A description of the property or area;

    c. The street address, if any, or other adequate identification of the location, of the area or premises which is the subject of the petition;

    d. The date of the public hearing;

    e. The time of the public hearing;

    f. The place of the public hearing;

    g. The subject matter of the public hearing; and

    h. The nature of action or relief requested, if any.

CASE NOTES:

Gallagher v. Board of Appeals of Falmouth, 351 Mass. 410 (1966) (a defect in the general notice to the public cannot be overcome by the appearance of some citizens and the absence of objection to the notice as all citizens are entitled to the statutory notice and the opportunity to be heard).

Carson v. Board of Appeals of Lexington, 321 Mass. 649 (1947) (the notice should be sufficient to warn neighboring landowners of the proposed action that may affect them injuriously).

Pelletier v. Board of Appeals of Leominster, 4 Mass. App. Ct. 58 (1976) (board's decision is confined to the matter before the board and where an owner of a plastic factory applied for a variance to build storage silos and the board did not grant the variance because they determined that the silos were a permitted use, abutters were not prevented from appealing a subsequent decision of the board to issue a building permit for the silos).

Healy v. Board of Appeals of Watertown, 356 Mass. 130 (1969) (zoning board did not lack jurisdiction where public hearing notice stated that both a variance and special permit were sought).

Shoppers' World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63 (1967) (although the petition to the board was an appeal from the denial of a building permit, the public hearing notice described the subject matter as a special permit and it was within the board's inherent administrative power to allow the application to be modified to comply with the standards of the bylaw).

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

Kane v. Board of Appeals of Medford, 273 Mass. 97 (1930) (notice which merely recited that petitioner was seeking variance of the zoning ordinance "as applied to the erection of alterations in a proposed building" was defective as it could not be determined with reasonable certainty whether the petition was for a new building or for the alteration of a building and further, the notice did not identify the intended use of the proposed building where the location was in a residential area).

Fish v. Building Inspector of Falmouth, 357 Mass. 774 (1964) (public hearing notice was not sufficiently broad, specific or informative when a zoning board of appeals granted permission to "construct and install a stone crushing plant" and where the notice specified that the purpose of the public hearing was for either a variance or special permit for a "mixing, batching, and processing plant").

Carson v. Board of Appeals of Lexington, 321 Mass. 649 (1947) (notice of public hearing which wrongly described street location of land in question was not defective where notice could hardly have referred to any other land and interested parties were not mislead by description).

Carson v. Board of Appeals of Lexington, 321 Mass. 649 (1947) (notice of public hearing which specified that the petition was for the "erection and maintenance of a garage" was not defective where the notice did not disclose the size of the proposed garage where the petitioner was a bus company and it was probable that the garage was intended for the storage of a considerable number of buses rather than for the accommodation of one or two private automobiles).

Dion v. Board of Appeals of Waltham, 344 Mass. 547 (1962) (notice which specified that the zoning board of appeals would hold a public hearing on a petition to erect a building to be used as a filling station on land in a residential zoning district amply indicated that the petition was for a variance even though the notice did not describe the petition in explicit terms as one for a variance).

Moore v. Cataldo, 356 Mass. 325 (1969) (notice stating that the public hearing was for a petition to construct and operate a nursing home on a parcel situated on specific streets and shown on a plan filed with the petition was sufficient and it was not necessary to indicate the size of the building or the number of patients the home would accommodate).

Planning Board of Nantucket v. Board of Appeals of Nantucket, 15 Mass. App. Ct. 733 (1983) (where notice specified that the application was for relief under section 6-C-4 of the bylaw to eliminate parking requirements for proposed retail, office and residential building, the notice was not deficient where the bylaw had no such section and it was clear that section 6-B-4 must have been intended).

D. PARTIES IN INTEREST

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

    a. The petitioner;

    b. Abutters;

    c. Owners of land directly opposite on any public or private street or way;

    d. Abutters to abutters within 300 feet of the property line of the petitioner;

    e. The planning board; and

    f. The planning board of every abutting community.

2. The assessors maintaining any applicable tax list shall certify to the Special Permit Granting Authority or the Zoning Board of Appeals the names and addresses of parties in interest and such certification shall be conclusive for all purposes.

3. The Special Permit Granting Authority or Zoning Board of Appeals may accept a waiver of notice from, or an affidavit of actual notice to any party in interest, his stead or any successor owner of record who may not have received a notice. The Special Permit Granting Authority or Zoning Board of Appeals may order special notice to any such person giving not less than 5 or more than 10 additional days to reply.

CASE NOTES:

Kane v. Board of Appeals of Medford, 273 Mass. 97 (1930); DelGrosso v. Board of Appeals of Revere, 330 Mass. 29 (1953); Planning Board of Peabody v. Board of Appeals of Peabody, 358 Mass. 81 (1970) (responsibility for mailing public hearing notice rests with the zoning board of appeals and not the petitioner).

Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663 (1985) (the Zoning Act requires only that the notice of decision "be mailed" and the board does not also have a duty to ensure that the notice is received. If the legislature had intended that the board ensure receipt, it could have so provided. The word "given" instead of "mailed" has been interpreted to require proof of receipt).

Medeiros v. Board of Alderman of Woburn, 350 Mass. 767 (1966) (action by special permit granting authority was invalid where required notice to planning board was not given).

Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965) (14 day time period for notice by publication in newspaper does not apply to the notice to parties in interest by mail).

Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965) (receiving notice by mail 4 days before public hearing did not give interested party an opportunity to prepare his position and therefore was not reasonable).

Kasper v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251 (1975) (abutting property owner to whom zoning board of appeals failed to mail written notice of public hearing must show he was prejudiced by such failure if he appeals the decision on that grounds).

Kasper v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251 (1975) (abutter who did not receive notice by mail was not prejudiced where he learned of the public hearing through a newspaper publication 12 days in advance of the public hearing and therefore had reasonable notice and an opportunity to prepare and present evidence).

Kasper v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251 (1975) (abutter who did not receive notice by mail, waived his right to object when after objecting to the lack of notice proceeded to participate in the public hearing without requesting a postponement).

Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215 (1982) (an interested party who did not receive notice was not prejudiced where he learned of the hearing through a notice in a published newspaper, found time to prepare for the hearing and was represented by counsel at the hearing).

Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304 (1986) (the 90 day appeal period provided in MGL, Chapter 40A, Section 17, applies only to defects of procedure or notice by publication, mailing or posting for public hearings and not to defects of notice in the mailing of the board's decision as required by MGL, Chapter 40A, Section 15).

Bernstein v. Chief Building Inspector & Building Commissioner of Falmouth, 52 Mass. App. Ct. 422 (2001) (a condominium unit owner had standing to appeal a decision of a zoning board of appeals permitting a developer to construct an additional building in a condominium complex).

E. CONDUCTING THE PUBLIC HEARING

1. No public hearing for any special permit, variance or appeal can be held on any day on which a state or municipal election, caucus or primary is held in the community.

2. A Zoning Board of Appeals or Special Permit Granting Authority can continue a public hearing to a date certain and give public notice pursuant to the Open Meeting Law (MGL, c.39 s.23B) without having to send new notice by mail to parties in interest. "It frequently occurs that a case is not finished on the advertised hearing day. It would be awkward, indeed, if mailed notices was required of each successive session." Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618 (1986).

3. A public hearing ends when rights of interested parties to present information and argue is cut off. Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111 (1982).

VII DECISIONS

Note: The decision and voting requirements for Special Permit Granting Authorities and Zoning Boards of Appeals can be found in MGL, Chapter 40A, Sections 9 and 15.

A. QUORUM

1. A public hearing which will satisfy the statutory requirement that a governmental body act after notice and hearing is a hearing held by a quorum of the governmental body.

2. Absent a statutory restriction, a majority of a governmental body is a quorum and a majority of the quorum can act.

3. In determining the quorum requirement for conducting a public hearing, an easy rule to remember is that the same number of members of the governmental body necessary to make a favorable decision on a matter must be present at the public hearing.

CASE NOTES:

Clark v. City Council of Waltham, 328 Mass. 40 (1951) (in the absence of a contrary statutory provision, a simple majority of a collective body is empowered to act for that body).

Sesnovich v. Board of Appeals of Boston, 313 Mass. 393 (1943); Real Properties, Inc. v. Board of Appeals of Boston, 311 Mass. 430 (1942) (when a statute requires a unanimous decision in a matter before a zoning board of appeals, there exists a statutory provision requiring that the quorum for such matter be all the members of the board).

District Atty. for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663 (1981) (under no circumstances can one vote constitute a majority of a quorum of a three-member board where one member votes to go into executive session and two members abstain).

B. VOTING REQUIREMENTS

1. A Special Permit Granting Authority may grant a special permit by a two-thirds vote of a board with more than five members, a vote of at least four members of a five-member board, and a unanimous vote of a three-member board.

2. A Zoning Board of Appeals may grant a variance or reverse any order or decision of any administrative official under the provisions of the Zoning Act by a concurring vote of all members of a three member board or a concurring vote of four members of a five member board.

3. Only those members of a Special Permit Granting Authority or Zoning Board of Appeals who are at the public hearing on a particular matter are entitled to vote on that matter.

4. Upon municipal acceptance, MGL, Chapter 39, Section 23D allows a member who missed one session of the public hearing to vote after reviewing evidence including an audio or video recording of the missed session.

CASE NOTES:

Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982) (a temporary vacancy on a board does not transform a five member board to a four member board).

Tanner v. Board of Appeals of Belmont, 27 Mass. App. Ct. 1181 (1989) (where two members of a board voted in favor and two voted against, and the fifth member was absent, the application was defeated as it required four affirmative votes to grant a special permit).

Security Mills Limited Partnership v. Board of Appeals of Newton, 413 Mass. 562 (1992) (a concurring vote of four members of a board consisting of five members means that four members must agree on the result and not the reasoning for reaching that particular result).

Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983) (where proceedings before a planning board on an application for a special permit are adjudicatory in nature, only those members who had attended the public hearing on the application could vote).

Bergman v. Gloucester Planning Board, Essex Misc. Case No. 141317 (January, 1992) (planning board member who attended public hearing on original definitive plan but did not attend public hearing on a modification to that plan was not entitled to vote on the modification).

Barbaro v. Wroblewski, 44 Mass. App. Ct. 269 (1998) (where court noted that the same members of a board who are making the decision must be present at each hearing).

Cottone v. Cedar Lake, LLC, 67 Mass. App. Ct. 464 (2006) (seven member zoning board established by charter was authorized to grant relief by a majority vote of a quorum).

C. DETAILED RECORD

1. A Special Permit Granting Authority and Zoning Board of Appeals must make 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 its official actions.

2. It is a common practice for members of a Zoning Board of Appeals or a Special Permit Granting Authority to look over property relevant to a future zoning decision. Zoning is a local matter and courts assume a Zoning Board of Appeals or a Special Permit Granting Authority is familiar with local conditions.

3. A Special Permit Granting Authority or a Zoning Board of Appeals may not make a decision on the basis of evidence obtained after the close of the public hearing.

4. A petitioner must be advised of all the facts and materials in the possession of the Board on which it intends to rely. Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171 (1977).

5. In reaching a decision, a Special Permit Granting Authority or Zoning Board of Appeals must agree on the result and it is not necessary that the concurring members reach agreement as to the reason for that result. Security Mills Limited Partnership v. Board of Appeals of Newton, 413 Mass. 562 (1992).

CASE NOTES:

Board of Selectmen of Stockbridge v. Monument Inn, Inc., 14 Mass. App. Ct. 901 (1982) (detailed record includes all information filed with the municipal clerk and is not restricted to the minutes of a board or to the permit granted by the board).

Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215 (1982) (a visit by the chairman of a zoning board of appeals to the property for which a variance was sought and the examination of town tax records did not constitute an improper consideration of evidence not before the board).

Fandel v. Board of Zoning Adjustment, 280 Mass. 195 (1932) (several communications received after the public hearing and were read at a meeting was not enough to invalidate a decision where there was no indication in the

record as to the nature of the communication nor the weight given them by members of the zoning board of appeals).

Caruso v. Pastan, 1 Mass. App. Ct. 28 (1973) (a decision of a zoning board of appeals granting a special permit was not invalid by reason of a private consultation between the board and the town planning board after the public hearing and before its decision where there was nothing in the facts presented to the court to suggest that the zoning board of appeals was influenced in any respect and where the court noted that the zoning board of appeals should not have discussed the case with the planning board following the conclusion of its public hearing and prior to issuing its decision).

Schiffone v. Zoning Board of Appeals of Walpole, 28 Mass. App. Ct. 981 (1990); Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982); MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512 (1976); Cass v. Board of Appeals of Fall River, 2 Mass. App. Ct. 555 (1974); Wolfson v. Sun Oil Co., 357 Mass. 87 (1970); Planning Board of Springfield v. Board of Appeals of Springfield, 355 Mass. 460 (1969); Ferrante v. Board of Appeals of Northampton, 345 Mass. 158 (1962); Cefalo v. Board of Appeals of Boston, 332 Mass. 178 (1955); (the findings which support the granting of a variance or special permit are rigorous while denial does not require such detailed findings but simply adequate findings and reasons).

Davis v. Zoning Board of Appeals of Chatham, 52 Mass. App. Ct. 349 (2001); ACW Realty Management, Inc. v. Planning Board of Westfield, 40 Mass. App. Ct. 242 (1996); Federman v. Board of Appeals of Marblehead, 35 Mass. App. Ct. 727 (1994); SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101, 105 & n. 11 (1984); S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 9 Mass. App. Ct. 477, 481 (1980); Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 277 (1969); (a special permit granting authority's power to grant or deny special permits is discretionary and a decision of a special permit granting authority will not be disturbed unless it is based on an untenable ground or is unreasonable, whimsical or capricious).

Wolfman v. Board of Appeals of Brookline, 15 Mass. App. Ct. 112 (1983) (the fact that attorneys for real estate developers submitted a draft decision to the zoning board of appeals and the board may have relied upon that draft in writing its decision did not show a lack of independent analysis of the facts by the board).

Tanner v. Board of Appeals of Belmont, 27 Mass. App. Ct. 1181 (1989) (statute does not require that the detailed record of the board's proceedings be signed by the individual members of the board where the text of the board's decision memorialized the votes cast and where the two members who voted to deny the petition had signed the decision).

D. CONDITIONAL DECISIONS

1. Special Permit Granting Authorities may impose conditions, safeguards and limitations on time or use when granting a special permit.

2. When granting a variance, a Zoning Board of Appeals may impose conditions, safeguards and limitations both of time and use but excluding any condition based on the continued ownership of the land or structure to which the variance pertains.

3. A Special Permit Granting Authority or Zoning Board of Appeals can not impose a condition which delegates to another board a determination on an issue of substance, or which will require a future decision on an issue of substance by the Special Permit Granting Authority or Zoning Board of Appeals.

4. A Special Permit Granting Authority or Zoning Board of Appeals cannot impose a condition the performance of which lies entirely beyond the applicant's power.

CASE NOTES:

Huntington v. Board of Appeals of Hadley, 12 Mass. App. Ct. 710 (1981) (legislature has made a clear policy judgment rejecting the attachment of an ownership condition to the grant of a variance).

Todd v. Board of Appeals of Yarmouth, 377 Mass. 162 (1958); Maki v. Yarmouth, 340 Mass. 207 (1960); Hopengarten v. Board of Appeals of Lincoln, 17 Mass. App. Ct. 1006 (1984) (where court has looked favorably on conditioning the grant of a special permit on ownership of the property by a specific individual).

Shuman v. Board of Alderman of Newton, 361 Mass. 758 (1972) (although the grant of a special permit may be limited to a particular applicant, the considerations on which the grant of the special permit is based still relates to the land rather than the applicant).

Weld v. Board of Appeals of Gloucester, 345 Mass. 376 (1963) (condition of special permit that the "water situation must be arranged to the satisfaction of all concerned" was invalid because it invoked undefined standards and necessarily implied that the board would have to make a further determination).

Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618 (1986) (a condition of a special permit which required that before the start of operation a detailed plan of dust control be submitted to the zoning board of appeals for approval was invalid where the zoning bylaw required that a standard of dust control be worked out before the issuance of the special permit).

Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147 (1976) (condition that building plans, the facility for off street parking, the buffer areas surrounding the building, the size, type and location of signs and the location of buildings on the land be approved by a majority vote of the planning board and the zoning board of appeals before construction is started was a valid condition although the court noted that it might have been preferable if

the board had passed on the matters, perhaps after consultation with the planning board, if necessary, without purporting to give the planning board any power of approval or disapproval).

Shoppers' World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63 (1967) (requirement that the petitioner comply with the recommendations of the planning board with regard to ingress and egress was a valid condition).

Planning Board of Falmouth v. Board of Appeals of Falmouth, 5 Mass. App. Ct. 324 (1977) (zoning board of appeals exercised its discretion to grant a variance which was conditioned on the submission of a new plan showing specified modifications in which some of the conditions were stated vaguely such as "a staggered line of trees placed in scattered locations" and "adequate but shielded lights" were valid conditions as they did not change the essential character of the board's decision nor did they contemplate further action by the board).

Zartarian v. Minkin, 357 Mass. 14 (1970) (a decision of a zoning board of appeals was not invalid for vagueness of a condition requiring that a nursing home "not be used wholly or in part for the care of mentally sick persons" or by reason of possible future determination by the board under a condition imposed by the board that "additional off-street parking be provided as deemed necessary" by the board or that the board might require "additional screening or parking").

Shalbey v. Board of Appeals of Norwood, 6 Mass. App. Ct. 521 (1978) (condition that "adequate drainage must be provided by the applicant" though imprecise, was not one requiring a further determination of substance by the board).

Hopengarten v. Board of Appeals of Lincoln, 17 Mass. App. Ct. 901 (1984) (condition requiring review of a special permit by the zoning board of appeals every three years to determine the safety of a metal radio tower was valid).

Lovaco, Inc. v. Zoning Board of Appeals of Attleboro, 23 Mass. App. Ct. 239 (1986) (the requirement of a performance bond to guarantee completion of a proposed golf course was valid where the ordinance would be violated if the applicant removed the gravel without constructing the golf course).

V.S.H. Realty, Inc. v. Zoning Board of Appeals of Falmouth, 30 Mass. App. Ct. 530 (1991) (condition imposed by the board in granting a special permit which required the developer to widen a state road was invalid).

E. AMENDING DECISIONS

1. A Special Permit Granting Authority or Zoning Board of Appeals has the power without holding a further public hearing to correct an inadvertent or clerical error in a decision so that the record will reflect the true intention of the Board.

2. A Special Permit Granting Authority or Zoning Board of Appeals may not make a substantive amendment which will change the result of the original decision or which will grant relief different than that originally granted.

CASE NOTES:

Dion v. Board of Appeals of Waltham, 344 Mass. 547 (1962) (it was held to be a proper exercise of a zoning board of appeals' authority where the board filed a decision granting a variance which contained an inadequate statement of its reasons but amended its decision by stating the reasons at greater length and filed the amended decision within the 20 day appeal period).

Potter v. Board of Appeals of Mansfield, 1 Mass. App. Ct. 89 (1973) (an amendment to a decision voted prior to the expiration of the appeal period was invalid where the amendment reversed the original decision from a denial to an approval of a special permit).

Dennis v. Planning Board of the Town of Manchester-by-the-Sea, Misc. Case No. 191467; 3 LCR 236 (1995) (board has a right to reconsider its initial vote at anytime prior to filing its decision with the town clerk).

Board of Appeals of Westwood v. Aristids, 42 Mass. App. Ct. 411 (1997) (a second decision filed by the board was not considered an amendment of its original decision because it substantively changed the original decision).

Burwick v. Zoning Board of Appeals of Worcester, 1 Mass. App. Ct. 739 (1974) (where board signed a decision which set out conditions and safeguards which were different from those orally agreed to by the board and where the board had the power without holding a new public hearing to sign another decision which set out conditions and safeguards which were consistent with the site plan originally agreed upon with the petitioner).

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

VIII REQUESTS FOR ZONING ENFORCEMENT

Note: The Zoning Act provides a specific process that an interested party must follow when seeking enforcement action. For a detailed description of this process, please refer to MGL, Chapter 40A, Section 7.

A. ENFORCEMENT PROCESS

1. The Inspector of Buildings, Building Commissioner or Local Inspector, of if there are none, in a town, the Board of Selectmen, or person or board designated by local ordinance or bylaw , shall be charged with the enforcement of the local zoning ordinance or bylaw.

2. If the Zoning Enforcement Officer is requested in writing to enforce the zoning ordinance or bylaw against any person allegedly in violation and such officer declines to act, he shall notify, in writing, the party requesting enforcement of any action or refusal to act, and the reasons therefore, within 14 days of receipt of such request.

3. An appeal to the Zoning Board of Appeals may be taken by any person aggrieved by reason of his inability to obtain enforcement action from the Zoning Enforcement Officer.

4. See **III APPEAL PROCESS** for the procedural requirements that must be followed when an aggrieved party appeals lack of enforcement action by the Zoning Enforcement Officer and **IV B. VARIANCES AND APPEALS** for the constructive grant of an appeal when the Zoning Board of Appeals fails to take timely action.

CASE NOTES:

Morganelli v. Building Inspector of Canton, 7 Mass. App. Ct. 475 (1979); Neuhaus v. Building Inspector of Marlborough, 11 Mass. App. Ct. 230 (1981); McDonald's Corporation v. Town of Seekonk, 12 Mass. App. Ct. 351 (1981) (responsibility for enforcing zoning ordinances or bylaws lies with the municipality and is assigned to the building inspector or other specified municipal officer).

Wyman v. Zoning Board of Appeals of Grafton, 47 Mass. App. Ct. 635 (1999) (a condition of a variance or special permit is presumed to be inserted in the public interest and a violation of such a condition should be enforced by the zoning enforcement officer).

Vokes v. Lovell, 18 Mass. App. Ct. 471 (1984); Bearce Corp. v. Building Inspector of Brockton, 11 Mass. App. Ct. 930 (1981) (the period within which parties aggrieved may appeal to the zoning board of appeals runs from the time of the written denial of the parties' request for enforcement action).

Vokes v. Lovell, 18 Mass. App. Ct. 471 (1984) (the 14 day time period requiring the zoning enforcement officer to respond in writing is directory and not mandatory).

Vokes v. Lovell, 18 Mass. App. Ct. 471 (1984) (we leave for another occasion analysis of the concern that a slothful zoning enforcement officer could prevent complaining parties from exercising their rights and whether the parties seeking enforcement action have an alternative to the time and expense which might accompany a complaint in the nature of mandamus).

Elio v. Zoning Board of Appeals of Barnstable, 55 Mass. App. Ct. 424 (2002) (zoning board lacked jurisdiction to hear appeal because building inspector had not made written response denying enforcement request).

Green v. Board of Appeals of Provincetown, 404 Mass. 571 (1989) (under the statute, a non-aggrieved person may seek zoning enforcement but only an aggrieved party has the right to appeal lack of zoning enforcement to the zoning board of appeals; see case notes in III APPEAL PROCESS for cases dealing with aggrieved party status).

Neuhaus v. Building Inspector of Marlborough, 11 Mass. App. Ct. 230 (1981) (even in the absence of any statutory requirement, it would be prudent and sensible for the person seeking enforcement action to give notice of the pending administrative proceedings to the person against whom enforcement is sought as such person would be entitled to be heard at every stage of the proceedings and would clearly be a "person aggrieved" within the meaning of the statute).

Gallivan v. Zoning Board of Appeals of Wellesley, 71 Mass. App. Ct. 850 (2008) (a party with adequate notice that the issuance of a building permit will violate a zoning provision must appeal the issuance of that permit within the 30 day period and cannot subsequently litigate the question by means of a request for enforcement).

B. STATUTE OF LIMITATIONS

1. If real property has been improved and used in accordance with the terms of the original building permit, no action to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation, shall be maintained, unless such action is commenced within six years next after the commencement of the alleged violation.

2. No action, the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation of the provisions of any zoning ordinance or bylaw or the conditions of any variance or special permit, shall be maintained unless such action is commenced within ten years next after the commencement of the alleged violation.

CASE NOTES:

Lord v. Zoning Board of Appeals of Somerset, 30 Mass. App. Ct. 226 (1991) (the six-year statute of limitations is applicable where the building permit authorizes the activity which is in violation of the zoning bylaw).

Lord v. Zoning Board of Appeals of Somerset, 30 Mass. App. Ct. 226 (1991) (in contrast to the six-year statute of limitations, which explicitly covers both use and structural violations, the ten-year statute of limitations covers only structural violations).

IX RULES AND REGULATIONS

A. SPECIAL PERMIT GRANTING AUTHORITIES

1. MGL, Chapter 40A, Section 9, requires that Special Permit Granting Authorities adopt and file rules and regulations with the municipal clerk.

2. Such rules and regulations must prescribe a size, form, contents, style and number of copies of plans and specifications and the procedure for a submission and approval of such permits.

B. ZONING BOARDS OF APPEALS

1. MGL, Chapter 40A, Section 12, requires that Zoning Boards of Appeals adopt rules for the conduct of its business and file such rules with the municipal clerk.

CASE NOTES:

Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147 (1976) (failure of zoning board of appeals to file rules with municipal clerk did not render two special permits invalid).

Burwick v. Zoning Board of Appeals of Worcester, 1 Mass. App. Ct. 739 (1974) (failure of zoning board of appeals to adopt regulations not fatal where abutters did not show how they would be harmed by such failure).

X COURT APPEALS

Note: The Zoning Act provides a specific process that must be followed when appealing a decision of the Zoning Board of Appeals or Special Permit Granting Authority. For a detailed description regarding this process, please refer to MGL, Chapter 40A, Section 17.

A. COURT WHERE APPEAL CAN BE FILED

1. Superior Court and if land is located in Hampden County an appeal can also be filed in the Housing Court.

2. Land Court.

3. District Court in all counties except Hampden County.

B. TIME PERIOD

1. An appeal must be filed within 20 days after the decision has been filed with the municipal clerk.

2. An appeal from a constructive grant must be filed within 20 days after the notice of constructive approval has been filed with the municipal clerk by the petitioner or the appellant.

C. NOTICE OF APPEAL

1. Notice of the action, with a copy of the complaint must be given to the municipal clerk within 20 days after the decision has been filed in the office of the municipal clerk.

D. TIME FOR PERFORMANCE

1. MGL, Chapter 4, Section 9

   Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day.

2. MGL, Chapter 41, Section 110A

   Any public office in any city or town may remain closed on any or all Saturdays as may be determined from time to time, in a city by the city council, subject to the provisions of the city charter, or, in a town, by vote of the town at a special or regular town meeting, and the provisions of section nine of chapter four shall apply in the case of such closing of any such office on any Saturday to the same extent as if such Saturday were a legal holiday.

CASE NOTES:

Carr v. Board of Appeals of Saugus, 361 Mass. 361 (1972) (statutory requirement of notice to the town clerk was satisfied by providing the clerk with only notice of the action but not a copy of the complaint).

McLaughlin v. Rockland Zoning Board of Appeals, 351 Mass. 678 (1967) (statutory requirement of notice to the town clerk was satisfied by providing the town clerk with only a copy of the complaint but not the formal notice of the action).

Garfield v. Board of Appeals of Rockport, 356 Mass. 37 (1969) (notice delivered to the town clerk at her home on the 20th day over two hours after regular closing time of town clerk's office sufficiently complied with statute).

Konover Management Corporation v. Planning Board of Auburn, 32 Mass. App. Ct. 319 (1992) (although notice was never physically filed with the town clerk, the actual knowledge of the town clerk and the assistant town clerk, imparted to them within the 20 day period by an employee of the planning board who had received and retained in his office a copy of the complaint, was sufficient in the circumstances to satisfy the requirement of notice).

Bingham v. City Council of Fitchburg, 52 Mass. App. Ct. 566 (2001) (the filing of the notice with the mayor after the close of business of the clerk's office on the last day of the appeal period did not satisfy the 20 day requirement where the clerk was not made aware that a complaint had been filed prior to the expiration of the 20 day appeal period).

Garfield v. Board of Appeals of Rockport, 356 Mass. 37 (1969) (it is the state of the clerk's knowledge that is important, not the physical location of the papers; however, a notice seasonably filed with the clerk's office during normal business hours is sufficient even if the clerk is not present).

Bjornlund v. Zoning Board of Appeals of Marshfield, 353 Mass. 757 (1967) (statute makes no allowance for slow and inefficient postal service).

County of Norfolk v. Zoning Board of Appeals of Walpole, 16 Mass. App. Ct. 930 (1983) (telephone notice expressing an intent to appeal a board's decision is insufficient).

Booker v. Chief Engineer of Fire Department of Woburn, 324 Mass. 264 (1949) (the word "day" when not qualified means "calendar day" which is a space of time that elapses between two successive midnights).