

# CITY OF MARLBOROUGH MEETING POSTING

Meeting: Planning Board

Date: April 8, 2024

Time: 7:00 PM

Location: Memorial Hall, 3<sup>rd</sup> Floor, City Hall, 140 Main Street, Marlborough, MA 01752

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2024 APR -4 PM 1:28

This meeting of the Planning Board will be held in Memorial Hall on Monday, April 8, 2024, at 7:00 PM.

## **PUBLIC ATTENDANCE IS PERMITTED**

Agenda Items to be Addressed:

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### **Draft Meeting Minutes**

- A. March 11, 2024
- 2. **Chair's Business**
  - A. CPTC Annual Conference
    - i. E-Materials (Electronic Packet Only)
- 3. **Approval Not Required (None)**
- 4. **Public Hearings (None)**
- 5. **Subdivision Progress Reports**
  - A. Farooq Ansari – Water's Edge & Sterling Woods
    - i. City Engineer Disclosure
- 6. **Preliminary/Open Space/Limited Development Subdivision (None)**
- 7. **Definitive Subdivision (None)**
- 8. **Signs (None)**
- 9. **Correspondence (None)**
- 10. **Unfinished Business**
  - A. Working Group – No updates
- 11. **Calendar Updates (None)**
- 12. **Public Notices of other Cities & Towns**
  - A. Framingham
  - B. Sudbury

**MINUTES**  
**MARLBOROUGH PLANNING BOARD**  
**MARLBOROUGH, MA 01752**

1A

**Call to Order**

**March 11, 2024**

The Meeting of the Marlborough Planning Board was called to order at 7:00 pm in Memorial Hall, 3rd Floor City Hall, 140 Main Street, Marlborough, MA. Members present: Sean Fay, James Fortin, Patrick Hughes, Dillon LaForce, George LaVenture, and Chris Russ. Meeting support provided by City Engineer, Thomas DiPersio. Member Absent: Barbara Fenby.

**1. Draft Meeting Minutes**

**A. February 26, 2024**

On a motion by Mr. LaVenture, seconded by Mr. Russ, the Board voted to accept and file the February 26, 2024, meeting minutes with a minor change. Yea: Fay, Fortin, Hughes, LaForce, LaVenture, and Russ. Nay: 0. Motion carried. 6-0.

**2. Chair's Business**

**A. Legal Referrals**

Mr. Fay notified the Board that the referral that was sent to the Legal Department regarding the limited subdivision on Brigham Street at the February 26, 2024, meeting had been withdrawn because the homeowner is going to seek the Zoning Board of Appeals for approval.

Mr. Fay discussed the general policies on legal referrals and how in the past the Board was very good at pushing the said question back to the proponent and requesting them to provide the Board with an opinion letter from their legal counsel providing support on said topic/question and then referring that to the Legal Department for review.

The Board agreed they should revert back to the practice of having the proponent's legal counsel provide the necessary support to the question at hand. Mr. Fay did make note, that the only the time the Board could not follow this procedure is during an ANR application because of the clock. He asked the Board members to make sure to have the proponent's opinion prior to making a referral to the Legal Department.

**3. Approval Not Required (None)**

**4. Public Hearings (None)**

**5. Subdivision Progress Reports**

**A. 689 Pleasant Street (Jewel Road)**

Mr. DiPersio summarized the February 29, 2024, update and explained they are under construction but haven't made much progress because of how wet the site is. The Engineering Division has started to receive the required wetland scientist updates and he explained that they are waiting on tree removal before getting the heavy construction going.

On a motion by Mr. Russ, seconded by Mr. LaVenture, the Board voted to accept and file the February 29, 2024, correspondence. Yea: Fay, Fortin, Hughes, LaForce, LaVenture, and Russ. Nay: 0. Motion carried. 6-0.

**B. Farooq Ansari – Water's Edge & Sterling Woods**

**i. Correspondence from City Engineer, Thomas DiPersio**

Mr. LaVenture read the March 7, 2024, correspondence into the record.

On a motion by Mr. Russ, seconded by Mr. LaVenture, the Board voted to accept and file the correspondence. Yea: Fay, Fortin, Hughes, LaForce, LaVenture, and Russ. Nay: 0. Motion carried. 6-0.

**MINUTES**  
**MARLBOROUGH PLANNING BOARD**  
**MARLBOROUGH, MA 01752**

Mr. DiPersio disclosed to the Board that he worked on the Water's Edge Subdivision 20-30 years ago during the design, approval and construction of the subdivision. He explained he hasn't had any involvement with Mr. Ansari since that time and that it doesn't affect his opinion or judgment on the matter.

Mr. Fay acknowledged his disclosure and suggested putting it in writing and running it by the Legal Department. Mr. DiPersio agreed.

Mr. Russ asked if Mr. Ansari started the acceptance process for both subdivisions in the past as indicated in his correspondence. Mr. DiPersio explained he believes this is the case for both the subdivisions, the acceptance process was started several years back, the acceptance plans were drawn up and submitted to the City. He explained he was able to confirm that draft deeds for the open space parcels were given to the City for Water's Edge (no open space parcels on this one) and that deeds for all the roadways within both subdivisions may not have been given to the City.

The Board discussed the required easements and Mr. DiPersio explained specifically on the Water's Edge Subdivision there are several drainage easements and a couple of sewer easements that run across private property. The City would need the rights to go onto the private properties to maintain the pipes. He went over the procedure and explained when the developer sells a lot in a subdivision that has an easement on it, the developer needs to retain those rights while he still owns the subdivision. So that needs to be explicit in the deed that the developer is selling it on, retaining those rights, and then when the City accepts the road, that is when the developer would then convey those rights to the City. He explained based on previous correspondence from previous City Engineer's, this doesn't appear to have been done properly. He couldn't confirm if this was ever rectified.

Mr. Fay asked if the reservation on the deed that says "subject to easements and restriction of record" would be a catch all if that note was on the plan? Mr. DiPersio said, this would be a question for the Solicitor.

The Board discussed the bond and its status, and asked where the bonds are being held. Mr. DiPersio explained this was unclear. The Board discussed the 2006 punch list for Sterling Woods. Mr. DiPersio explained the detention basins are overgrown and need to be cleared out. Mr. LaVenture asked who would be responsible for the clearing if these were public ways? Mr. DiPersio said, the City.

The Board agreed the Developer needs to provide the proper supporting documents for the acceptance process to continue to move forward.

The Board discussed the current condition of the roadways and the potential option of using the bond money to complete the necessary maintenance and punch list items. Mr. DiPersio and Mr. Fay discussed if the two bond amounts would cover the fees associated with each subdivision. They agreed the \$20,000 would cover the required detention basin maintenance for Water's Edge, but the \$97,000 would not cover the fees to repair the roadways for Sterling Woods. Mr. DiPersio noted that in his review, it didn't appear any of the roadway deterioration was due to poor construction. Mr. LaVenture argued these roadways are 20-30 years old and questioned if it would be legitimate for the City to use the bond money to repairs the roads.

On a motion by Mr. LaVenture, second by Mr. Russ, the Board voted to send Farooq Ansari a copy of the City Engineer's March 7, 2023, correspondence and to request that he provide the following information for each subdivision:

**MINUTES  
MARLBOROUGH PLANNING BOARD  
MARLBOROUGH, MA 01752**

- Proof that the rights for all required easements have been retained and can be transferred to the City;
- Copies of all the proposed deeds;
- Proof that taxes are paid for land in question;
- Copy of the Sterling Woods Acceptance Plans;
- Documentation that the detention basins have been cleared and can be inspected;
- Proof that the Sterling Woods punch list items from the November 1, 2006, correspondence have been completed.

Yea: Fay, Fortin, Hughes, LaForce, LaVenture, and Russ. Nay: 0. Motion carried. 6-0.

**6. Preliminary/Open Space/Limited Development Subdivision (None)**

**7. Definitive Subdivision (None)**

**8. Signs (None)**

**9. Correspondence (None)**

**10. Unfinished Business**

**A. Working Group**

Mr. LaVenture updated the Board and explained the working group met on February 28<sup>th</sup>.

**i. Porous Pavement**

Mr. LaVenture summarized the language below and reviewed the Porous Product vs Desired Application spreadsheet. – See attachment A

“Our goal was to develop a matrix showing the different manufacturers/types of porous material and identify the best specific use for them in the categories of tree surrounds, sidewalks, walkways, cul-de-sacs, median strips, driveways, parking lots, and roadways. Realizing the extra cost needs to be offset by significant benefit/impact, we thought driveways, parking lots, and roadways would be the best place to focus. We believe a test pilot implementation driveway or parking lot [strategically placed partial usage] might be a good way to start. We then looked to develop design and success criteria for the test pilot.

Important points included:

- how the material holds up over a winter, and
- how infiltration both through the material and the underlying base holds up

We thought it would be beneficial to know:

- how the material has held up by one year after completion of housing construction
- how infiltration holds up by 5 years after housing construction - preferably with a perk rate loss of less than 5-10%
- what maintenance is/has been required
- how the base has held up

With this said, we thought a parking lot partially porously paved would give us a better understanding of the implementation and allow us to develop our success criteria. Additionally, having a developer install a length



**MINUTES**  
**MARLBOROUGH PLANNING BOARD**  
**MARLBOROUGH, MA 01752**

of roadway (area and length TBD depending on the site/soil conditions) would be beneficial and put the onus on the developer's engineering design team to help develop a potential spec."

Mr. LaVenture explained he has been in contact with the Stormwater Engineer for Burlington, VT. He is out on family leave until April 22, 2024, but is very willing to join a future Planning Board meeting via Teams hopefully during of the Board's

ii. Valuation of future lots

Mr. LaVenture summarized the language in attachment B reviewing the four methods of real estate appraisal listed below. – See Attachment B

The top 4 methods of real estate appraisal are:

- sales comparison approach
- cost approach
- income approach
- price per square foot approach

Mr. LaVenture explained since three of the four approaches deal with developed property, a sales comparison approach seems to be the best option. Having a separate realtor associated with the Board provide a value estimation to compare with the proponent's value estimate might be beneficial. Using the land's assessed value as suggested by Chair Fay might prove useful as well. We reached out the Assessor's Office to schedule a time to discuss.

Mr. LaVenture explained one additional item the Working Group discussed was the use of a bond to secure street acceptance and construction completion. The working group would like a better understanding of the bonding process and whether a completion secured solely by bond provides the surety the Board requires. For example, could a developer's bond vanish if not paid on? We have reached out to the Comptroller/Treasurer to set up a meeting to discuss in depth how this is handled behind the scenes. Addressing concerns on, what happens if the bond does lapse and the Board has 100% of surety in a bond, the Board no longer has any leverage. Furthermore to relay the importance of the Comptroller/Treasurer notifying the Board when bonds lapse and to determine what the lead time is on the notification.

The Board and Mr. DiPersio discussed old bonds for all the unaccepted roadways in the City and wondered how many of these have lapsed. Mr. DiPersio explained in the past when he was working with the previous City Solicitor Don Rider, there was an attempt made with the Treasurer at the time, to find out how many bonds are there, and there wasn't a good clear answer. He explained their office didn't seem to be aware of any. The Board discussed a previously seen spreadsheet that had information pertaining to each subdivision's bond.

Mr. LaVenture reviewed and discussed a development sign for Nottingham Woods. – See attachment C.

Mr. LaVenture explained a number of these developments have these signs and several of them are in rough shape and need replacement or removal and asked who is responsible for these signs and does this indicate that the roadway is not accepted? Mr. DiPersio said no, I don't think so, but that going forward if there is a sign like that, maybe we request that it been taken down before the City accepts the roadway because we don't want to maintain these signs. The Board discussed other locations throughout the City where the signs are located.

**11. Calendar Updates (None)**

**12. Public Notices of other Cities & Towns (None)**

**MINUTES  
MARLBOROUGH PLANNING BOARD  
MARLBOROUGH, MA 01752**

On a motion by Mr. Hughes, seconded by Mr. LaForce, the Board voted to adjourn the meeting. Yea: Fay, Fortin, Hughes, LaForce, LaVenture, and Russ. Nay: 0. Motion carried. 7-0.

Respectfully submitted,

/kmm

George LaVenture/Clerk

DRAFT

Porous Product vs Desired Application

	tree surrounds	sidewalks	walkways	cul de sacs	median strips	driveways	parking lots	roadways
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## Top 4 Methods of Real Estate Appraisal

As previously mentioned, there are numerous real estate appraisal methods that investors use to value real estate. The appropriate method might vary based on the asset class, the information provided by the broker, investment strategy, and other factors. Additionally, it's not uncommon for investors to gain a broader perspective of the property's value by following more than one method.

### 1. Sales Comparison Approach

The sales comparison approach assumes that prior sales of similar properties provide the best indication of a property's value. For this method, investors leverage commercial real estate comps, either within their proprietary database or in a third-party database. It's traditionally used for residential real estate, but can hold value for commercial investors as well, particularly for raw land and large developments.

Even within the same market and asset classes, recently sold properties won't necessarily mirror prospective deals—especially when the sale is more than a few years old. To ensure that one outlying data point won't provide misleading information, investors typically consider at least three sales. Discrepancies in building features, age, and quality can also paint a misleading picture. Drilling down into these discrepancies and adjusting the valuation accordingly helps investors to avoid misleading valuations.

### 2. Cost Approach Appraisal

The cost approach appraisal method follows the premise that the value of a building should be roughly equivalent to the cost one might incur in building an identical structure. This real estate appraisal method embraces the idea that investors should never spend more to purchase a property than they would building the same one.

At a high level, the cost approach to appraisal involves:

Calculating the cost of replacing the building, depreciation, and the land's value

Subtracting depreciation from construction costs

Adding the land's value

Because material costs weigh so heavily in the cost approach appraisal, this method is most helpful for new buildings. It's not as useful for older buildings constructed with dated building materials. The land's value must also be publicly available.

### 3. Income Approach Appraisal

The income approach appraisal is based on the philosophy that a building's value should be based on the revenue it generates.

To calculate the building's value with this real estate valuation method, start by subtracting the operating costs from the revenue, which yields the net operating income. Then, divide the NOI by the cap rate.

There are two different formulas for the income approach appraisal: the direct capitalization method and the yield capitalization method. The former assumes that revenue will remain the same, while the latter acknowledges that revenue changes as tenancies change.

Because this real estate property valuation method depends entirely on revenue, it's not the ideal choice for owner-occupied properties.

### 4. Price Per Square Foot

The price per square foot method of real estate appraisal considers value through the lens of total space available. Because property values can vary dramatically from market to market, it's crucial to benchmark within the same submarket. For example, price per square foot can vary dramatically between Detroit and New York City, and potentially even different neighborhoods within New York City.

To find price per square foot, simply divide the property price by the total square footage.





# Nottingham Woods

A MULA/CAPPADONA DEVELOPMENT





# Roles and Responsibilities of Planning and Zoning Boards

Prepared for the  
Citizen Planner  
Training Collaborative

## **MODULE 1**

# Roles and Responsibilities of Planning and Zoning Boards

## Introduction

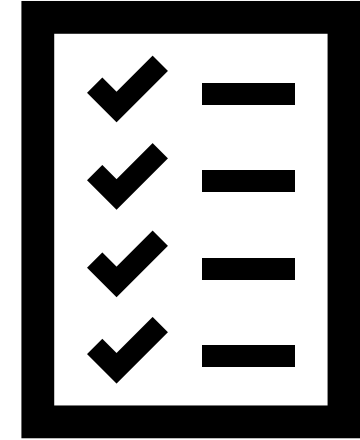


# Introduction

## COURSE OBJECTIVE

By the end of this course, you will be able to answer the following:

- What do planning boards and zoning boards (ZBAs) do?
- How are planning boards different from zoning boards?
- What sorts of rules and regulations should the planning and zoning boards create and adhere to?

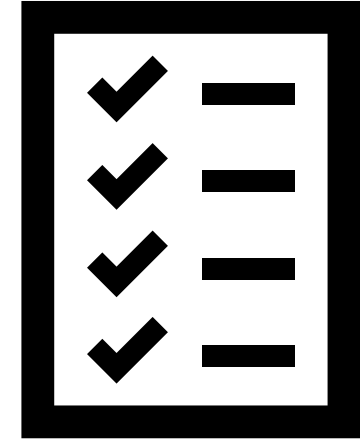


*What should you  
be leaving the  
room with today?*

# Introduction

## COURSE OBJECTIVE

- What is the Open Meeting Law, and how does it pertain to public hearings and public meetings of planning and zoning boards?
- What is the Public Records Law, and how does it pertain to planning and zoning boards?
- What is the Conflict-of-Interest Law, and how does it pertain to planning and zoning boards?



*What should you  
be leaving the  
room with today?*

# Introduction OVERVIEW



*How does  
Massachusetts'  
status as a  
"home rule"  
state affect land  
use decisions?*

- This module discusses the roles of the Planning Board and the Zoning Board of Appeals.
- A majority of land use decisions occur at the local level.
- However, there are state and federal exceptions to local control, and those exceptions are a focus of this training.

# Introduction

## OVERVIEW

### Zoning Basics

- A zoning bylaw/ordinance regulates the use, pattern, and appearance of development through zoning districts, dimensional requirements, use requirements, and other regulations.
- Districts must be:
  - “. . . uniform within the district for . . . structures or uses permitted,” and
  - “. . . shown on a zoning map in a manner sufficient for identification.”
- Uses are permitted within zoning districts:
  - By right (may be subject to by-right site plan review)
  - By special permit
  - By variance (rare!)

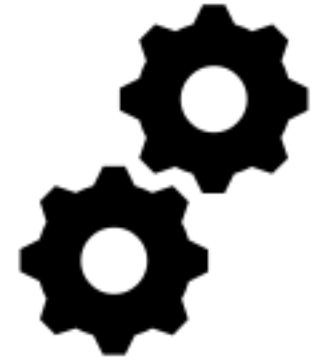


# Introduction OVERVIEW

*Board Membership*

## An effective board member knows:

- The authority of the board and its duties
- How the board operates
- Standards for decision-making
- Applicable state regulations, laws, and plans
- Other local relevant plans or regulations
- The authority of other boards



# Board Composition

	Planning Board	Zoning Board of Appeals
No. of Members	5, 7, or 9 members	3 or 5 members
Elected or Appointed	Depends on municipality	Typically appointed
Associate Members	<ul style="list-style-type: none"><li>• Only allowed for special permits.</li><li>• PB of 5 members can have 1 associate member; PB of more than 5 can have 2 associate members.</li><li>• Designated by chair if needed for a case.</li><li>• Acts only due to absence, inability to act, conflict, or vacancy.</li></ul>	<ul style="list-style-type: none"><li>• No statutory language dictates how many associate members a ZBA can have.</li><li>• Designated by chair if needed for a case.</li><li>• Acts only due to absence, inability to act, conflict, or vacancy.</li></ul>

## Introduction OVERVIEW

*Responsibilities of  
Planning Boards*

### The Planning Board is involved with:

Area	Statute (If Applicable)
Master Plans	G.L. c. 41, § 81D
Zoning Amendments	G.L. c. 40A, § 5
Special Permits (if authorized by local bylaw or ordinance – Special Permit Granting Authority)	G.L. c. 40A, § 1A, § 9
Subdivisions	G.L. c. 41, §§ 81K-81GG
Approval Not Required (ANR) Plans	G.L. c. 41, §§ 81L, 81P, 81X

## Introduction OVERVIEW

*Responsibilities of  
Planning Boards*

### The Planning Board is involved with:

Area	Statute (If Applicable)
Site Plan Review (if authorized by local bylaw or ordinance)	N/A
Repetitive Petitions	G.L. c. 40A, § 16
Scenic Roads and Shade Trees	G.L. c. 40, § 15C, G.L. c. 87
Establishment of Historic Districts	G.L. c. 40C, § 3
Comprehensive Permits (in advisory role if requested)	G.L. c. 40B, §§ 20-23

And more!



## Introduction OVERVIEW

*Responsibilities of  
Zoning Boards*

The **Zoning Board of Appeals (ZBA)** is the “permit granting authority” and hears and acts on:

Area	Statute (If Applicable)
Appeals	G.L. c. 40A, § 8, § 15
Special Permits (if authorized by local bylaw or ordinance – Special Permit Granting Authority)	G.L. c. 40A, § 1A, § 9
Variances	G.L. c. 40A, § 10
Appeals from Decisions of Zoning Administrator	G.L. c. 40A, § 13
Nonconforming Uses/Structures	G.L. c. 40A, § 6
Comprehensive Permits	G.L. c. 40B, §§ 20-23

# Roles and Responsibilities of Planning and Zoning Boards

## Powers and Duties

# Powers and Duties

## PLANNING BOARDS

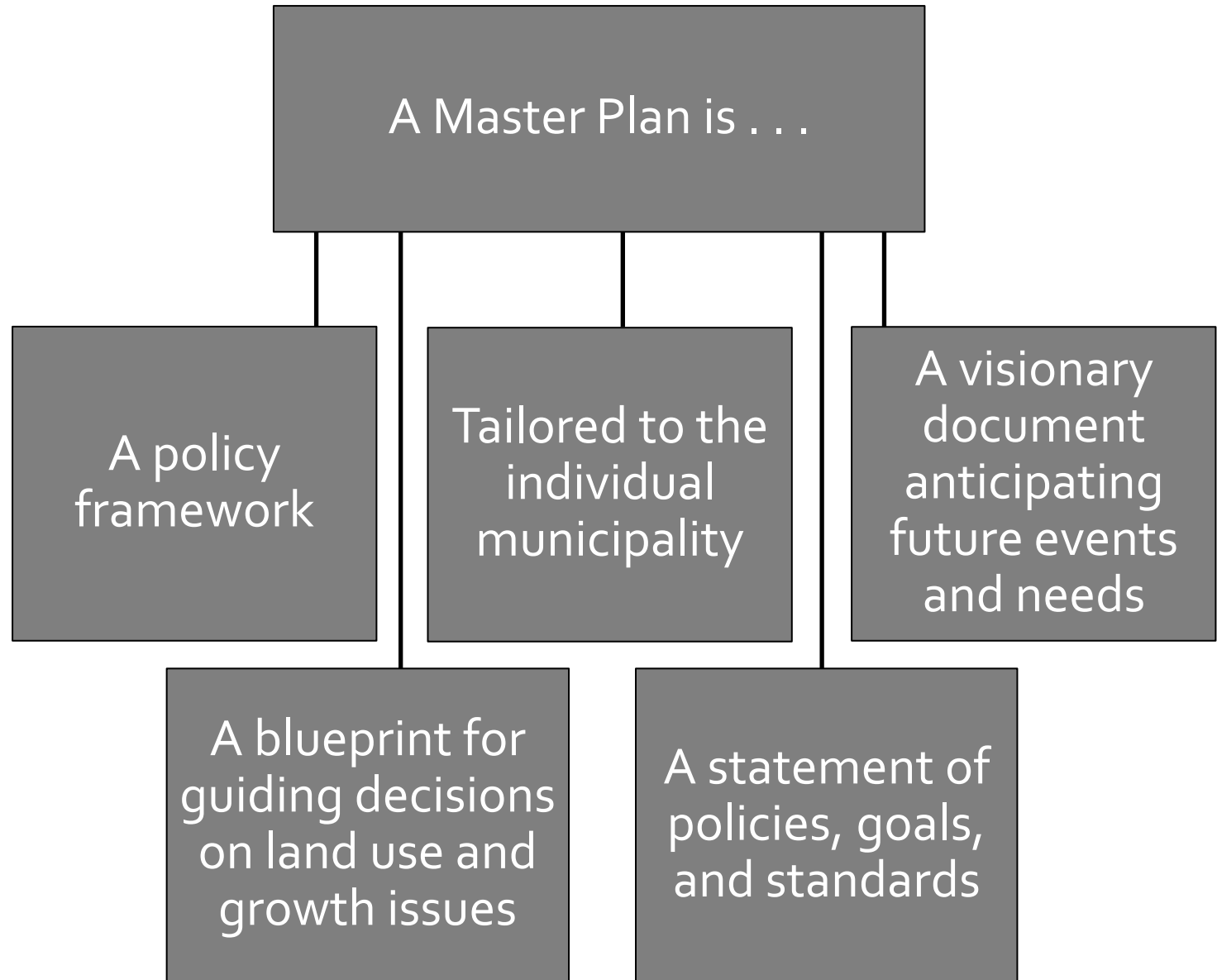
*Master Plans*

### Master Plans: G.L. c. 41, § 81D

- Tasks the Planning Board with the creation and approval of **Master Plans**
- Required sections:
  - 1.Goals & Policies
  - 2.Land Use Plan
  - 3.Housing
  - 4.Economic Development
  - 5.Natural & Cultural Resources
  - 6.Open Space & Recreation
  - 7.Services & Facilities
  - 8.Circulation
  - 9.Implementation

# Powers and Duties PLANNING BOARDS

*Master Plan*



# Powers and Duties PLANNING BOARDS

*Zoning Amendments*

## Zoning Amendments: G.L. c. 40A, § 5

- The Planning Board is one of several entities able to put forth proposed zoning amendments.
- Planning Boards have authority and duty to hold a public hearing on and provide recommendations for any changes to the zoning bylaw or ordinance. (Can be jointly held with City Council.)
- Changes then require a 2/3 (or simple majority for certain kinds of housing and related development) Town Meeting or City Council vote.

Powers and  
Duties  
**PLANNING BOARDS**

*Special Permits*

**Special Permits: G.L. c. 40A, § 1A**

- Special Permit Granting Authority (SPGA) may include:
  - Board of Selectmen
  - City Council/Town Council
  - Board of Appeals
  - Planning Board
  - Zoning Administrators
- Municipalities determine which entity will act as the SPGA.

# Powers and Duties PLANNING BOARDS

## *Special Permits*

### Special Permits: G.L. c. 40A, § 9

- Special permits allow for specific types of uses that are *only* permitted upon the issuance of such a permit.
- G.L. c. 40A, § 3 describes use exemptions from special permits (e.g., agricultural, religious, educational, etc.).
- G.L. c. 40A, § 9 “Special Permits” describes uses, rules and regulations, timelines, public hearing requirements, reasonable conditions etc. regarding special permits.

# Powers and Duties

## PLANNING BOARDS

### *Special Permits*

## Special Permits: G.L. c. 40A, § 9

Public Hearing	Must be held 65 days from receipt of a special permit application. Can be extended by mutual agreement.
Notice	First public hearing notice must be published at least 14 days before the date of the public hearing.
Final Action	Decision and filing with municipal clerk must occur within 90 days of the close of the public hearing. Can be extended by mutual agreement.
Voting	Unanimous for 3-member board; 4 of 5-member board; 2/3 more than 5 members (or simple majority for certain kinds of housing and related development). Cannot transform into a smaller board.
Lapse	Special permits lapse within three years.



# Powers and Duties PLANNING BOARDS

*Subdivisions*

## Subdivisions: G.L. c. 41, §§ 81K-81GG

### Purpose of Subdivision Control Law:

To protect “. . . the safety, convenience and welfare of the inhabitants of cities and towns . . . by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not yet become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas.”

# Powers and Duties PLANNING BOARDS

## *Subdivisions*

### Subdivisions: G.L. c. 41, §§ 81K-81GG

- A **subdivision** is the division of a tract of land into two or more lots.
- A division of a tract of land into two or more lots will not constitute a subdivision if every lot has required frontage on an adequate way (to be discussed shortly).



# Powers and Duties PLANNING BOARDS

*Subdivisions*

## Subdivisions: G.L. c. 41, §§ 81K-81GG

The Planning Board:

- Adopts subdivision rules and regulations
- Determines whether a plan requires approval
- Reviews and approves or disapproves preliminary and definitive subdivision plans
- Holds public hearings for definitive plans
- Obtains performance guarantee (G.L. c. 41, §81U)
- Releases lots
- Advises the ZBA on comprehensive permits that are subdivisions

# Powers and Duties

## PLANNING BOARDS

### *Subdivisions*

## Performance Guarantee: G.L. c. 41, § 81U

- Proper Bond
- Deposit of Money or Negotiable Securities
- Covenant (restricts sale or construction prior to completion of infrastructure & utilities)
- Tri-partite agreement whereby lender retains funds under first mortgage
- Can use one or combination of guarantees
- Applicant selects type of guarantee

# Powers and Duties

## PLANNING BOARDS

### *Subdivisions*

## Preliminary Subdivision Plans

- Opens negotiations between Planning Board and applicant
- Required for non-residential subdivision plans
- Not recorded at the Registry of Deeds
- No right to appeal decision on a preliminary plan
- No public hearing required
- 45 days to approve, approve with modifications, or disapprove

# Powers and Duties PLANNING BOARDS

*Subdivisions*

## Definitive Subdivision Plans

- The Planning Board may approve, modify and approve, or deny the plan.
- Before endorsement, the Planning Board shall require submission of a performance guarantee.
- Definitive plans are recorded at the Registry of Deeds/Land Court.
- Definitive plans must be recorded within 6 months from the date of endorsement.

## Powers and Duties

### PLANNING BOARDS

#### *Subdivisions*

## Definitive Subdivision Plans

- Plan is submitted to Board of Health with a 45-day response period.
- The Planning Board must hold a public hearing.
- For a nonresidential plan **or** a residential subdivision with preliminary plan, **final action is required within 90 days of submission.**
- For a residential subdivision with no preliminary plan, **final action is required within 135 days of submission.**

# Powers and Duties PLANNING BOARDS

*ANR Plans*

## ANR Plans: G.L. c. 41, § 81L/81P

A plan dividing land into two or more lots does not require Planning Board approval if:

- All lots on the plan meet frontage requirements, and
- The plan provides adequate access to all lots via:
  - Public way or way used and maintained as a public way;
  - Way shown on an approved definitive plan; or
  - Way in existence when the subdivision control law took effect in the town and which is suitable for proposed use of lots.



## Powers and Duties PLANNING BOARDS

*ANR Plans*

### ANR Plans: G.L. c. 41, § 81P

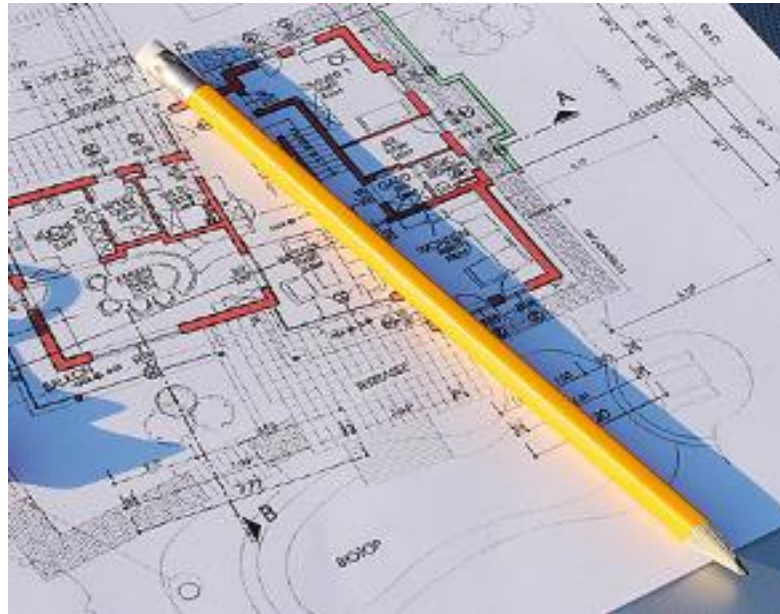
- No public hearing is required.
- The Planning Board has 21 days to endorse the plan or decide subdivision approval is required. Written notice of the Planning Board's decision must be provided to municipal clerk and applicant.
- Constructive approval may be granted if no action within 21 days. There is no provision for extension.
- The Planning Board cannot rescind an ANR endorsement.

# Powers and Duties PLANNING BOARDS

*Site Plan Review*

## Site Plan Review

While the Zoning Act does not mention Site Plan Review (SPR), municipalities may adopt SPR requirements and procedures as part of their bylaw or ordinance. Site Plan review is:



- Typically used for by-right uses to review site and design issues.
- Sometimes a part of the Special Permit process.
- Generally (but not always) overseen by the Planning Board.

# Powers and Duties

## PLANNING BOARDS

### *Repetitive Petitions*

## Repetitive Petitions: G.L. c. 40A, § 16

- No appeal, application, or petition that has been unfavorably acted upon by the SPGA or ZBA can be acted upon favorably within two years **unless approved through the repetitive petition process.**
- To begin this process, the applicant must submit the application, petition, or appeal to the Planning Board for review.
- All but one member of the full Planning Board must consent to a repetitive petition.
- There must be a finding of “specific and material changes” to the original application.

# Powers and Duties

## PLANNING BOARDS

*Scenic Roads  
and Shade Trees*

### Scenic Roads: G.L. c. 40, § 15C

- The Planning Board, Conservation Commission, or Historical Commission may recommend or request that any road (except numbered routes or state highways) be designated as a scenic road by Town Meeting or City/Town Council.
- Stone walls and mature trees cannot be altered or removed from scenic roads without public hearing of the Planning Board.



# Powers and Duties

## PLANNING BOARDS

*Scenic Roads  
and Shade Trees*

### Shade Trees: G.L. c. 87, § 3

- The trimming and removal of shade trees is under the jurisdiction of the Tree Warden and requires a public hearing.
- However, if a shade tree is on a scenic road, the required public hearings “shall be consolidated into a single public hearing before the tree warden and the planning board.”



# Powers and Duties

## PLANNING BOARDS

*Other Roles*

### Other Planning Board Roles

Planning Boards also:

- Are involved with the creation of Historic Districts.  
**G.L. c. 40C, § 3**
- May provide recommendations to the Zoning Board of Appeals when they review comprehensive permits, particularly when a subdivision is involved.  
**G.L. c. 40B, § 21**
- May serve on a Community Preservation Committee.  
**G.L. c. 44, § 5**

# Powers and Duties PLANNING BOARDS

*Other Roles*

## Other Planning Board Roles

- Initiate or are involved with other planning projects/plans (also known as “Action Plans” implementing the Master Plan), such as:
  - Downtown plans/Village Center Plans
  - Economic development plans
  - Neighborhood/area plans
  - Corridor plans
  - Housing plans
- Work closely with the Town Planner or Planning Director (and some Planning Boards also hire and supervise the Town Planner/Planning Director as well).

# Powers and Duties

## ZONING BOARDS

### Zoning Board of Appeals: G.L. c. 40A, § 1A

- The Zoning Act designates the Board of Appeals as one of the “permit granting authority.”
- The Zoning Board of Appeals, or ZBA, interprets and applies the zoning bylaw or ordinance to matters that come before it.





# Powers and Duties ZONING BOARDS

## *Appeals*

### Appeals: G.L. c. 40A, § 8 and § 15

- Appeals to the ZBA are provided for under **G.L. c. 40A, § 8** and are made when an individual or entity believes:
  - They have wrongfully been denied a permit
  - Someone else has wrongfully been granted a permit
  - Someone is violating a bylaw or ordinance and the Zoning Officer has not addressed the violation to the appellant's satisfaction.
- **G.L. c. 40A, § 15** lays out the appeals process in detail.

# Powers and Duties ZONING BOARDS

*Special Permits*

## Special Permits: G.L. c. 40A, § 1A and § 9

- Special Permit Granting Authority (SPGA) may include:
  - Board of Selectmen
  - City Council
  - Board of Appeals
  - Planning Board
  - Zoning Administrators
- Section 9 of the Zoning Act outlines the procedural requirements for special permits.

# Powers and Duties ZONING BOARDS

## *Variances*

### Variances: G.L. c. 40A, § 10

- Under certain circumstances, the ZBA may approve a **variance** from a zoning requirement.
- Types:
  - Dimensional variances
  - Use variances (very rare and only if local bylaw or ordinance allows)

## Powers and Duties ZONING BOARDS

### *Variances*

### Variances: G.L. c. 40A, § 10

The ZBA may only approve petitions for variances if:

1. Due to circumstances (beyond the norm for the zoning district) related to the **soil conditions, shape or topography** of the land or structures . . . , and
2. Literal enforcement of the provisions of the bylaw would involve **substantial hardship** to the applicant, and
3. The requested relief may be granted **without substantial detriment** to the public good and **without nullifying or substantially derogating** from the intent and purpose of the ordinance or bylaw.

# Powers and Duties ZONING BOARDS

*Appeals from Decisions  
of Zoning Administrator*

## Zoning Administrators: G.L. c. 40A, § 13

- If authorized by local bylaw or ordinance, ZBAs may appoint a Zoning Administrator to whom the board “may delegate . . . some of its powers and duties by a concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of all except one member of a board consisting of five members.”
- Any person, municipal office, or board may appeal a decision or order of the Zoning Administrator to the Board of Appeals.

# Powers and Duties ZONING BOARDS

*Nonconforming  
Uses or Structures*

## Nonconforming Uses or Structures: G.L. c. 40A, § 6

The ZBA shall determine whether any proposed changes to a nonconforming use or structure:

1. Would significantly increase the nonconforming nature of the structure or use, and
2. if significant, whether they are “substantially more detrimental to the neighborhood.”

**1.**

If a change is *not* significant, a positive finding can be made.

**2a.**

If a change is significant but not harmful, a positive finding can be made, often with conditions.

**2b.**

If a change is significant *and* harmful, a positive finding cannot be made.

Powers and  
Duties  
**ZONING BOARDS**

*Comprehensive Permits*

## Comprehensive Permits: G.L. c. 40B, §§ 20-23

Comprehensive Permits allow applicants proposing to build low- or moderate-income housing to consolidate local approvals with a single application to the Board of Appeals.



# Powers and Duties ZONING BOARDS

*Comprehensive Permits*

## The Zoning Board of Appeals must . . .

Rules and Regulations	<ul style="list-style-type: none"><li>• Adopt rules relating to the comprehensive permitting process.</li></ul>
Applications	<ul style="list-style-type: none"><li>• Receive and review comprehensive permit applications.</li></ul>
Local Boards	<ul style="list-style-type: none"><li>• Notify applicable local boards of comprehensive permit applications and request their appearance at public hearings.</li></ul>
Public Hearing	<ul style="list-style-type: none"><li>• Hold a properly noticed public hearing <b>within 30 days</b> of receipt of the comprehensive permit application</li></ul>
Final Action	<ul style="list-style-type: none"><li>• <b>Make a decision within 40 days</b> of the close of the hearing. If favorable to the applicant, the ZBA shall issue a comprehensive permit or approval.</li></ul>



# Powers and Duties

## REACHING A DECISION

### Decision Making Process

The Board's record for any decision should include:

- Application
- Correspondence between applicant and city/town staff
- Written comments submitted by members of the public
- Oral evidence presented at hearing
- Plans, drawings, photographs, deeds, surveys, and consultant/expert reports
- Written testimony
- Public hearing notice
- Municipal records and other documents submitted during proceeding
- The Board's findings, which:
  - Include reasoning for positive findings, and
  - Are supported by facts that relate to the required conditions or standards; if no such evidence was provided to meet these standards, the Board's findings should state this.

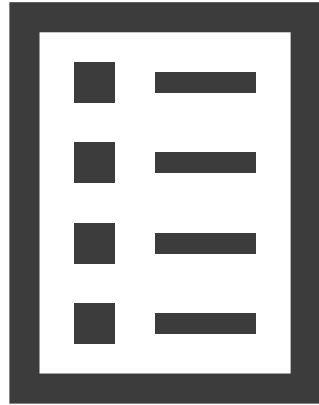
# Roles and Responsibilities of Planning and Zoning Boards

## Rules and Regulations

# Rules and Regulations

## STATUTORY REQUIREMENTS

### Rules and Regulations



- Every board should have a set of Rules and Regulations that governs the board's operation, administration, and procedures.
- Many city and town boards go beyond minimum statutory requirements and adopt a more comprehensive set of Rules & Regulations.

# Rules and Regulations

## STATUTORY REQUIREMENTS

### Statutory Requirements

#### ZBA

- G.L. c. 40A, § 12
- ZBAs must adopt procedural rules & regulations and file with clerk.

#### SPGA

- G.L. c. 40A §9
- SPGAs must adopt special permit rules & regulations and file with clerk.

#### Planning Board

- G.L. c. 41, §81Q
- PBs must adopt subdivision rules & regulations and file with clerk, then with registry of deeds and recorder of land court.

# Rules and Regulations COMPONENTS

*Procedures  
and Organization*

## Board Organization

- Procedures for electing officers (e.g., chair, vice-chair, clerk)
- Officer duties
- Appointment of board to other bodies (e.g., the regional planning commission)
- Designation of liaisons to other boards and staff
- Appointment and roles of associate members

# Rules and Regulations COMPONENTS

*Procedures  
and Organization*

## Meetings

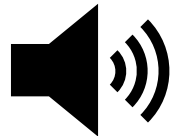
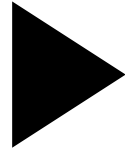
- Time, days of week, location, agendas, and postings for both regular and special meetings
- Guidelines for the preparation and conduct of meetings
- Procedures for public hearing notices
- Additional means of outreach the board employs beyond statutory requirements
- The roles of officers during meetings
- If applicable, an explanation of the Mullin Rule



# Rules and Regulations COMPONENTS

*Procedures  
and Organization*

## The Mullin Rule: G.L. c. 39, § 23D



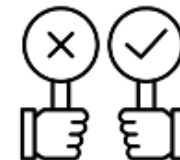
- Board members who missed one public hearing session may participate and vote if the municipality has adopted G.L. c. 39, § 23D.
- Board member must certify in writing (and file with municipal clerk) that they reviewed all evidence of missed session including:
  - 1) Videotape or audio recording of the missed session;
  - 2) Audio tape of the missed session; or
  - 3) Transcript for the missed session (minutes are not sufficient)

# Rules and Regulations COMPONENTS

*Procedures  
and Organization*

## Quorum and Voting Requirements

- Generally, the majority of a board is a quorum, and the majority of a quorum may act.
- However, Rules and Regulations should include special voting requirements, e.g., Special Permits require a 2/3 vote for a 7- to 9-member board, a 4/5 vote for a 5-member board, and a unanimous vote for a 3-member board (**or simple majority for certain kinds of housing and related development**).
- For certain land use decisions, such as special permits and subdivision plans, a quorum of the full board, or a super-majority vote of the full board, is required, not just a quorum of the meeting.





## Rules and Regulations COMPONENTS

*Procedures  
and Organization*

### Remote Participation - 940 CMR 29.10

- Must be adopted by the “Chief Executive Officer” (generally the Mayor or Selectboard).
- The “remote” member is part of the quorum and can vote, but there must be a “quorum number” present at meeting.
- All votes taken at a meeting with a remote member shall be roll call votes.
- The member participating remotely may do so only if physical attendance would be unreasonably difficult.

## Rules and Regulations COMPONENTS

*Procedures  
and Organization*

### Remote Participation - 940 CMR 29.10

- Chair must announce for the record use of remote technology, member using it, and reason for use.
- The remote participants must be visible/audible to all persons present at meeting location.
- Chair may decide how to address technical difficulties but is encouraged to suspend discussion while reasonable efforts are made to correct the problem. If the remote participant is disconnected, that fact and the time of disconnection shall be noted in the minutes.

# Rules and Regulations COMPONENTS

*The Permitting Process*

## Permitting

- Boards should clearly outline the procedures and required materials for seeking Board approval.
- Failure to follow procedural requirements may result in a **constructive grant** in favor of the applicant or may render the decision indefensible should the applicant appeal.



## Rules and Regulations COMPONENTS

*The Permitting Process*

### Permitting

Board regulations should outline the following permitting guidelines:

- Form of application required
- Required materials
- Requisite number of copies of the application, plan(s), etc.
- Filing procedures and fees
- Responsibility for and manner of payment of the newspaper for publication of notice
- Timing of submittal of specific items (e.g., certified list of abutters, assessor's map(s), studies or reports, etc.)
- Delivery or referral to other public bodies for review and recommendations

# Rules and Regulations COMPONENTS

*The Permitting Process*

## Permitting

Board	Type of Application/Petition	Statute Requiring Rules and Regulations
ZBA	Appeals	G.L. c. 40A, § 12
	Variances	
	Changes to nonconforming uses/structures	
	Comprehensive Permits	G.L. c. 40B, § 21
SPGA	Special Permits	G.L. c. 40A, § 9
Planning Board	Subdivisions	G.L. c. 41, § 81Q
	ANR Plans	

## Rules and Regulations COMPONENTS

*Code of Conduct*

### Code of Conduct

- Many communities employ a Code of Conduct that goes beyond the standard provisions of state laws relating to ethical considerations.
- Codes may vary greatly in length depending on the preferences of the municipality.
- Boards may benefit from reviewing the ethical codes of other municipalities for guidance.



# Roles and Responsibilities of Planning and Zoning Boards

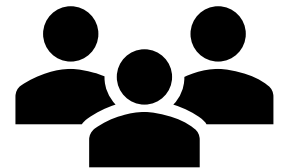
## Open Meeting Law

# Open Meeting Law

G.L. c. 30A, §§ 18-25

## Purpose and Certification

- The Open Meeting Law ensures transparency in the deliberations on which public policy is based.
- Within two weeks of a member's election or appointment or the taking of the oath of office, whichever occurs later, all members of public bodies must complete the Certificate of Receipt of Open Meeting Law Materials.





# Open Meeting Law

G.L. c. 30A, §§ 18-25

## Meeting Notices

Meeting notices must:

- Be posted 48 hours in advance except in the case of an emergency, excluding Saturdays, Sundays, and legal holidays.
- Be posted in a legible, easily understandable format.
- Contain the date, time, and place of the meeting.
- List the date and time that the notice was posted, as well as the date and time of any revisions, if applicable.
- List all topics that the chair reasonably anticipates will be discussed at the meeting, with enough specificity to reasonably inform the public of the issues to be discussed.

# Open Meeting Law

G.L. c. 30A, §§ 18-25

## Executive Session

- While all meetings of public bodies must be open to the public, certain topics may be discussed in executive, or closed, session.
- Before going into an executive session, the chair of the public body must:
  1. convene in open session;
  2. state the reason for going into executive session, stating all subjects that may be revealed without compromising the purpose for which executive session was called;
  3. state whether the public body will reconvene in open session at the close of the executive session; and
  4. take a roll call vote of the body to enter/exit executive session.

# Roles and Responsibilities of Planning and Zoning Boards

Public Records Law

# Public Records Law

G.L. c. 4, § 7(26)

## Public Records and the Records Custodian

- Every document, paper, record, map, photograph, etc., as defined by law, that is made or received by a government entity or employee is presumed to be a public record.
- Specific statutory exemptions to this rule have been created by the Legislature.
- The Records Custodian is responsible for providing copies of existing public records in their possession upon request for a determined fee.



# Public Records Law

G.L. c. 4, § 7(26)

## Public Meeting Minutes

- Minutes of open meetings, regardless of form and whether approved or not, are public and must be made available within 10 days if requested under the Open Meeting Law.
- There is no requirement that the minutes be transcribed or approved before they are made public.
- A records custodian should clearly mark all unapproved minutes “official draft minutes.”



# Roles and Responsibilities of Planning and Zoning Boards

## Conflict of Interest Law

# Conflict of Interest Law

G.L. c. 268A

## Applicability and Requirements

- Anyone performing services for a city or town or holding a municipal position, whether paid or unpaid, is considered a municipal employee.
- All city and town employees must:
  - Be provided with a Summary of the Conflict-of-Interest Law for Municipal Employees **within 30 days of hire or election**, and then annually thereafter; and
  - Acknowledge in writing that they received the summary.

## Conflict of Interest Law G.L. c. 268A

### Violations



- **The Commission can impose a civil penalty of up to \$10,000 (\$25,000 for bribery cases) for each violation.**
- The Commission can order the violator to repay any economic advantage gained by the violation, and to make restitution to injured third parties.
- Violations of the conflict-of-interest law can also be prosecuted criminally.



# Conflict of Interest Law

## G.L. c. 268A

### Types of Restrictions

(See Conflict of Interest Summary in handout for detail.)

Restriction	Types
On-the-Job	<ul style="list-style-type: none"><li>• Bribes</li><li>• Gifts and gratuities</li><li>• Misuse of position</li><li>• Self-dealing and nepotism</li><li>• False claims</li><li>• Appearance of conflict</li><li>• Mishandling of confidential information</li></ul>
After-Hours	<ul style="list-style-type: none"><li>• Second job conflicting with duties</li><li>• Divided loyalties</li><li>• Inside track</li></ul>
After Leaving Municipal Employment	<ul style="list-style-type: none"><li>• Forever ban</li><li>• One-year cooling off period</li><li>• Restrictions for partners</li></ul>

# Roles and Responsibilities of Planning and Zoning Boards

Wrap-Up

Questions?



## Additional Resources STATUTES

### Referenced Statutes

Zoning Act:	G.L. c.40A
Subdivision Control:	G.L. c. §§81K-81GG
Comprehensive Permits:	G.L. c. 40B, §§ 20-23
Master Plans:	G.L. c. 41, §81D
Mullin Rule:	G.L. c.39, §23D
Scenic Roads:	G.L. c. 40, § 15C
Shade Trees:	G.L. c. 87
Open Meeting Law:	G.L. c.30A, §§18-25; 940 CMR 29.00 <i>et seq.</i>
Public Records Law:	G.L. c. 4, §7(26)
Conflict of Interest Law:	G.L. c. 268A

## Additional Resources

### FURTHER READING

**Massachusetts Housing Partnership**  
[www.mhp.net](http://www.mhp.net)

**EOHLC**  
[www.mass.gov/EOHLC/](http://www.mass.gov/EOHLC/)

**Comprehensive Permits**

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**Open Meeting Law Guide and Training**  
[www.mass.gov/the-open-meeting-law](http://www.mass.gov/the-open-meeting-law)

**Public Records Law Guide**  
[www.sec.state.ma.us/pre/prepdf/guide.pdf](http://www.sec.state.ma.us/pre/prepdf/guide.pdf)

**Conflict of Interest Law Guide and Training**  
[www.mass.gov/orgs/state-ethics-commission](http://www.mass.gov/orgs/state-ethics-commission)

**OML/PRL-COI Guides**

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**Citizen Planner Training Collaborative**  
[www.masscptc.org](http://www.masscptc.org)

**Mass Planners List Serve**  
[https://masscptc.org/mailman/listinfo/massplanners\\_masscptc.org](https://masscptc.org/mailman/listinfo/massplanners_masscptc.org)

**American Planning Association-Massachusetts Chapter**  
[www.APA-MA.org](http://www.APA-MA.org)

**Mass. Association of Planning Directors** [www.massplanning.org](http://www.massplanning.org)

**Sources of Support**



[www.masscptc.org](http://www.masscptc.org)

Thank you!

CPTC Guidebook  
ROLES AND RESPONSIBILITIES OF  
PLANNING AND ZONING BOARDS  
Module 1



## Roles and Responsibilities of Planning and Zoning Boards



## Roles and Responsibilities of Planning and Zoning Boards

### Citizen Planner Training Collaborative Planning and Land Use Training Modules

Module 1. Roles and Responsibilities of Planning and Zoning Boards

Module 2. Introduction to the Zoning Act

Module 3. Special Permits and Variances

Module 4. Introduction to Subdivision Control and ANR

Module 5. Reading a Subdivision Plan

Module 6. Site Plan Review

Module 7. Vested Rights and Nonconforming Uses and Structures

Module 8. Zoning Exemptions

Module 9. Fair, Defensible Land Use Decisions

Module 10. Creating Master Plans

Module 11. Planning with Community Support

Module 12. Adopting and Revising Rules and Regulations

Module 13. Design Review

Module 14. Drafting Zoning Amendments

Module 15. Fair Housing Laws

Module 16. Zoning with Overlay Districts

Curriculum content last revised May 25, 2023, by the Citizen Planner Training Collaborative, Robert Mitchell FAICP, the team of Barrett Planning Group LLC, Ilana Quirk, Esq. of Freeman Law Group LLC, and Horsley Witten Group, and Adam Costa, Esq., of Mead, Talerman, and

## Roles and Responsibilities of Planning and Zoning Boards

Costa, LLC. The following people contributed to Module 1: Judi Barrett and Alexis Lanzillotta, Barrett Planning Group LLC.

### *Module 1: Roles & Responsibilities of Planning and Zoning Boards*

## Table of Contents

INTRODUCTION .....	5
Mission Statement .....	6
Course Objective .....	7
Overview.....	8
POWERS AND DUTIES.....	11
Planning Boards .....	12
Zoning Boards .....	19
RULES AND REGULATIONS.....	22
Statutory Requirements .....	23
Components of Rules and Regulations.....	24
GENERAL LAWS TO CONSIDER.....	27
Open Meeting Law.....	28
Public Records Law .....	31
Conflict of Interest Law .....	33
ADDITIONAL RESOURCES.....	35
List of Statutes .....	36
Further Reading .....	37

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## Introduction

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## Mission Statement

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The Citizen Planner Training Collaborative's mission is to:

- Empower local land use officials, particularly planning and zoning board members, to make effective and judicious decisions;
- Provide educational opportunities to such officials;
- Provide access to information, tools and resources to assist them in doing their work; and
- Encourage cooperation and collaboration among land use boards.

The CPTC provides training workshops around the state in the fall; an annual spring conference in Worcester; internet access to training modules, best practices, sample bylaws and regulations; and links to a variety of planning resources.

CTPC is itself a collaboration, combining the resources and expertise of the University of Massachusetts Extension, the Massachusetts Department of Housing & Community Development, the Massachusetts Chapter of the American Planning Association, the Massachusetts Association of Planning Directors, the Massachusetts Association of Regional Planning Agencies, and Mass Audubon.

**[www.masscptc.org](http://www.masscptc.org)**

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## Course Objective

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By the end of this course, you will be able to answer the following:

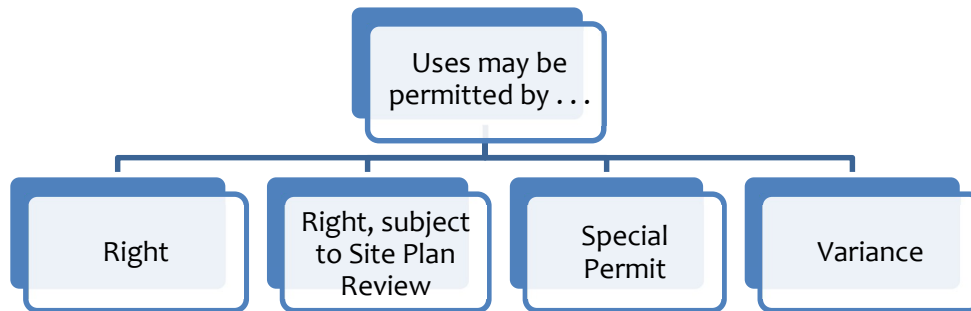
- What do Planning Boards and Zoning Boards of Appeals (ZBAs) do?
- How are Planning Boards different from ZBAs?
- What sorts of rules and regulations should Planning and Zoning Boards create and adhere to?
- What is the Open Meeting Law, and how does it pertain to public hearings and public meetings of Planning and Zoning Boards?
- What is the Public Records Law, and how does it pertain to Planning and Zoning Boards?
- What is the Conflict of Interest Law, and how does it pertain to Planning and Zoning Boards?

## Overview

This module discusses the roles of the Planning Board and the Zoning Board of Appeals. Because Massachusetts is a home rule state, the majority of land use decisions occur at the local level. However, there are state and federal exceptions to local control, and those exceptions are a primary focus of this training.

### ZONING BASICS

- A zoning bylaw/ordinance regulates the use, pattern, and appearance of development through zoning districts, dimensional requirements, use requirements, and other regulations.
- Per G.L. c. 40A §4, zoning districts shall be:
  - "... uniform within the district for ... structures or uses permitted," and
  - "... shown on a zoning map in a manner sufficient for identification."



### BOARD MEMBERSHIP

An effective board member knows:

- The authority of the board and its duties
- How the Board operates
- Standards for decision-making
- Legal aspects of Board conduct
- Applicable state regulations, laws, and plans
- Other local relevant plans or regulations

#### **ProTip! – Collaboration with Other Boards and Departments**

To facilitate cooperation and avoid working at cross-purposes, board members should learn about the jurisdiction and responsibilities of their colleagues on other boards and commissions.

## RESPONSIBILITIES

Each topic will be discussed in the next section and in other modules as cross-referenced.

The **Planning Board** is involved with:

Master Plans	G.L. c. 41, § 81D Module 10
Zoning Amendments	G.L. c. 40A, § 5 Module 14
Special Permits	If authorized by local bylaw or ordinance G.L. c. 40A, § 1A, § 9 Module 3
Subdivisions	G.L. c. 41, §§ 81K-81GG Module 4
Approval Not Required (ANR) Plans	G.L. c. 41, §§ 81L, 81P, 81X Module 4
Site Plan Review	If authorized by local bylaw or ordinance Module 6
Repetitive Petitions	G.L. c. 40A, § 16 Module 2
Scenic Roads and Shade Trees	G.L. c. 40, § 15C (scenic roads) G.L. c. 87 (shade trees)
Establishment of Historic Districts	G.L. c. 40C, § 3
Comprehensive Permits	Advisory role to the ZBA if requested, particularly if the comprehensive permit involves a subdivision G.L. c. 40B, §§ 20-23
Other	Serve on Community Preservation Committee (G.L. c. 44, § 5) Review requests to convert tax classification of land (G.L. c. 61, § 8) Initiate planning projects/plans Work with the Town Planner/Planning Director

## Roles and Responsibilities of Planning and Zoning Boards

The **Zoning Board of Appeals (ZBA)** acts as “permit granting authority,” per G.L. c. 40A, § 1A, and hears and acts on:

Appeals	G.L. c. 40A, § 8 (Enforcement) G.L. c 40A, § 15 (Petitions) Module 2
Special Permits	If authorized by local bylaw or ordinance G.L. c. 40A, § 1A, § 9 Module 3
Variances	G.L. c. 40A, § 10 Module 3
Appeals from Decisions of Zoning Administrator	G.L. c. 40A, § 13 Module 2
Nonconforming Uses or Structures	G.L. c. 40A, § 6 Module 7
Comprehensive Permits	G.L. c. 40B, §§ 20-23

## BOARD COMPOSITION

	Planning Board	Zoning Board of Appeals
No. of Members	5, 7, or 9 members	3 or 5 members
Elected or Appointed	Depends on municipality	Typically appointed
Associate Members *Note: The local bylaw or ordinance determines how associate members are appointed. Then, it is up to the chair to designate who can sit as an associate member for a particular case.	<ul style="list-style-type: none"> <li>Only allowed for special permits and possibly site plan review depending on procedure and local regulations.</li> <li>PB of 5 members can have 1 associate member; PB of more than 5 can have 2 associate members.</li> <li>Designated by chair if needed for a case.*</li> <li>Acts only due to absence, inability to act, conflict, or vacancy.</li> </ul>	<ul style="list-style-type: none"> <li>No statutory language dictates how many associate members a ZBA can have.</li> <li>Acts only due to absence, inability to act, conflict, or vacancy.</li> <li>Designated by chair if needed for a case.*</li> <li>Acts only due to absence, inability to act, conflict, or vacancy.</li> </ul>



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## Powers and Duties

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## Planning Boards

### MASTER PLANS

**G.L. c. 41, §81D** tasks the Planning Board with the creation and approval of Master Plans. Per this statute, master plans must include the following sections:

1. Goals & Policies
2. Land Use Plan
3. Housing
4. Economic Development
5. Natural & Cultural Resources
6. Open Space & Recreation
7. Services & Facilities
8. Circulation
9. Implementation

**ProTip! – Master Plan Updates**

Master Plans should be evaluated at regular, predetermined intervals and updated every 5-10 years.



As part of this process, Planning Boards work in consultation with other committees and individual members may also serve on a separate Master Plan Steering Committee.

*Further reading: Module 10, “Creating a Master Plan”*

### ZONING AMENDMENTS

**G.L. c. 40A, § 5** describes the process for adopting and amending zoning ordinances or bylaws. A proposed zoning bylaw, ordinance, or amendment may be submitted to the City Council or Board of Selectmen by:

## Roles and Responsibilities of Planning and Zoning Boards

- The City Council
- The Board of Selectmen
- The ZBA
- An individual owning land to be affected by change or adoption
- The request of registered voters of a town pursuant G.L. c. 39, §10
- Ten registered voters in a city
- The Planning Board
- A regional planning agency
- Other methods per local regulations

Beyond having the power to propose zoning changes themselves, Planning Boards have an authority and duty to hold a public hearing on and provide recommendations for any changes to the zoning bylaw or ordinance:

“The board of selectmen or city council shall within fourteen days of receipt of such zoning ordinance or by-law submit it to the planning board for review. . . . **No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town . . . has . . . held a public hearing thereon. . . .**” (emphasis added).

Any zoning changes require a 2/3 or simple majority for certain kinds of housing development vote of the City Council or Town Meeting, and any changes must then be submitted to the Attorney General for review. For councils with fewer than twenty-five members, a 3/4 vote of all members is required when there is a written protest filed against the zoning change by the owners of twenty percent or more of the area to be included in such change, or of the area of land immediately adjacent extending three-hundred feet from the boundary of the area affected by the proposal.

*Further reading: Module 14, “Drafting Zoning Amendments”*

## SPECIAL PERMITS

Per **G.L. c. 40A, §1A**, a Special Permit Granting Authority (SPGA) is determined by the municipality and “shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by zoning ordinance or by-law for the issuance of special permits.”

Special permits:

1. “[Provide] for specific types of uses which shall only be permitted in specified districts upon the issuance” of such a permit;

## Roles and Responsibilities of Planning and Zoning Boards

2. May be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law;
3. Shall be subject to general or specific provisions set forth therein; and
4. May also impose conditions, safeguards and limitations on time or use.

The particular types of and requirements for special permits the SPGA may issue are outlined in **G.L. c. 40A, §9** and include:

- Increases in the density or intensity of use in a proposed development
- Multi-family housing in a nonresidential district
- Transfer of development rights (TDR) of land within or between districts
- Cluster developments
- Planned unit developments
- Shared elderly housing
- Activities that necessary in connection with scientific research or scientific development
- Adult bookstores, adult motion picture theatres, adult paraphernalia, adult video stores, or establishments which display live nudity (§9A)
- Protection of access to direct sunlight for solar energy systems (§9B)
- Exclusion of accessory or incidental childcare facilities from maximum permissible floor area calculations (§9C)

Some key deadlines are as follows:

<b>Public Hearing</b>	Must be held 65 days from receipt of a special permit application. Can be extended by mutual agreement.
<b>Notice</b>	First public hearing notice must be published at least 14 days before the date of the public hearing.
<b>Final Action</b>	Decision and filing must occur within 90 days of the close of the public hearing. Can be extended by mutual agreement.
<b>Voting</b>	Unanimous 3 member board, 4 of 5 member board, 2/3 more than 5 members or simple majority for certain kinds of housing development vote of the City Council or Town Meeting. These votes are quorum votes of the full board, not quorum votes of board members in attendance.
<b>Lapse</b>	Special permits lapse within three years.

Also note that **G.L. c. 40A, §3** describes exemptions from special permits.

*Further Reading: Module 3, “Special Permit and Variances” and Module 8, “Zoning Exemptions”*

## SUBDIVISIONS

**G.L. c. 41, §§ 81K-81GG** is known as the Subdivision Control Law, the purpose of which is to protect “. . . the safety, convenience and welfare of the inhabitants of cities and towns . . . by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not yet become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas.” This law allows for Planning Board control of lot creation as well as the design and construction of roads, utilities, and drainage to serve these lots. The Planning Board:

- Adopts subdivision rules and regulations (must be on record with the clerk, Registry of Deeds & Land Court Recorder to be in effect)
- Determine whether a plan requires approval
- Reviews and approves or disapproves preliminary and definitive subdivision plans
- Holds public hearings for definitive plans
- Obtains performance guarantee
- Releases lots
- Advises the ZBA on comprehensive permits that are subdivisions

### WHAT IS . . . a Performance Guarantee?

Under Section 81U of the Subdivision Control Law, the Planning Board must require that the construction of ways and the installation of municipal services be secured by a performance guarantee before endorsing a subdivision plan. The applicant may choose one or a combination of the following:

- Proper Bond
- Deposit of Money or Negotiable Securities
- Covenant (restricts sale or construction prior to completion of infrastructure & utilities)
- Tri-partite agreement whereby lender retains funds under first mortgage

Preliminary Subdivision Plans	Definitive Subdivision Plans
<ul style="list-style-type: none"> <li>• Opens negotiations between Planning Board and applicant.</li> <li>• Required for non-residential subdivision plans.</li> <li>• No right to appeal decision on a preliminary plan.</li> </ul>	<ul style="list-style-type: none"> <li>• Plan is submitted to Board of Health with a 45-day response period.</li> <li>• Before endorsement, the Planning Board shall require submission of a performance guarantee.</li> </ul>
No public hearing is required.	The Planning Board must hold a public hearing.
Preliminary plans are not recorded at the Registry of Deeds.	Definitive plans must be recorded at the Registry of Deeds within 6 months from the date of endorsement.
The Planning Board has <b>45 days</b> to approve, approve with modifications, or disapprove.	• The Planning Board may approve, approve with modifications, or disapprove.

	<ul style="list-style-type: none"><li>• For a nonresidential plan <b>or</b> a residential subdivision with preliminary plan, <b>final action is required within 90 days of submission.</b></li><li>• For a residential subdivision with no preliminary plan, <b>final action is required within 135 days of submission.</b></li></ul>
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*Further Reading: Module 4, “Introduction to Subdivision Control Law and ANR”*

## ANR PLANS

Within the Subdivision Control Law, **G.L. c. 41, § 81L/81P** provides for plans not requiring Planning Board approval, also known as Approval Not Required (ANR) plans. In order for a plan to be considered an ANR, it must meet frontage requirement of local zoning bylaw or ordinance, and provide vital access to the lot via a:

- Public way or a way that is used and maintained as a public way;
- Way shown on an approved plan in accordance with the Subdivision Control Law; or
- Way in existence when the subdivision control law took effect in the town and is suitable for proposed use of lots.

Additionally, Section 81P specifies that for ANR plans,

- No public hearing is required.
- The Planning Board has **21 days** to endorse the plan or decide subdivision approval is required. Written notice must be provided to municipal clerk and applicant during this time. Constructive approval may be granted if no action within 21 days, with no provision for extension.
- The Planning Board cannot rescind an ANR endorsement.

*Further reading: Module 4, “Introduction to Subdivision Control Law and ANR”*

## SITE PLAN REVIEW

The Zoning Act does not specifically provide for or even mention Site Plan Review (SPR). However, municipalities may adopt SPR requirements and procedures as part of their bylaw or ordinance. SPR is:

- Typically used for by-right uses to review site and design issues.
- Sometimes a part of the Special Permit process.

- Generally (but not always) overseen by the Planning Board.

*Further reading: Module 6, “Site Plan Review”*

### REPETITIVE PETITIONS

Under **G.L. c 40A, § 16**, no appeal, application, or petition that has been unfavorably acted upon by the SPGA or ZBA can be acted upon favorably within two years unless approved through the repetitive petition process, which starts with the applicant submitting the application, petition, or appeal to the Planning Board. All but one member of a Planning Board must “consent to” a repetitive petition.

*Further reading: Module 2, “Introduction to the Zoning Act”*

### SCENIC ROADS AND SHADE TREES

Per **G.L. c. 40, § 15C**, “Upon recommendation or request of the planning board, conservation commission or historical commission of any city or town, such city or town may designate any road in said city or town, other than a numbered route or state highway as a scenic road. . . .” Such a designation results in the prohibition of removal or alteration of stone walls or mature trees from the road without public hearing of the Planning Board.

**G.L. c. 87, § 3** pertains to trimming or removal of public shade trees and primarily addresses the powers and responsibilities of tree wardens. However, Section 3 specifically addresses overlap with the Planning Board if the shade tree is on a scenic road. If this occurs, the public hearings “shall be consolidated into a single public hearing before the tree warden and the planning board.”

### ESTABLISHMENT OF HISTORIC DISTRICTS

Prior to the establishment of a Historic District, a historic district study committee or historic district commission shall investigate and write a report on the proposed district and transmit copies of their findings to planning board. (See **G.L. c. 40C, § 3** for details on what is required in the report.)

## COMPREHENSIVE PERMITS

While the Zoning Board of Appeals has exclusive jurisdiction over comprehensive permits, the Planning Board may serve in an advisory role, particularly if a subdivision is part of the comprehensive permit application.

## OTHER

Planning Boards may also:

- Serve on a Community Preservation Committee (G.L. c. 44, § 5).
- Initiate or be involved with other planning projects/plans, such as downtown plans, economic development plans, neighborhood/area plans, corridor plans, and housing plans. (These may also be known as “Action Plans” implementing the Master Plan.)
- Work closely with the Town Planner or Planning Director (and some Planning Board also hire and supervise the Town Planner/Planning Director as well).



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## Zoning Boards

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- A Zoning Board of Appeals interprets and applies the zoning bylaw or ordinance to matters that come before it.
- If another board, the building inspector, or other official determines that a use is not permitted, the applicant may appeal to the ZBA. These powers and duties are described further below.

### APPEALS

Appeals to the ZBA are provided for under **G.L. c. 40A, § 8 and § 15**. While Module 2, “Introduction to the Zoning Act” addresses the appeal process further, essentially appeals are made when an individual or entity believes:

- They have wrongfully been denied a permit.
- Someone else has wrongfully been granted a permit.
- Someone is violating a bylaw or ordinance and the Zoning Officer has not addressed the violation to the appellant’s satisfaction.

### SPECIAL PERMITS

Per **G.L. c. 40A, §1A**, a Special Permit Granting Authority (SPGA) “shall include the board of selectmen, city council, **board of appeals**, planning board, or **zoning administrators** as designated by zoning ordinance or by-law for the issuance of special permits” (emphasis added). The types of special permits are detailed above in the “Planning Board” section, as both the Planning Board and Board of Appeals may be part of the Special Permit Granting Authority.

*Further reading: Module 3, “Special Permits and Variances”*

## VARIANCES

A variance (**G.L. c. 40A, § 10**) is a reduction of or change to a zoning requirement that is otherwise prohibited under the zoning bylaw or ordinance but may be granted by the ZBA. Most variances relate to dimensional requirements; less common are use variances, which the ZBA can only grant if the local bylaw or ordinance allows. The ZBA may only grant petitions for variances if the Board finds that:

- Due to circumstances (beyond the norm for the zoning district) related to the **soil conditions, shape or topography** of the land or structures . . .
- Literal enforcement of the provisions of the bylaw would involve substantial hardship to the applicant, and
- The requested relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the ordinance or bylaw.

*Further reading: Module 3, “Special Permits and Variances”*

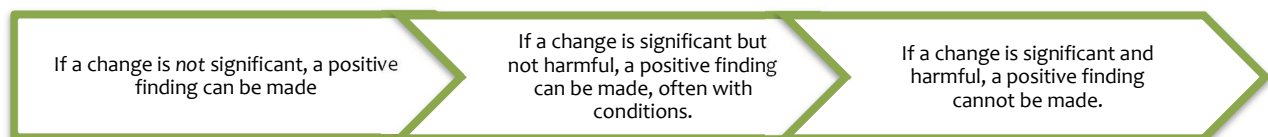
## APPEALS FROM DECISIONS OF ZONING ADMINISTRATOR

If authorized by local bylaw or ordinance, **G.L. c. 40A, § 13** allows Boards of Appeal to appoint a Zoning Administrator. The Board “may delegate to said zoning administrator some of its powers and duties by a concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of all except one member of a board consisting of five members.” Any person, municipal office, or board may appeal a decision or order of the Zoning Administrator to the Board of Appeals.

## NONCONFORMING USES OR STRUCTURES

The Board of Appeals is usually tasked by zoning bylaws and ordinances with determining whether any proposed changes to a nonconforming use or structure are:

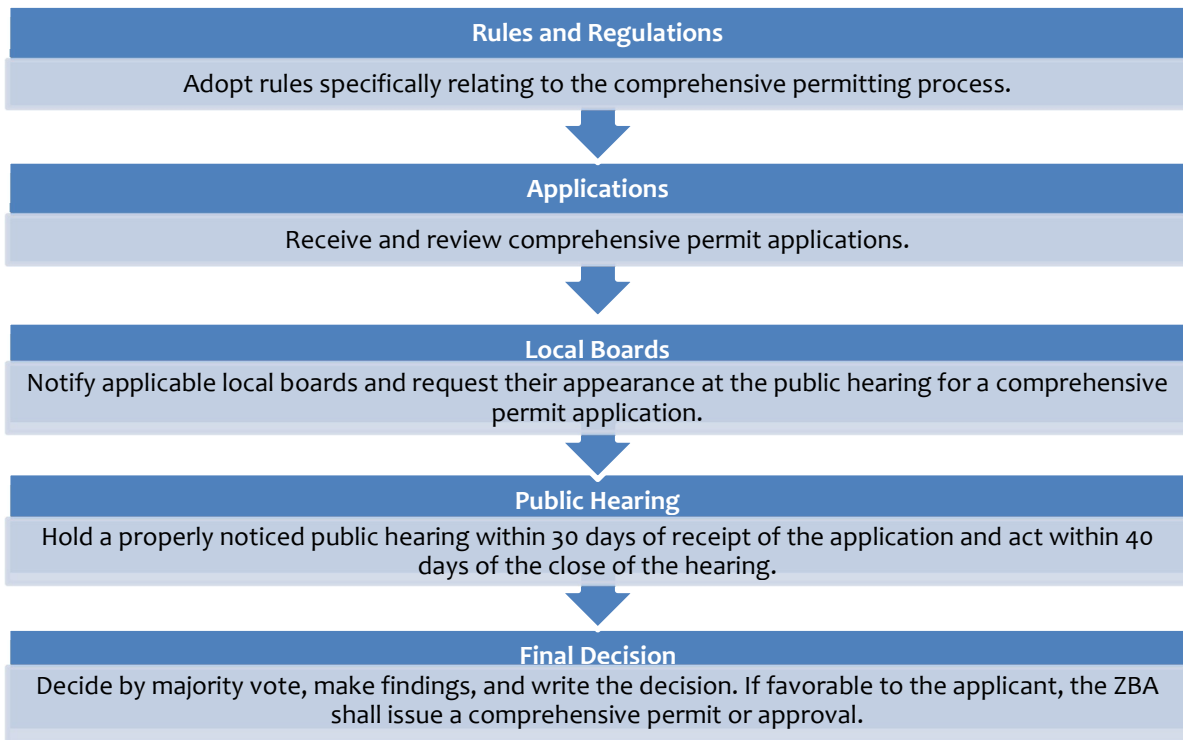
1. significant, and
2. if significant, whether they are “substantially more detrimental to the neighborhood.”



*Further reading: Module 7, “Vested Rights and Nonconforming Uses or Structures”*

## COMPREHENSIVE PERMITS

Under **G.L. c. 40B, §§ 20-23**, Comprehensive Permits allow any “public agency or limited dividend or nonprofit organization proposing to build low or moderate housing” to consolidate local approvals with a single application to the Board of Appeals. The ZBA’s duties with regard to comprehensive permits are to:



*Further reading: see “Additional Resources” section at end of module.*

### **ProTip! – Reaching a Fair and Reasonable Decision**

The Board’s record for any decision should include the following:

- ✓ The application
- ✓ Correspondence between applicant and city/town staff
- ✓ Written comments submitted by members of the public
- ✓ Oral evidence presented at hearing
- ✓ Plans, drawings, photographs, deeds, surveys, and consultant/expert reports
- ✓ Written testimony
- ✓ Public hearing notice
- ✓ Municipal records and other documents submitted during proceeding
- ✓ The Board’s findings, which should:
  - Include a statement of the reasoning that progresses from evidence to decision.
  - Be supported by facts that relate to the required conditions or standards; if no such evidence was provided to meet these standards, the Board’s findings should state this.

*Further reading: Module 9, “Fair, Defensible Land Use Decisions”*

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## Rules and Regulations

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## Statutory Requirements

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Every board should have a set of Rules & Regulations that governs the board's operation, administration, and procedures. There are a number of sections within Chapters 40A and 41 that refer to rules and regulations, including:

- G.L. c. 40A, § 12 states: "The board of appeals shall adopt rules, not inconsistent with the provisions of the zoning ordinance/by-law for the conduct of its business and for purposes of this chapter and shall file a copy of said rules with the city or town clerk."
- G.L. c. 40A, § 9 requires the Special Permit Granting Authority (SPGA) to adopt rules relative to the issuance of special permits. The rules shall be filed with the municipal clerk and "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. 41, § 81Q requires the planning board to adopt subdivision rules & regulations. These must be filed with the municipal clerk, Registry of Deeds, and Recorder of Land Court.

Many city and town boards go beyond these minimum requirements and adopt a more comprehensive set of Rules & Regulations, the typical contents of which are enumerated in the next section.

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## Components of Rules and Regulations

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### PROCEDURES AND ORGANIZATION

The rules and regulations should explain the following:

#### Board Organization

- Procedures for electing officers (e.g., chair, vice-chair, clerk)
- Officer duties
- Appointment of board to other bodies (e.g., the regional planning commission)
- Designation of liaisons to other boards and staff
- Appointment and roles of associate members

#### Meetings

- Time, days of week, location, agendas, and postings for both regular and special meetings
- Guidelines for the preparation and conduct of meetings (typical agenda, sequence of speaking during public hearings, procedural differences between open meetings versus public hearings, quorum requirements, provisions for extension of a public hearing, etc.)
- Procedures for reading public hearing notices — as outlined in G.L. c. 40A, §§ 11 and 15 — and any additional means of outreach the board employs beyond statutory requirements (e.g., publishing the notice with greater frequency and in more locations than is required, using social media to share the notice, etc.)
- The roles of officers during meetings
- If applicable, an explanation of the Mullin Rule and how it applies to the board

#### WHAT IS . . . *the Mullin Rule*?

Municipalities can adopt the so-called Mullin Rule, as provided for under G.L. c. 39, § 23D. This allows board members who missed one substantive public hearing session to still participate in the decision, but only if the they provide the necessary written certificate and enters it into the record of proceedings that the member reviewed all materials submitted to the board during the missed session and reviewed either:

- 1) A videotape (with audio) of the missed session;
- 2) An audio tape of the missed session; or
- 3) A transcript for the missed session (minutes are not sufficient).

### Quorum and Voting Requirements

- Quorum requirements (Generally, the majority of a board is a quorum and the majority of a quorum may act.)
- Special voting requirements (e.g., Special Permits require a 2/3 vote for a 7-9 member board, a 4/5 vote for a 5-member board, and a unanimous vote for a 3-member board or simple majority vote for certain kinds of housing development of the City Council or Town Meeting.)
- Whether the municipality allows for remote participation of board members.

#### WHAT IS . . . Remote Participation?

- Must be adopted by the “Chief Executive Officer” (generally the Mayor or Selectboard).
- The “remote” member is part of the quorum and can vote, but there must be a “quorum number” present at meeting.
- All votes taken at a meeting with a remote member shall be roll call votes.
- The member participating remotely may do so only if physical attendance would be unreasonably difficult.
- Chair must announce for the record use of remote technology, member using it, and reason for use.
- The remote participants must be visible/audible to all persons present at meeting location.
- Chair may decide how to address technical difficulties but is encouraged to suspend discussion while reasonable efforts are made to correct the problem. If the remote participant is disconnected, that fact and the time of disconnection shall be noted in the minutes.

### Adoption of Rules and Regulations

- List of dates when rules and regulations were adopted and amended by the board

## THE PERMITTING PROCESS

Boards should clearly outline the procedures and required materials for seeking Board approval.

Board	Type of Application/Petition	Statute Requiring Adoption of Regulations (If Applicable)
ZBA	Appeals	G.L. c. 40A, § 12
	Variances	
	Changes to nonconforming uses or structures	
	Comprehensive Permits	G.L. c. 40B, § 21
SPGA	Special Permits	G.L. c. 40A, § 9
	Subdivisions	G.L. c. 41, § 81Q

### Planning Board

#### ANR Plans

This is important not only for the public, but also for board members, as failure to follow procedural requirements may result in a constructive grant or may render the decision indefensible should the applicant appeal.

#### **WHAT IS . . . a Constructive Grant?**

Where a statute provides for the failure to act or to act within a stated period of time, either for holding a hearing or making & filing a decision, a constructive grant or approval of an application may result.

Examples of this include: special permits, variances, ANR plans, definitive subdivision plans, and Chapter 40B permits.

The following requirements relating to the permitting process are frequently outlined in Board rules and regulations:

- Form of application required
- Required materials
- Requisite number of copies of the application, plan(s), etc.
- Filing procedures
- Fees
- Responsibility for and manner of payment of the newspaper for publication of notice
- Timing of submittal of specific items (e.g. certified list of abutters, assessor's map(s), studies or reports, etc.)
- Delivery or referral to other public bodies for review and recommendations.

*Further reading: Module 12, "Adopting and Revising Rules and Regulations"*

## CODE OF CONDUCT

A number of communities employ a Code of Conduct that is either universally adopted by the chief elected officials of all boards and committees, or selectively by individual boards. While such codes often include provisions already found in state laws related to conflict of interest, taking of bribes, and other ethical considerations, many of these codes go beyond those prohibitions. They often include language related to the conduct of board members both during and outside of meetings, as well as parameters dictating when they can or cannot speak on behalf of the board. The codes may contain language on the responsibilities of board members to the board, to the town or city they represent, and to the public at large. Some codes are one page documents while others are quite lengthy. Boards may benefit from reviewing the ethical codes of other municipalities for guidance.



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## General Laws to Consider

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## Open Meeting Law

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The following represents an overview of content from the Attorney General's "Open Meeting Law Guide and Educational Materials" (2018), available at:

[www.mass.gov/the-open-meeting-law](http://www.mass.gov/the-open-meeting-law)

### PURPOSE OF THE LAW

The Open Meeting Law (G.L. c. 30A, §§ 18-25) ensures transparency in the deliberations on which public policy is based. Because the democratic process depends on the public having knowledge about the considerations underlying governmental action, the Open Meeting Law requires, with some exceptions, that meetings of public bodies be open to the public. It also seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently.

### CERTIFICATION

Within two weeks of a member's election or appointment or the taking of the oath of office, whichever occurs later, all members of public bodies must complete the Certificate of Receipt of Open Meeting Law Materials certifying that they have received these materials, and that they understand the requirements of the Open Meeting Law and the consequences of violating it. The certification must be retained where the public body maintains its official records. All public body members should familiarize themselves with the Open Meeting Law, the Attorney General's regulations, and Open Meeting Law determinations issued to the member's public body within the last five years in which the Attorney General found a violation of the law.

In the event a Certificate has not yet been completed by a presently serving member of a public body, the member should complete and submit the Certificate at the earliest opportunity to

be considered in compliance with the law. A public body member must sign a new Certificate upon reelection or reappointment to the public body but need not sign a Certificate when joining a subcommittee.

### MEETINGS OF A PUBLIC BODY

With certain exceptions, all meetings of a public body must be open to the public. A meeting is generally defined as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.”

### NOTIFYING THE PUBLIC

Public bodies must, except in cases of emergency, provide the public with notice of its meeting 48 hours in advance, excluding Saturdays, Sundays, and legal holidays. Notice of emergency meetings must be posted as soon as reasonably possible prior to the meeting. Also note that other laws, such as those governing procedures for public hearings, may require additional notice.

Meeting notices must:

- Be posted in a legible, easily understandable format;
- Contain the date, time, and place of the meeting;
- List the date and time that the notice was posted (either on the notice itself or in a document or website accompanying the notice), as well as the date and time of any revisions, if applicable
- List all topics that the chair reasonably anticipates will be discussed at the meeting, with sufficient specificity to reasonably inform the public of the issues to be discussed. Where there are no anticipated topics for discussion in open session other than the procedural requirements for convening an executive session, the public body should list “open session” as a topic, in

#### **ProTip!**

##### **(1) Update the meeting notice as needed.**

If a discussion topic is proposed after a meeting notice is posted, and it was not reasonably anticipated by the chair more than 48 hours before the meeting, the public body should update its posting to provide the public with as much notice as possible of what subjects will be discussed during the meeting.

##### **(2) Postpone the meeting if necessary.**

Although a public body may consider a topic that was not listed in the meeting notice if it was not anticipated, the Attorney General strongly encourages public bodies to postpone discussion and action on topics that are controversial or may be of particular interest to the public if the topic was not listed in the meeting notice.

addition to the executive session, so the public is aware that it has the opportunity to attend and learn the basis for the executive session.

## EXECUTIVE SESSION

### WHEN CAN A PUBLIC BODY MEET IN EXECUTIVE SESSION?

While all meetings of public bodies must be open to the public, certain topics may be discussed in executive, or closed, session.

### HOW DOES A PUBLIC BODY GO INTO EXECUTIVE SESSION?

Before going into an executive session, the chair of the public body must:

- Convene in open session;
- State the reason for going into executive session, stating all subjects that may be revealed without compromising the purpose for which executive session was called;
- State whether the public body will reconvene in open session at the close of the executive session; and
- Take a roll call vote of the body to enter executive session. (Note: the body must vote to exit executive session as well.)

### WHAT IS REQUIRED ONCE IN EXECUTIVE SESSION?

While in executive session, the board must:

- Keep accurate records;
- Take a roll call of all votes taken; and
- Only discuss the matters for which the executive session was called.

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## Public Records Law

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The following frequently asked questions are taken with occasional modification from the Massachusetts Secretary of State and the Division of Public Record's "Guide to the Massachusetts Public Records Law" (2017), available at:

[www.sec.state.ma.us/pre/prepdf/guide.pdf](http://www.sec.state.ma.us/pre/prepdf/guide.pdf)

### PUBLIC RECORDS LAW: G.L. c. 4, §7(26)

#### **WHAT IS A PUBLIC RECORD?**

Every document, paper, record, map, photograph, etc., as defined by law, that is made or received by a government entity or employee is presumed to be a public record. Specific statutory exemptions to this rule have been created by the Legislature. These exemptions, which are discretionary to the records custodian, allow the records custodian to withhold a record from the general public. If a records custodian claims an exemption and withholds a record, the records custodian has the burden of showing how the exemption applies to the record and why it should be withheld.

#### **WHAT IS A RECORDS CUSTODIAN AND WHAT IS THEIR RESPONSIBILITY?**

A records custodian must respond to any requests for a copy of a public record within ten calendar days in writing. The Public Records Law only applies to records that are in existence and created or maintained in the usual course of business. A records custodian is not required to answer questions or to create a record in response to a request, but may do so at his or her discretion.

#### **WHAT CAN A RECORDS CUSTODIAN CHARGE FOR PROVIDING PUBLIC RECORDS?**

Unless specifically addressed by statute, a custodian may charge twenty cents (\$0.20) per page for photocopies, twenty-five cents (\$0.25) per page for microfilm copies, and fifty cents (\$0.50) per page for computer printouts. A records custodian may charge and recover a fee for the time he or she spends searching, redacting, photocopying and refiling a record. The per hour charge for this process may not be greater than the prorated hourly wage of the lowest paid employee who is capable of performing the task.

**WHEN MUST OPEN MEETING MINUTES BE MADE AVAILABLE TO THE PUBLIC?**

Minutes of open meetings, regardless of form and whether approved or not, are public and must be made available within 10 days if requested under the Open Meeting Law. There is no requirement that the minutes be transcribed or approved before they are made public. A records custodian should clearly mark all such minutes as “unofficial draft” minutes.

**WHAT SHOULD A CUSTODIAN DO IF THEY DO NOT POSSESS RECORDS ARE NOT IN THEIR POSSESSION?**

Records custodians should forward any such requests to the appropriate party. A large public records request may include items for which the custodian is not responsible. It is in the public interest for the custodian to forward such requests to the appropriate parties in responding to a public records request.

**WHERE CAN RECORDS CUSTODIANS AND REQUESTERS LEARN MORE?**

Records custodians and requesters seeking more information may telephone the Division and speak with the Attorney of the Day. The Attorney of the Day is a staff member of the Division, reporting to the Supervisor, and is available to answer “general questions” concerning the Public Records Law between the hours of 9:00 a.m. and 4:00 p.m. Oral and written legal advisories are not generally provided by the Division. The phone number for the Division is (617) 727-2832.

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## Conflict of Interest Law

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The following excerpts are taken with occasional modification from the State Ethics Commission's "Summary of the Conflict of Interest Law for Municipal Employees," available at:

[www.mass.gov/orgs/state-ethics-commission](http://www.mass.gov/orgs/state-ethics-commission)

### OVERVIEW

- All city and town employees must be provided with a Summary of the Conflict of Interest Law for Municipal Employees within 30 days of hire or election, and then annually thereafter.
- All city and town employees are then required to acknowledge in writing that they received the summary.
- The summary of the Conflict of Interest Law (**G.L. c. 268A**) is intended to help municipal employees understand how that law applies to them. It is not a substitute for legal advice, nor does it mention every aspect of the law that may apply in a particular situation.
- Municipal employees can obtain free confidential advice about the conflict of interest law from the Commission's Legal Division through the website referenced above.
- **When the Commission determines that the conflict of interest law has been violated, it can impose a civil penalty of up to \$10,000 (\$25,000 for bribery cases) for each violation.** In addition, the Commission can order the violator to repay any economic advantage he gained by the violation, and to make restitution to injured third parties. Violations of the conflict of interest law can also be prosecuted criminally.
- Anyone performing services for a city or town or holding a municipal position, whether paid or unpaid, including full- and part-time municipal employees, elected officials, volunteers, and consultants, is a municipal employee under the conflict of interest law.

### ON-THE-JOB RESTRICTIONS

- **Bribes.** Asking for and taking bribes is prohibited. (See § 2.)
- **Gifts and gratuities.** Asking for or accepting a gift because of your official position, or because of something you can do or have done in your official position, is prohibited. (See §§ 3, 23[b][2], and 26.)

## Roles and Responsibilities of Planning and Zoning Boards

- **Misuse of position.** Using your official position to get something you are not entitled to, or to get someone else something they are not entitled to, is prohibited; causing someone else to do these things is also prohibited. (See § 23(b)(2) and § 26.)
- **Self-Dealing and Nepotism.** Participating as a municipal employee in a matter in which you, your immediate family, your business organization, or your future employer has a financial interest is prohibited. (See § 19.)
- **False Claims.** Presenting a false claim to your employer for a payment or benefit is prohibited, and causing someone else to do so is also prohibited. (See § 23(b)(4) and 26.)
- **Appearance of Conflict.** Acting in a manner that would make a reasonable person think you can be improperly influenced is prohibited. (See § 23(b)(3).)
- **Mishandling of Confidential Information.** Improperly disclosing or personally using confidential information obtained through your job is prohibited. (See § 23(c).)

### AFTER-HOURS RESTRICTIONS

- **Second Job.** Taking a second job that conflicts with duties of municipal job
- **Divided Loyalties.** Receiving pay from anyone other than the city or town to work on a matter involving the city or town is prohibited. Acting as agent or attorney for anyone other than the city or town in a matter involving the city or town is also prohibited whether or not you are paid. (See § 17.)
- **Inside Track.** Being paid by your city or town, directly or indirectly, under some second arrangement in addition to your job is prohibited, unless an exemption applies. (See § 20.)

### AFTER LEAVING MUNICIPAL EMPLOYMENT

- **Forever Ban.** After you leave your municipal job, you may never work for anyone other than the municipality on a matter that you worked on as a municipal employee.
- **One-Year Cooling Off Period.** For one year after you leave your municipal job you may not participate in any matter over which you had official responsibility during your last two years of public service.
- **Partners.** Your partners will be subject to restrictions while you serve as a municipal employee and after your municipal service ends.



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## Additional Resources

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## List of Statutes

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The following statutes were addressed in this module:

Zoning Act:	G.L. c.40A
Subdivision Control:	G.L. c. §§81K-81GG
Comprehensive Permits:	G.L. c. 40B, §§ 20-23
Master Plans:	G.L. c. 41, §81D
Mullin Rule:	G.L. c.39, §23D
Scenic Roads:	G.L. c. 40, § 15C
Shade Trees:	G.L. c. 87
Open Meeting Law:	G.L. c.30A, §§18-25; 940 CMR 29.00 <i>et seq.</i>
Public Records Law:	G.L. c. 4, §7(26)
Conflict of Interest Law:	G.L. c. 268A

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## Further Reading

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### OML/PRL/COI GUIDES

**Open Meeting Law Guide and Training:** [www.mass.gov/the-open-meeting-law](http://www.mass.gov/the-open-meeting-law)

**Public Records Law Guide:** [www.sec.state.ma.us/pre/prepdf/guide.pdf](http://www.sec.state.ma.us/pre/prepdf/guide.pdf)

**Conflict of Interest Law Guide and Training:** [www.mass.gov/orgs/state-ethics-commission](http://www.mass.gov/orgs/state-ethics-commission)

### SOURCES OF SUPPORT

**American Planning Association:** [www.planning.org](http://www.planning.org)

**American Planning Association-Massachusetts Chapter:** [www.APA-MA.org](http://www.APA-MA.org)

**Citizen Planner Training Collaborative:** [www.masscptc.org](http://www.masscptc.org)

**Department of Housing and Community Development:** [www.mass.gov/hed/economic/eohed/dhcd/](http://www.mass.gov/hed/economic/eohed/dhcd/)

**Massachusetts Association of Planning Directors:** [www.massplanning.org](http://www.massplanning.org)

**Massachusetts Housing Partnership:** [www.mhp.net](http://www.mhp.net)

**Mass Planners List Serve:** [https://masscptc.org/mailman/listinfo/massplanners\\_masscptc.org](https://masscptc.org/mailman/listinfo/massplanners_masscptc.org)

**Planetizen:** [www.planetizen.com](http://www.planetizen.com)

#### **Massachusetts Regional Planning Agencies:**

**Berkshire Regional Planning Commission:** [www.berkshireplanning.org](http://www.berkshireplanning.org)

**Boston Region Metropolitan Planning Organization:** [www.bostonmpo.org](http://www.bostonmpo.org)

**Cape Cod Commission:** [www.capecodcommission.org](http://www.capecodcommission.org)

**Central Massachusetts Regional Planning Commission:** [www.cmrpc.org](http://www.cmrpc.org)

**Franklin Regional Council of Governments:** [www.frcog.org](http://www.frcog.org)

**Martha's Vineyard Commission:** [www.mvcommission.org](http://www.mvcommission.org)

**Merrimack Valley Planning Commission:** [www.mvpc.org](http://www.mvpc.org)

**Metropolitan Area Planning Council:** [www.mapc.org](http://www.mapc.org)

**Montachusett Regional Planning Commission:** [www.mrpc.org](http://www.mrpc.org)

**Nantucket Planning and Economic Development Commission:**  
[www.nantucket-ma.gov/departments/npedc/npedc.html](http://www.nantucket-ma.gov/departments/npedc/npedc.html)

**Northern Middlesex Council of Governments:** [www.nmcog.org](http://www.nmcog.org)

**Pioneer Valley Planning Commission:** [www.pvpc.org](http://www.pvpc.org)

**Old Colony Planning Council:** [www.ocpcrpa.org](http://www.ocpcrpa.org)

**Southeastern Regional Planning and Economic Development District:** [www.srpedd.org](http://www.srpedd.org)

## Roles and Responsibilities of Planning and Zoning Boards



# Special Permits and Variances

Prepared for the  
Citizen Planner  
Training Collaborative

## **MODULE 3**

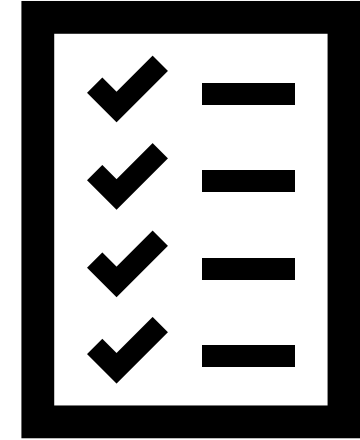
# Special Permits and Variances

## Introduction

# Introduction COURSE OBJECTIVES

By the end of this course, you will be able to answer the following:

- What is a special permit?
- What is a variance?
- Who has authority to grant special permits? Variances?

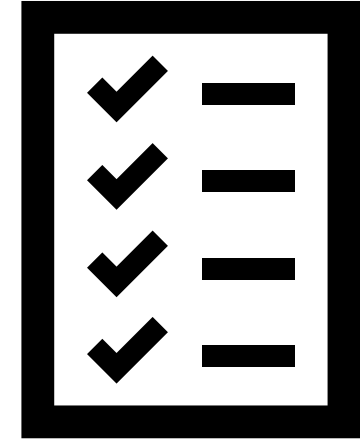


*What should you  
be leaving the  
room with today?*

# Introduction

## COURSE OBJECTIVES

- How do special permits and variances differ?
- What are the procedural requirements for special permits and variances?
- How do judicial decisions guide the way we work with special permits and variances?



*What should you  
be leaving the  
room with today?*



# Introduction OVERVIEW

## What is a . . . ?

### *Special Permit?*

---

An approval for a use that may be allowed at the discretion of the municipal board or other authority with power to grant it under the zoning ordinance or bylaw.

### *Variance?*

---

A request for loosening dimensional or, if authorized by bylaw or ordinance, use requirements of a zoning ordinance or bylaw.

# Introduction OVERVIEW

## Granting Authority

### *Special Permit*

Per G.L. c. 40A, §1A, the Special Permit Granting Authority (SPGA) may consist of:

- Planning Board
- Zoning Board of Appeals (ZBA)
- Zoning Administrator
- Select Board/Town Council (town)
- City Council (city)



### *Variance*

- Only the ZBA can grant variances.
- G.L. c. 40A, §10 lays out procedures for administration of variances.

# Introduction OVERVIEW

## Key Differences

### Key Differences

#### *Special Permit*

- Can authorize conditionally allowed uses after ***the benefit or detriment*** of a proposal has been weighed.
- Criteria for issuing special permits “are less stringent than those . . . for a variance.” (*Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 153 [1976]).



#### *Variance*

- Can authorize an ***otherwise prohibited*** use or vary dimensional requirements that normally apply to land or structures.
- Should be issued sparingly, and only if all statutory prerequisites have been met.

# Introduction OVERVIEW

*Statutory History*

## Special Permits: Statutory Updates

### 2016 Amendments:

- New zoning does not apply to a special permit issued before advertisement of the zoning amendment if the use or construction is begun **within 12 months** after issuance of the permit and unless construction is continued through to completion. (G.L. c. 40A, §6, ¶1; previously six months.)
- Generally, a special permit lapses if not exercised after **three years**. (G.L. c. 40A, §9, ¶14; previously two years.)

# Introduction OVERVIEW

*Statutory History*

## Variances: Statutory History

- The Massachusetts Legislature authorized the granting of variances in 1924 as part of the original Zoning Enabling Act.
- The statutory language and requirements for variances was revised in 1933, 1954 and 1958.
- The most recent revision occurred in 1975.

# Introduction OVERVIEW

*Judicial Decisions*

## Special Permits: Select Judicial Decisions

### Building Permits

- *LaCharite v. Board of Appeals of Lawrence*, 327 Mass. 417, 422 (1951):

A special permit is not to be confused with a building permit. Applicants still must obtain a building permit after special permit is granted if building is contemplated.



# Introduction OVERVIEW

*Judicial Decisions*

## Special Permits: Select Judicial Decisions

### Dimensional special permits

- *Woods v. Newton*, 351 Mass. 98, 102-103 (1966)
- *Emond v. Board of Appeals of Uxbridge*, 27 Mass. App. Ct. 630, 632-636 (1989)



Where locally authorized, a special permit may be used to vary dimensional requirements set forth in a bylaw or ordinance, eliminating the need to demonstrate hardship under the variance procedure.

# Introduction OVERVIEW

*Judicial Decisions*

## Variances: Select Judicial Decisions

**Variances are to be issued sparingly and are not guaranteed.**

- *Damaskos v. Board of Appeal of Boston*, 359 Mass. 55, 61 (1971): “No person has a legal right to a variance, and they are to be granted sparingly.”
- *Dion v. Board of Appeals of Waltham*, 344 Mass. 547 (1962): “Variances are to be granted sparingly. . . . [T]he burden rests upon the person seeking a variance and the board ordering a variance to produce evidence at the hearing . . . .”





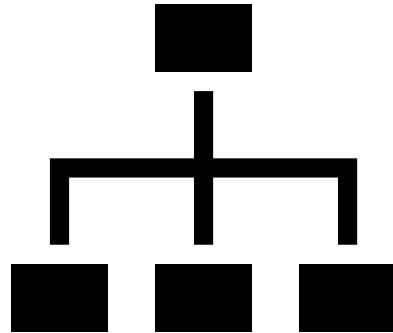
# Special Permits and Variances

## Classifications and Applicability

# Classifications and Applicability

## SPECIAL PERMITS: AUTHORIZED TYPES

### Special Permit Types Under Chapter 40A, Section 9

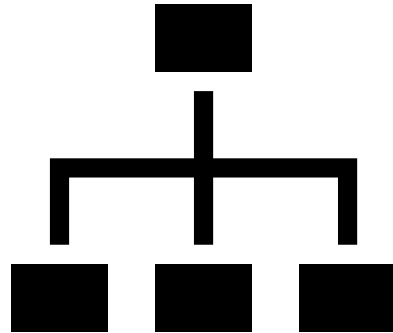


- Increases in density or intensity of use if the applicant provides open space, housing for people with low or moderate income, traffic or pedestrian improvements, solar energy systems, protection for solar access, or other amenities;

# Classifications and Applicability

## SPECIAL PERMITS: AUTHORIZED TYPES

### Special Permit Types Under Chapter 40A, Section 9

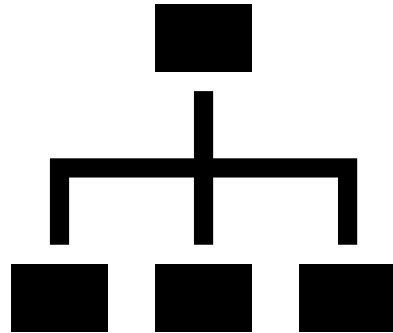


- Multi-family housing in a nonresidential district if
  - The public good would be served,
  - The multifamily use will not adversely affect the nonresidential district, and
  - Other uses permitted in the district will not be noxious to a multifamily use.

# Classifications and Applicability

## SPECIAL PERMITS: AUTHORIZED TYPES

### Special Permit Types Under Chapter 40A, Section 9

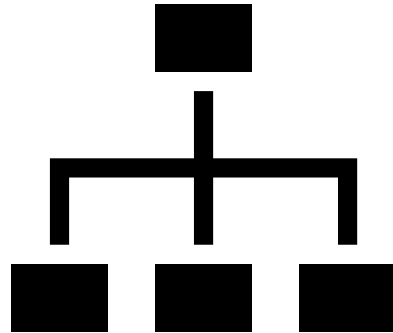


- Transfer of development rights (TDR) of land within or between districts.
  - Must include incentives such as increases in density, intensity of use, floor space, or lot coverage
  - Encourages TDR in a manner that protect open space, preserve farmland, promote housing for persons of low and moderate income or further other community interests

# Classifications and Applicability

## SPECIAL PERMITS: AUTHORIZED TYPES

### Special Permit Types Under Chapter 40A, Section 9

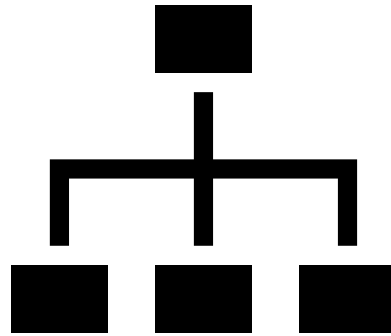


- Cluster developments
- Planned unit developments
- Shared elderly housing
- Activities that are necessary in connection with scientific research or scientific development

# Classifications and Applicability

## SPECIAL PERMITS: AUTHORIZED TYPES

### Other Types of Special Permits



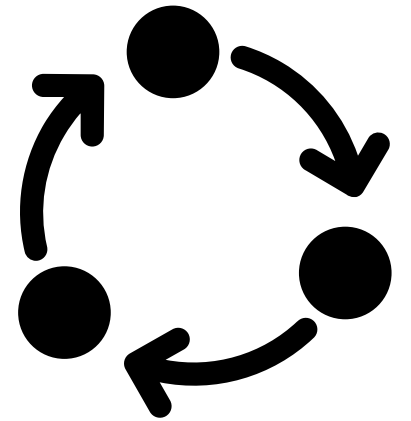
- **Chapter 40A, §9A:** adult bookstores, adult motion picture theatres, adult paraphernalia, adult video stores, or establishments which display live nudity.
- **Chapter 40A, §9B:** encourages use of solar energy systems through special permit regulation of the orientation of streets, lots and buildings, set back requirements, vegetation, and other provisions.

# Classifications and Applicability

## SPECIAL PERMITS: APPLICABILITY

### Adequate Standards

- Local ordinances or bylaws must state clear standards for the evaluation of special permit applications.
- The bylaw must “provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits. . . .”  
*(MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638 [1970])*

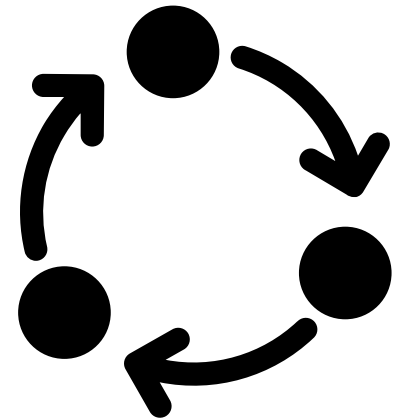


# Classifications and Applicability

## SPECIAL PERMITS: APPLICABILITY

### Specificity

- Section 9 limits the award of special permits to “specific types of uses which shall only be permitted in specified districts.”
- These uses and districts must be clearly spelled out in the ordinance or bylaw.
- Uses *not specifically authorized* do not qualify for a special permit even if they are similar to other uses mentioned in the zoning bylaw or ordinance.



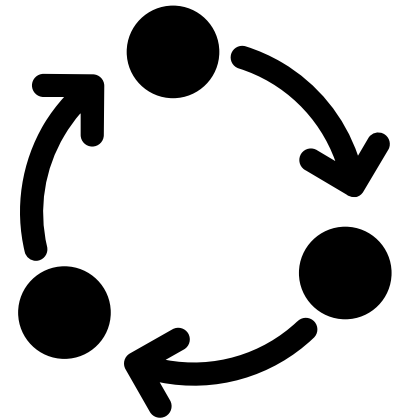


# Classifications and Applicability

## SPECIAL PERMITS: APPLICABILITY

### Uniformity/"SCIT Doctrine"

- Section 4 of the Zoning Act requires that "[any] ordinance or bylaw which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted."



# Classifications and Applicability

## VARIANCES: AUTHORIZED TYPES

### Dimensional Variances

- An action by the ZBA to vary or reduce the requirement of a zoning bylaw or ordinance relative to dimensional requirements, including:
  - Minimum setback requirements
  - Minimum lot frontage
  - Minimum lot area
  - Minimum lot width
  - Maximum building height, or
  - Maximum lot coverage ratios

# Classifications and Applicability

## VARIANCES: AUTHORIZED TYPES

### Use Variances

- An action by the ZBA to allow a use not otherwise allowed by the zoning ordinance or bylaw.
- **Use variances may be granted only when they are specifically authorized in the community's zoning ordinance or bylaw.**
- By granting a use variance, the ZBA allows a prohibited use in a given location, but the zoning designation of the land does not change.

# Classifications and Applicability

## VARIANCES: APPLICABILITY

### Variance Applicability

OVERVIEW - The ZBA must make ALL three findings below in order to grant a variance:

1. "Circumstances relating to the **soil conditions, shape, or topography** of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located . . . " AND
2. "A literal enforcement of the provisions of the ordinance or bylaw would involve **substantial hardship**, financial or otherwise, to the petitioner . . ." AND
3. "Desirable relief may be granted without substantial detriment to the **public good** and without nullifying or substantially derogating from the intent or purpose of such ordinance or bylaw."

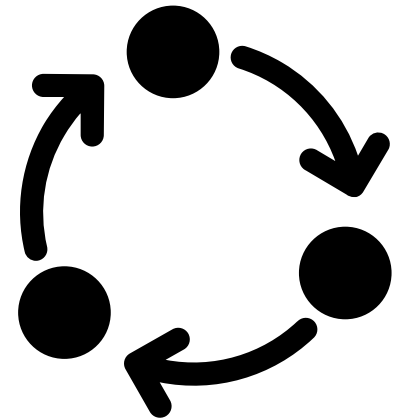
# Classifications and Applicability

## VARIANCES: APPLICABILITY

### Property Finding

“Owing to circumstances relating to the **soil conditions, shape, or topography** of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located . . .”

- **Soil conditions:** See *Wolfman v. Board of Appeals of Brookline*, 15 Mass. App. Ct. 112 (1983)
- **Shape:** See *Wolfson v. Sun Oil Company*, 357 Mass. 87 (1970)
- **Topography:** See *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972 (1985)



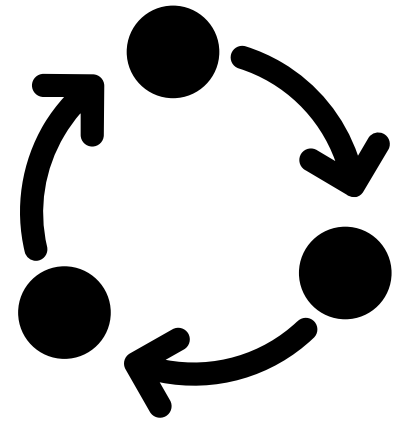
## Classifications and Applicability

### VARIANCES: APPLICABILITY

#### Hardship Finding

2. When an applicant demonstrates financial, physical, or other personal difficulties, the ZBA and the public may be sympathetic. However, sympathy alone is not an appropriate legal basis for granting a variance.

Massachusetts courts have held that the hardship “. . . must relate to the premises for which the variance was sought” (*Hurley v. Kolligian*, 333 Mass. 170, 173 [1955]).

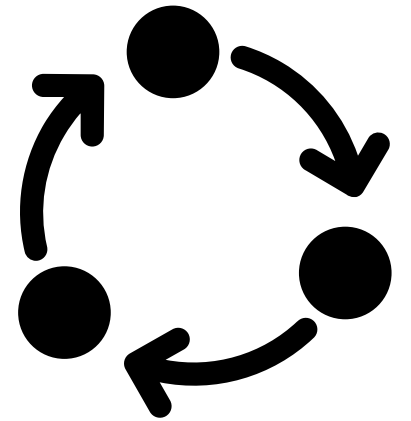


# Classifications and Applicability

## VARIANCES: APPLICABILITY

### Public Good Finding

3. The ZBA must conclude that the variance can be granted “without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or bylaw.”



# Special Permits and Variances

## Procedures



Procedures  
**SPECIAL PERMITS:  
THE FILING  
PROCESS**

## Steps for Filing a Special Permit Application

STEP  
ONE



Applicant files a special permit application with municipal clerk.

STEP  
TWO



Municipal clerk certifies date and time of filing.

STEP  
THREE



The special permit application, together with the certification of the municipal clerk, must be filed with the Special Permit Granting Authority (SPGA).

STEP  
FOUR



The SPGA may give notice of the application to other boards and agencies for review, at which point they have 35 days to respond.

Special permit applications may be withdrawn without prejudice prior to the publication of the public hearing notice.

## Procedures

### VARIANCES: THE FILING PROCESS

#### Steps for Filing a Variance Petition

STEP  
ONE



Applicant files variance petition or appeal with municipal clerk.

STEP  
TWO



Municipal clerk certifies date and time of filing.

STEP  
THREE



The variance petition or appeal, together with the certification of the municipal clerk, must be filed with the Zoning Board of Appeals (ZBA).

Variance petitions may be withdrawn without prejudice prior to the publication of the public hearing notice

# Procedures

## THE PUBLIC HEARING

### Public Hearing Overview

Public hearings:

- Are a statutory requirement for both special permits and variances.
- Provide a valuable opportunity for interested people to provide and listen to testimony relating to the matter before the board.



## Procedures THE PUBLIC HEARING

### Notice Requirements

Per G.L. c. 40A, §§ 11 and 15, a public hearing notice must be:



- Published in a newspaper circulated within the community at least twice in successive weeks, with the first notice published at least 14 days before the public hearing;



- Posted in the city or town hall for at least 14 days before the public hearing;



- Sent by the board to “parties in interest” even if they live in another community

# Procedures

## THE PUBLIC HEARING

### Contents of Notice

Required contents:

- ✓ Name of the applicant or appellant
- ✓ Description of the property or area
- ✓ Street address, if any, or other adequate identification of the location in question
- ✓ Date, time, and location of the public hearing
- ✓ Subject matter of the public hearing
- ✓ The nature of action or relief requested

# Procedures

## THE PUBLIC HEARING

### Party in Interest

The following parties in interest must be sent a postage prepaid notice of the public hearing:



- The petitioner
- Abutters
- Owners of land directly opposite on any public or private street/way
- Abutters to abutters within 300 feet of the applicant's property line or the property subject to enforcement action
- The planning board
- The planning board of abutting communities
- The owner of the property subject to enforcement action if not the applicant

## Procedures

### THE PUBLIC HEARING

## Notice Requirements

Other important notes about public hearing notification:

- The ZBA or SPGA can continue a public hearing and give public notice pursuant to the Open Meeting Law (G.L. c. 40A, §18) without having to send new notice by mail to parties in interest.
- **Boards must follow the Open Meeting Law!**

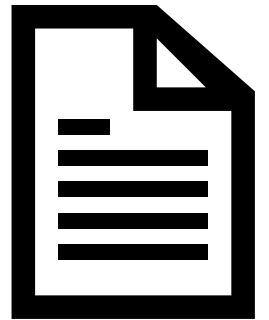


## Procedures THE PUBLIC HEARING

### Open Meeting Law

The Open Meeting Law states that the agenda must:

- ✓ Be posted at least 48 hours in advance, excluding Saturdays, Sundays and legal holidays;
- ✓ Contain the date, time, and place of the meeting; and
- ✓ Identify the matters about which a discussion or any actions can reasonably be anticipated by the chairperson.





# Procedures

## THE PUBLIC HEARING

*Conducting a Hearing*

### Prior to Hearing

- ✓ Properly publish the legal advertisement for the public hearing within the required timeframe.
- ✓ Mail the notice of public hearing to persons in interest.
- ✓ Check that the application file is complete and contains all submitted evidence.
- ✓ Provide board members with copies of the file documentation or give notice that the documentation is in the file and ready for review.

# Procedures

## THE PUBLIC HEARING

*Conducting a Hearing*

### Prior to Hearing

- ✓ Review the application and related material to ensure they are available for public inspection.
- ✓ Ensure that the date does not coincide with a state or municipal election, caucus, or primary held in the community, as this is prohibited by G.L. c. 40A, §11.
- ✓ Confirm that the facility at which the public hearing is taking place is appropriate in size and allows all members of the public to have appropriate access to view and hear the proceedings.

# Procedures THE PUBLIC HEARING

*Conducting a Hearing*

## Prior to Hearing

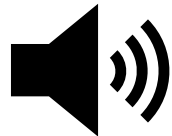
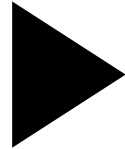
- ✓ Plan ahead if a large crowd is anticipated and set up additional overflow rooms with equipment that will allow attendees to view/hear the proceedings and ask questions.
- ✓ Ensure that the Board has the necessary quorum for taking evidence.
- ✓ Determine if the municipality has adopted the “Mullin Rule” in case any board members miss a session of the public hearing.

# Procedures

## THE PUBLIC HEARING

*Conducting a Hearing*

### The Mullin Rule: G.L. c. 39, § 23D



- Board members who missed one public hearing session may participate and vote if the municipality has adopted G.L. c. 39, § 23D.
- Board member must certify in writing (and file with municipal clerk) that they reviewed all evidence of missed session including:
  - 1) Videotape or audio recording of the missed session;
  - 2) Audio tape of the missed session; or
  - 3) Transcript for the missed session (minutes are not sufficient).

# Procedures THE PUBLIC HEARING

*Conducting a Hearing*

## Opening the Hearing

- ✓ Read or summarize the legal notice for the public hearing (at the start of each public hearing session on the application).
- ✓ Explain the board's meeting/hearing procedures to the public. People need to know:
  - (1) When it will be their turn to participate,
  - (2) How they should seek recognition from the chairperson before participating, and
  - (3) That written documentation will be accepted.

# Procedures

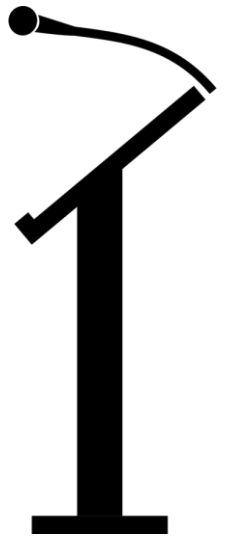
## THE PUBLIC HEARING

*Conducting a Hearing*

### Conducting the Hearing

While conducting a public hearing:

- ✓ Give the applicant a proper opportunity to present the application.
- ✓ Encourage board members to ask questions of the applicant.
- ✓ Encourage public participation in an orderly manner.
- ✓ Provide the public and the applicant a fair opportunity to be heard respectfully.



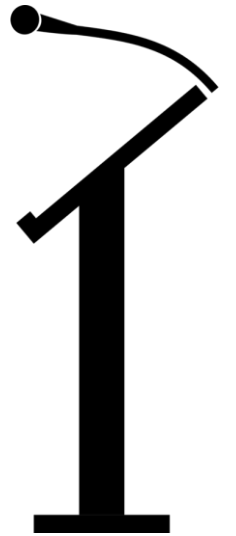
# Procedures

## THE PUBLIC HEARING

*Conducting a Hearing*

### Conducting the Hearing

- ✓ Consider placing reasonable time restrictions on presentations and testimony and make sure restrictions are applied fairly.
- ✓ Refrain from making jokes during the process.
- ✓ If an unexpectedly large crowd arrives and the facility cannot accommodate the crowd, the hearing should be immediately continued to a new date, time, and location.

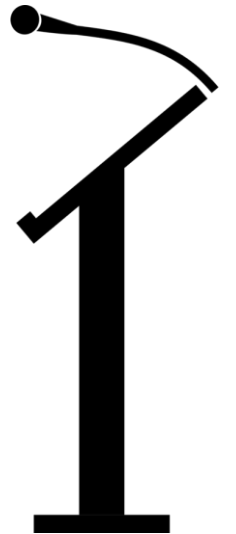


# Procedures THE PUBLIC HEARING

*Conducting a Hearing*

## Conducting the Hearing

- ✓ If possible, the board should have an audio tape or video of the proceedings.
- ✓ Make a clear record of the board's proceedings and attendance.
- ✓ Place all materials received during the public hearing process in the appropriate file.





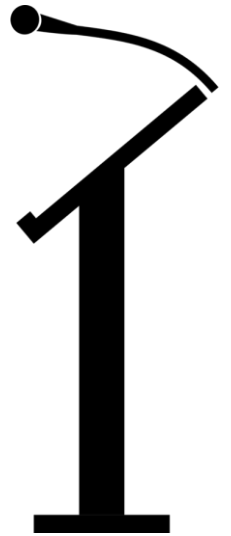
# Procedures

## THE PUBLIC HEARING

*Conducting a Hearing*

### Conducting the Hearing

- ✓ Note the presence and any absence by each board member in the file and in the minutes.
- ✓ Be sure to keep the board's minutes as up to date as possible. It is critically important that there be an accurate record of the motions made and votes taken by the board.



## Procedures THE PUBLIC HEARING

*Conducting a Hearing*

### Closing the Hearing

After all evidence has been presented and before the deadline for the public hearing has passed, the board should proceed with closing the public hearing.

Announce that a vote will be called to close the public hearing.



Ask whether anyone has any new information.



Have the chairperson announce which members will act on the decision.



Vote to close the public hearing. (Determined by majority vote.)

# Special Permits and Variances

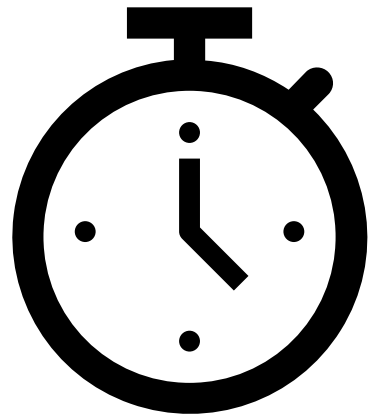
## The Final Decision

## The Final Decision TIMELINE

	Public Hearing	Notice	Final Action
Special Permits	65 days from application unless an agreed upon extension is filed.	Published at least 14 days before the public hearing.	Within 90 days of the close of the public hearing, unless an agreed upon extension is filed. Written decision must be filed within this timeframe.
Variances	65 days from petition/appeal unless an agreed upon extension is filed.	Published at least 14 days before the public hearing.	Within 100 days of receipt of petition, unless an agreed upon extension is filed, with 14 additional days to file.

# The Final Decision TIMELINE

## What is a constructive grant?



- When the board has failed to act in a timely manner, an application or petition may be approved through constructive grant following specific action taken by the petitioner.
- See G.L., c. 40A, §§9, 11 and 15 for detail.

## The Final Decision STEPS

*Review Findings of Fact*

### Findings of Fact

**Findings of fact should be determined by majority vote *before* the board votes to grant or deny requested relief (if applicable).**

- Review the local zoning criteria, statutory criteria, and all the evidence submitted during the public hearing.
- Poll each board member to determine whether each member took a view of the property and note this in the minutes.

## The Final Decision STEPS

*Review Findings of Fact*

### Findings of Fact

Vote to make findings of fact based on the following:

- The applicant (and, if different, the owner of the property and the permission granted)
- The property (address, zoning district, square footage, and frontage)
- The relief sought (if any) and the local provisions that apply



# The Final Decision STEPS

*Review Findings of Fact*

## Findings of Fact

- What board members were present during the public hearing sessions
- The dates of the public hearing sessions
- Local zoning criteria and the board's familiarity with local conditions
- Statutory criteria

**Refrain from simply reciting the applicable criteria; say *why* the criteria are satisfied.**





# The Final Decision STEPS

*Review Findings of Fact*

## Legal Conclusions

Make the required legal conclusions:

- Review the legal criteria (local and statutory) required in or order to grant any requested relief.
- Vote to make the required legal conclusions based on whether the required criteria have been satisfied, and why or why not.
- Consider creating a template with local zoning criteria and statutory criteria to make sure that they are carefully reviewed and considered.



## The Final Decision STEPS

*Reaching the Decision*

### Final Decision

After reviewing the findings and legal conclusions, vote **to grant, grant with conditions, or deny**.

- Special permit and any relief: requires supermajority vote of the SPGA (3/3, 4/5, or a two-thirds vote if more than five members) (or simple majority for certain kinds of housing and other related development).
- Variance: requires supermajority vote of the ZBA (3/3 or 4/5).



**Unless the municipality has adopted the “Mullin Rule,” only members who attended the public hearing may vote.**

# The Final Decision Steps

*Reaching the Decision*

## Statutory Updates

### **2020 Amendments:**

- Voting requirements updated to simple majority for special permits related to multifamily or mixed-use housing in eligible locations providing a minimum of 10% housing affordable to households making less than 80% AMI. (G.L. c. 40A, §9, previously 2/3 vote)

## The Final Decision STEPS

*Reaching the Decision*

### Relief Requested

- ✓ Address any and all relief the applicant has requested.
- ✓ Consider a catchall motion and vote that: "Any relief not expressly granted is hereby denied."
- ✓ If relief is requested under more than one section, e.g. multiple special permits triggered, Board should vote on each independently.

## The Final Decision STEPS

*Reaching the Decision*

### Conditional Approval

**If the board votes to grant with conditions,** any imposed decisions must:

- Be reasonable, clearly explained, and within the board's authority.
- Not require additional approval by another entity, or that another substantive issue must be resolved.

## The Final Decision STEPS

*Reaching the Decision*

### Special Permits: Conditional Approval

G.L. c. 40A §9: The board may “impose conditions, safeguards and limitations on time and use.” Examples:

- Deadlines on when to begin and finish phased construction
- Sewer connection and bond
- Hours of operation and police details during periods of heavy traffic

**Note: Unlike a variance, a special permit may be conditioned by limiting its duration to the term of ownership or use by the applicant.**

## The Final Decision STEPS

*Reaching the Decision*

### Variances: Conditional Approval

G.L. c. 40A §10: The board may “impose conditions, safeguards and limitations both of time and use.” Examples:

- Conditions and limitations on the use of the property (e.g. the property’s use can be limited to a specified square footage);
- Conditions that “extract” a public benefit necessitated by the grant of the variance (e.g. roadway improvements, stormwater drainage, exterior lighting);
- Limitations on the time period(s) within which the variance will be valid.

**Note: Unlike a special permit, a variance may not be conditioned by limiting its duration to the term of ownership or use by the applicant.**

## The Final Decision STEPS

*Writing the Decision*

### Writing the Decision

- **Write a clear decision that is based upon the facts and the law.** The decision should be written clear, simple, and concise language.
- Someone unfamiliar with the matter should be able to read the decision and:
  - Immediately be able to visualize the property;
  - Easily understand any relief (if applicable) that was requested in the application; and
  - Grasp the action the board took regarding each matter and its reasons for those actions.



## The Final Decision STEPS

*Writing the Decision*

### Writing the Decision

G.L. c. 40A, §11 requires that the written decision:

- Contains the name and address of the owner;
- Identifies the land affected;
- Sets forth compliance with the statutory requirements for the issuance of such a variance or permit; and
- Certifies that copies of the decision and all plans referred to in the decision have been filed with the planning board and municipal clerk.

## The Final Decision STEPS

*Filing the Decision*

### Filing the Decision



- The SPGA and ZBA are both required to make a detailed record of their proceedings, including the vote of each member and the reasons for its decision.
- **Special Permits:** SPGA must file its decision with the municipal clerk **within 14 days after the decision has been reached.**
- **Variances:** ZBA must file its decision with the municipal clerk **within 114 days from receipt of the petition.**

## The Final Decision STEPS

*Filing the Decision*

### Filing the Decision



- The board must mail notice of the decision to the petitioner, parties in interest, and every public hearing attendee who requested a notice.
- The notice must specify that any appeal must be made pursuant to G.L. c. 40A, § 17, and filed within 20 days after the date the decision was filed with the city or town clerk.

## The Final Decision STEPS

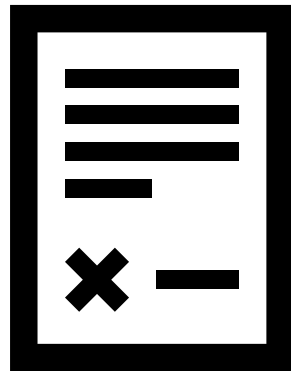
### Filing the Decision



- The board must provide a certified copy of its decision to the applicant and property owner.
- The decision must identify the owner's name, address, and land affected, specify compliance with statutory requirements, and certify that copies of the decision have been filed with the Planning Board and the municipal clerk.
- The city or town clerk must certify that 20 days have elapsed after the decision has been filed, and either that no appeal has been filed or that it has been filed within such time.

## The Final Decision STEPS

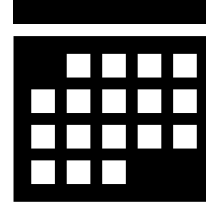
### Effective Date



- No special permit or variance (or extension or modification) takes effect until recorded in the registry of deeds or filed and noted on the certificate of title.
- The applicant or owner is responsible for the resulting cost.
- A special permit may be exercised during an appeal; however, the exercise will be “at risk” of a successful appeal.

## The Final Decision STEPS

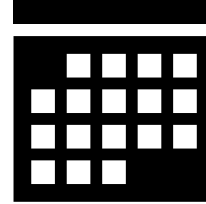
### Lapse of Decision



- A **special permit** will lapse if not exercised within three years (or a shorter time as provided for under local zoning or in the special permit), except for “good cause.”
- A **variance** will lapse if not exercised in one year.
- The life of the special permit or variance includes the time required to pursue or await determination of an appeal.

## The Final Decision STEPS

### Extension of Permit



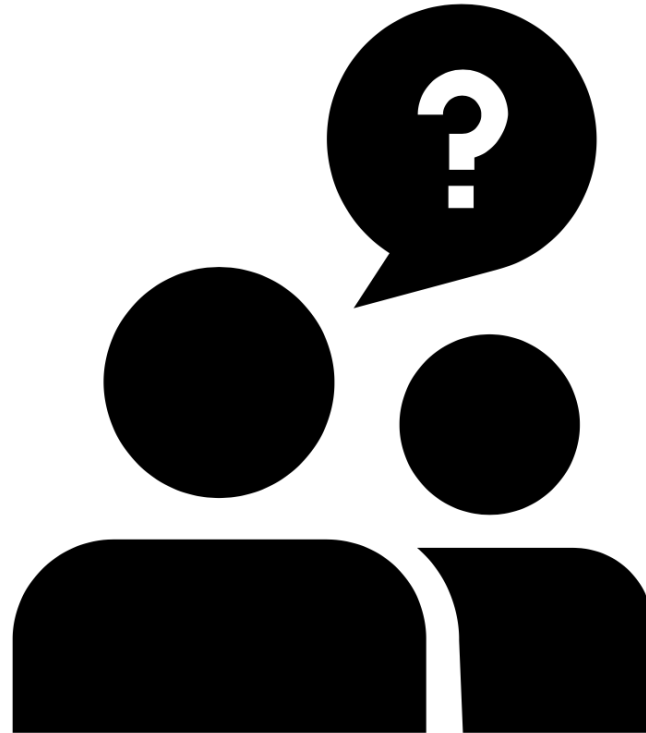
- A **special permit** expires, unless used, within 3 years. It cannot be “extended” prior to expiration, or “renewed” subsequent to expiration without going through the entire special permit process again.
- A **variance** permit may be extended for a period not to exceed 6 months, if the request for extension is filed prior to the one-year expiration of the permit.

# Special Permits and Variances

Wrap-Up



Questions?



## Additional Resources STATUTES

### Referenced Statutes

Statutes referenced in this module include but are not limited to:

Zoning Act:	G.L. c.40A
Special Permits:	G.L. c.40A, §9
Variances:	G.L. c.40A, §10
Hearing notice, recording decisions, etc.:	G.L. c. 40A, §11
Mullin Rule:	G.L. c.39, §23D
Open Meeting Law:	G.L. c.30A, §§18-25; 940 CMR 29.00 <i>et seq.</i>

## Additional Resources STATUTES

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Mullin Rule:	G.L. c.39, §23D
Open Meeting Law:	G.L. c.30A, §§18-25; 940 CMR 29.00 <i>et seq.</i>

Additional  
Resources

**FURTHER SUPPORT**

**Citizen Planner Training Collaborative**

[www.masscptc.org](http://www.masscptc.org)

**Executive Office of Housing and Livable Communities**

[www.mass.gov/eohlc/](http://www.mass.gov/eohlc/)

**Mass Planners List Serve**

[https://masscptc.org/mailman/listinfo/massplanners\\_masscptc.org](https://masscptc.org/mailman/listinfo/massplanners_masscptc.org)

**American Planning Association-Massachusetts Chapter**

[www.APA-MA.org](http://www.APA-MA.org)

**Mass. Association of Planning Professionals**

[www.massplanning.org](http://www.massplanning.org)



[www.masscptc.org](http://www.masscptc.org)

Thank you!

# CPTC Guidebook

## SPECIAL PERMITS AND VARIANCES

### Module 3



Citizen Planner Training Collaborative  
Planning and Land Use Training Modules

Module 1. Roles and Responsibilities of Planning and Zoning Boards

Module 2. Introduction to the Zoning Act

Module 3. Special Permits and Variances

Module 4. Introduction to Subdivision Control and ANR

Module 5. Reading a Subdivision Plan

Module 6. Site Plan Review

Module 7. Vested Rights and Nonconforming Uses and Structures

Module 8. Zoning Exemptions

Module 9. Fair, Defensible Land Use Decisions

Module 10. Creating Master Plans

Module 11. Planning with Community Support

Module 12. Adopting and Revising Rules and Regulations

Module 13. Design Review

Module 14. Drafting Zoning Amendments

Module 15. Fair Housing Laws

Module 16. Zoning with Overlay Districts

Curriculum content last revised May 25, 2023 by the Citizen Planner Training Collaborative, the team of Barrett Planning Group LLC, Freeman Law Group LLC, and Horsley Witten Group, and Attorney Adam Costa. The following people contributed to Module 3, Special Permits and Variances: Judi Barrett and Alexis Lanzillotta, Barrett Planning Group, and Nathan Kelly AICP and Jeff Davis AICP, Horsley Witten Group with 2022 updates by Pamela J. Brown, Esq. FAICP, Brown & Brown, PC. This module also includes material from previous modules prepared by Barbara J. Saint André, Esq. Jonathon Witten, Esq., and Donald Schmidt (formerly with DHCD).

## Table of Contents

INTRODUCTION .....	1
Mission Statement .....	3
Course Objective .....	4
Overview.....	5
CLASSIFICATIONS AND APPLICABILITY .....	10
Types of Special Permits & Variances.....	12
Applicability .....	14
PROCEDURES .....	20
The Filing Process .....	22
The Public Hearing.....	23
THE FINAL DECISION .....	30
Timeline.....	32
Steps to Making a Final Decision .....	34
ADDITIONAL RESOURCES .....	40
List of Statutes .....	42
Further Support.....	43



## Special Permits and Variances

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## Introduction

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## Special Permits and Variances

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## Mission Statement

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The Citizen Planner Training Collaborative's mission is to:

- Empower local land use officials, particularly planning and zoning board members, to make effective and judicious decisions;
- Provide educational opportunities to such officials;
- Provide access to information, tools and resources to assist them in doing their work; and
- Encourage cooperation and collaboration among land use boards.

The CPTC provides training workshops around the state in the fall; an annual spring conference in Worcester; internet access to training modules, best practices, sample bylaws and regulations; and links to a variety of planning resources.

CTPC is itself a collaboration, combining the resources and expertise of the University of Massachusetts Extension, the Massachusetts Department of Housing & Community Development, the Massachusetts Chapter of the American Planning Association, the Massachusetts Association of Planning Directors, the Massachusetts Association of Regional Planning Agencies, and Mass Audubon.

**[www.masscptc.org](http://www.masscptc.org)**

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## Course Objective

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By the end of this course, you will be able to answer the following:

- What is a special permit?
- What is a variance?
- Who has authority to grant special permits? Variances?
- How do special permits and variances differ?
- What are the procedural requirements for special permits and variances?
- How do judicial decisions guide the way we work with special permits and variances?

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## Overview

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In this course, we will review the definitions of, differences between, and procedural requirements for special permits and variances. You will also find key judicial decisions explained throughout this handout.

### WHAT IS A SPECIAL PERMIT?

A special permit is an approval for a use that may be allowed at the discretion of the city or town board or other authority with power to grant it under the zoning ordinance or bylaw. **G.L. c. 40A, §§9, 9A, 9B, and 9C** establish procedures for administering special permits and provide for a host of specific uses which they regulate. G.L. c. 40A, §9 states, in part, that:

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

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

Special permit procedures . . . [provide] for specific uses which are deemed necessary or desirable but which are not allowed as of right because of their potential for incompatibility with the characteristics of the district. . . . Uses most commonly subjected to special permit requirements are those regarded as troublesome (but often needed somewhere in the municipality, for example, gasoline service stations, parking lots, and automobile repair garages) . . . and uses often considered desirable but which would be incompatible in a particular district unless conditioned in a manner which makes them suitable to a given location. . . .

Essentially, the special permit regulates the middle tier of uses between those that are outright prohibited and those allowed as of right. It recognizes that a use may be appropriate in a given district but not necessarily everywhere in the district.

Under G.L. c. 40A, §1A, the power to grant a special permit can be assigned to a Planning Board, Zoning Board of Appeals (ZBA), Zoning Administrator, or the Select Board in a town or the City Council in a city. The municipality gets to decide, but the choices are limited to the officials included in the definition of “special permit granting authority” in the Zoning Act. Sometimes communities have more

than one special permit granting authority, such as a special permit for a shopping center falling under the Planning Board's jurisdiction and while the ZBA handles the special permit for a cell tower.

### WHAT IS A VARIANCE?

The most common request for a variance involves loosening the dimensional requirements that lots and structures have to meet in order to comply with the zoning ordinance or bylaw. Sometimes people ask for a variance to allow a use that is otherwise prohibited (more on this below). Only the ZBA has the power to grant variances. **G.L. c. 40A, §10** establishes procedures for the administration of variances.

### HOW DO SPECIAL PERMITS AND VARIANCES DIFFER?

Early special permit decisions of the Supreme Judicial Court point out some key differences between a variance and a special permit. The variance (a) can authorize an otherwise prohibited use or to loosen dimensional requirements that normally apply to structures, and (b) should be issued sparingly, and only if *all* of the statutory prerequisites have been met. Special permits can authorize conditionally allowed uses after weighing the benefit or detriment of a specific proposal. The criteria for issuing a special permit “are less stringent than those involved in the application for a variance” (*Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 153 [1976]). Special permits are also used to permit a modification, change or alteration to a non-conforming use or structure (this is the subject of another CPTC module).

### STATUTORY HISTORY

The legislative history of special permits and variances in Massachusetts is connected to the 1926 Standard State Zoning Enabling Act, drafted by Herbert Hoover when he served as U.S. Secretary of Commerce. The Standard Act was eventually codified in one form or another by all fifty states. Massachusetts adopted significant updates through The Zoning Enabling Act (Chapters 368 and 551 of the Acts of 1954), and The Zoning Act (Chapter 808 of the Acts of 1975).

#### Special Permits:

The Zoning Act was amended by Chapter 219, Sec. 29 and 30, of the Acts of 2016:

- Per G.L. c. 40A, §6, ¶1, a special permit that is issued before a zoning amendment is advertised need not conform to the new zoning if it is adopted as long as the use or construction is begun within a period of not more than 12 months after issuance of the permit and, in cases involving construction, unless construction is continued through to completion as continuously and expeditiously as is reasonable. (Previously, the limit was six months instead of twelve.)
- Generally, a special permit lapses if not exercised after three years (G.L. c. 40A, §9, ¶14). (Previously, the deadline for exercising a special permit was two years.)

## Special Permits and Variances

More recent changes were made by Chapter 358 of the Acts of 2020:

- Per G.L. c. 40A, §5 now includes a reduction in the number of votes required to enact certain housing related zoning bylaws from a supermajority to a simple majority
- Per G.L. c. 40A, §9 concerning the voting thresholds for the issuance of certain kinds of special permits including (a) multifamily housing located within ½ mile of a commuter rail station, ferry terminal or bus station and b) mixed use development in “eligible locations” (village, town, city centers, other commercial districts) provided in either case at least 10% of the housing shall be affordable to and occupied by households whose annual income is less than 80% of AMI determined by HUD.
- Guidance provided by the Executive Office of Housing and Economic Development (EOHED) helps to clarify questions communities have related to the applicability of statutory changes.

### Variances:

The Massachusetts Legislature authorized the granting of variances in 1924 as part of the original Zoning Enabling Act. The statutory language and requirements for variances was revised several times (in 1933, 1954 and 1958). The most recent revision occurred in 1975.



### JUDICIAL DECISIONS

#### ON SPECIAL PERMIT AND VARIANCE DEFINITIONS

##### SPECIAL PERMITS

**Special permits and building permits:** A special permit is not to be confused with a building permit, although pursuance and issuance of the latter may follow the former. In *LaCharite v. Board of Appeals of Lawrence*, 327 Mass. 417, 422 (1951), the court noted that “a permit to build is entirely different in kind from the special permit. One is issued by the building inspector and the other is authorized by decision of the board only after many formalities [detailed in G.L. c. 40A, §9] have been complied with.” After the issuance of a special permit, the successful applicant must *then* obtain a building permit if construction is contemplated.

**Special permits and site plan review:** Special permits in some respects resemble the process known as site plan review; indeed, some uses require approval under both devices. There is, however, one key difference: per *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970), the site plan review board’s powers are limited to “regulation of a use rather than its prohibition,” whereas a special permit granting authority has the full range of discretion in assessing an application, *including* the right to deny the permit. See Module 6 for more information on site plan review.

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

##### VARIANCES

Per *Damaskos v. Board of Appeal of Boston*, 359 Mass. 55, 61 (1971), “No person has a legal right to a variance and they are to be granted sparingly.”

Similarly, in *Dion v. Board of Appeals of Waltham*, 344 Mass. 547 (1962), the Supreme Judicial Court wrote, “Variances are to be granted sparingly and granting them has been surrounded by many statutory safeguards. . . . The legislative policy of avoiding variances, except upon a clear showing that the prerequisites have been satisfied, the circumstance that no evidentiary weight may be given to the board’s findings. . . . and the provisions for a new hearing, viewed together, show that the burden rests upon the person seeking a variance and the board ordering a variance to produce evidence at the hearing . . . that the statutory prerequisites have been met and the variance justified” (p. 555-6).

## Special Permits and Variances

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## Classifications and Applicability

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## Special Permits and Variances

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## Types of Special Permits & Variances

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### SPECIAL PERMITS

**Chapter 40A, §9** provides for specific uses that may be authorized by special permit, including:

- Increases in the density or intensity of use in a proposed development if the applicant provides open space, housing for people with low or moderate income, traffic or pedestrian improvements, solar energy systems, protection for solar access, or other amenities;
- Multi-family housing in a nonresidential district if the public good would be served, if the special permit granting authority finds that the multifamily use will not adversely affect the nonresidential district, and if other uses permitted in the district will not be noxious to a multifamily use;
- Transfer of development rights (TDR) of land within or between districts. TDR zoning must include incentives such as increases in density, intensity of use, floor space, or lot coverage that encourage the transfer of development rights in a manner that protect open space, preserve farmland, promote housing for persons of low and moderate income or further other community interests;
- Cluster developments;
- Planned unit developments;
- Shared elderly housing;
- Activities necessary in connection with scientific research or scientific development.

In addition:

**Chapter 40A, §9A** allows cities and towns to require a special permit for adult bookstores, adult motion picture theatres, adult paraphernalia, adult video stores, or establishments which display live nudity.

**Chapter 40A, §9B** encourages the use of solar energy systems and protects solar access through special permit regulation of the orientation of streets, lots and buildings, maximum building height limits, minimum building set back requirements, limitations on the type, height and placement of vegetation, and other provisions.

## VARIANCES

**Dimensional variances:** A typical variance, often referred to as a dimensional variance, is generally an action by the ZBA to vary or reduce the requirement of a zoning bylaw or ordinance relative to dimensional requirements. These include variations to minimum setback requirements, minimum lot frontage, minimum lot area, minimum lot width, maximum building height, or maximum lot coverage ratios. The dimensional variance is specifically authorized in the Zoning Act. It is a good example of a “shall,” i.e., where the Zoning Act says the “. . . permit granting authority **shall** have the power after public hearing . . . to grant upon appeal or upon petition with respect to particular land or structures a variance from the terms of the applicable zoning ordinance or by-law ...” Communities cannot deny the ZBA the power to grant dimensional variances or impose decision criteria or standards on the ZBA above and beyond those listed in G.L. c. 40A, § 10.

**Use variances:** This refers to an action by the ZBA to allow a use not otherwise allowed by the zoning ordinance or bylaw (e.g., a request to allow a commercial use on residentially zoned property where the zoning ordinance prohibits commercial activities). *Use variances may be granted **only** when they are specifically authorized in the community’s zoning ordinance or bylaw.* In addition, the ZBA must make the three findings outlined in the next section. By granting a use variance, the ZBA allows a prohibited use in a given location, but the zoning designation of the land does not change.

Perhaps the most compelling argument against a use variance is that granting one will likely conflict with the community’s comprehensive plan or master plan. A second problem is that use variances circumvent the statutory procedure for changing zoning (G.L. c. 40A, §). The adoption of new zoning (or amending an existing bylaw or ordinance) involves complying with some *critical* procedural requirements, including notice, advertisements, public hearings, reports and, finally, a two-thirds vote of the legislative body. Moreover, in towns, zoning bylaws must undergo review by the Attorney General’s office after town meeting has acted. As a result, the zoning adoption and amendment process is considered thorough and procedurally fair.

By contrast, a use variance is granted by a three- or five-member ZBA following the procedural requirements specified in G.L. c. 40A, §10. Neither legislative action nor Attorney General review is required. The intentionally deliberative process for changing zoning is absent in the variance process and especially noticeable when the variance granted is a use variance.

# Applicability

## SPECIAL PERMITS

Case law has established several prerequisites for the exercise of special permit powers. Local ordinances or bylaws must comply with each prerequisite or run the risk that the courts will invalidate the special permit.

### JUDICIAL DECISIONS

#### ON ADEQUATE LOCAL STANDARDS

By and large, the courts have been generous in reviewing local standards for evaluating special permit applications. For example:

In *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 118 (1955), the court upheld an ordinance instructing the special permit granting authority to consider only “the effects upon the neighborhood and the City at large” as adequate.

In *Simeone Stone Corp. v. Oliva*, 350 Mass. 31 (1965), the subjective terms “obnoxious . . . to the neighborhood” and “detrimental effect upon . . . adjoining properties” were upheld as sufficiently clear.

In *Sellors v. Concord*, 329 Mass. 259 (1952) the court ruled that the standards requiring that “such use not [be] detrimental or injurious to the neighborhood” and that “due consideration shall be given to conserving the public health, safety, convenience, welfare, and property values” were satisfactory.

On the other hand, several decisions following *Smith v. Board of Appeals of Fall River*, 319 Mass. 341 (1946) have held that poorly worded or overly broad standards cannot stand. See, for example, *Clark v. Board of Appeals of Newbury*, 348 Mass. 407 (1965).

**1. Adequate Standards:** Local ordinances or bylaws must state the standards for the evaluation of special permit applications. The bylaw must “provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits . . . . The standards need not be of such a detailed nature that they eliminate entirely the element of discretion from the board's decision” (*MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638 [1970]).

**2. Specificity Requirement:** Section 9 limits the award of special permits to “specific types of uses which shall only be permitted in specified districts.” These uses and districts must be clearly spelled out in the ordinance or bylaw.

In *Gage v. Egremont*, 409 Mass. 345, 349 (1991), the Supreme Judicial Court held invalid the town's bylaw authorizing by special permit “any . . . use determined by the planning board . . . not offensive or detrimental to the neighborhood.” The court reasoned that this generic approach violated the charge of the statute to be specific.

Similarly, uses not specifically authorized do not qualify for a special permit even if they happen to be similar to other uses the zoning bylaw or ordinance does mention. “It is not enough that a use for which a special permit is sought be ‘consistent’ or ‘compatible’ with a specific use for which the bylaw states such a permit may be granted.” (See *Board of Appeals of Webster v. Z & K Enterprises, Inc.*, 1

Mass. App. Ct. 845 [1973], in which the court upheld the denial of a special permit for a mobile home park because the bylaw only allowed a “hotel or tourist court”). **Simply put, only those uses actually spelled out are eligible for consideration.**

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

### 3. Uniformity Requirement/“SKIT Doctrine”:

Section 4 of the Zoning Act requires, in part, that “[any] ordinance or bylaw which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.”

Nonetheless, as noted above, in *SCIT, Inc. v. Planning Board of Braintree*, the Appeals Court ruled that chapter 40A, §4 “does not contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated.” In *Gage v. Egremont*, 409 Mass. 345, 348 (1991), the Supreme Judicial Court limited *SCIT* to the proposition that not all uses in a district could be placed on special permit. “[A] zoning bylaw must permit at least one use in each zoning district as a matter of right.” *SCIT* and *Gage*, taken together, mean that towns may not limit all uses in a district to the grant of a special permit; at least one use must be allowed as of right. However, communities need to avoid the temptation to leave only uses such as these available as of right:

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

### JUDICIAL DECISIONS

#### ON THE SPECIFICITY OF LOCALLY REGULATED USES

The courts have frequently been called upon to decide whether a proposed use “fits” within a specific category of use allowed by special permit. Some examples:

*In Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147 (1976), the court agreed with the ZBA’s determined that a nonprofit indoor tennis facility fit under the umbrella of “clubs not conducted for profit” in a residentially zoned area.

The court determined in *Dowd v. Board of Appeals of Dover*, 5 Mass. App. Ct. 148 (1977) that an as-of-right allowance for a farm or garden did not carry over to a nursery used in conjunction with a business, despite a previous ruling stating that “farm” was broad enough to include greenhouses.



## VARIANCES

Chapter 40A, Section 10 requires that the grant of a variance be made only where the ZBA finds that **all three** of the following “required findings” have been reached in the affirmative:

1. “owing to circumstances relating to the **soil conditions, shape, or topography** of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located”
2. “a literal enforcement of the provisions of the ordinance or bylaw would involve **substantial hardship**, financial or otherwise, to the petitioner . . .”
3. “desirable relief may be granted without substantial detriment to the **public good** and without nullifying or substantially derogating from the intent or purpose of such ordinance or bylaw.”

**The ZBA must make all of the following findings in order to grant a variance!**

### **Finding No.1 — Peculiarities in Soil Conditions, Shape, or Topography:**

- In *Wolfman v. Board of Appeals of Brookline*, 15 Mass. App. Ct. 112 (1983), the Appeals Court upheld a lower court decision supporting the grant of a variance where the parcel “contains an irregular pattern of subsurface **soil conditions** and materials at varying levels of elevation and a relatively high water table. . . . these soil conditions ‘show the locus to be unique as compared to other lots along Beacon Street. . . .’”
- The statute also allows a finding related to a **unique shape** of the parcel. Although there are many relevant cases where applicants sought to establish a unique parcel shape to justify a variance, a particularly compelling one (*Wolfson v. Sun Oil Company*, 357 Mass. 87 [1970]) involved the request by a gasoline station to expand its operation by constructing service bays. Years earlier the city revised its zoning ordinance, placing the property into three zoning districts. The proposed service bay construction could not comply with the rear and side yard setback requirements of one of the new zoning districts, so the owner applied for and was granted a dimensional variance. On appeal, a lower court upheld the variance: “[B]ecause of the size and irregular shape of the locus, and more particularly because of the re-zoning in 1964 which divided it into three separate zones, the locus was unique.” However, on further appeal, the Supreme Judicial Court reversed: “The special circumstances found by the judge and the board is based on the premise that the size and irregular shape of the locus, together with its

division into three separate zones, would result in violations of the code if any additional construction was attempted. Sunoco's desire to change the operation of the gasoline station after purchasing the locus 'with a zoning law limitation on its use cannot be made a fulcrum to lift those limitations. . . . In the instant case there was no 'substantial hardship'. . . . [E]ven if the variance is not granted, Sunoco can continue to make reasonable use of the locus as a gasoline station."

- Cases that have been decided on **topographical constraints** follow the same pattern as those discussed previously. Simply avoiding added costs or reducing difficulties associated with development of property with difficult topography does not provide legal justification for a variance. In *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972 (1985) (rescript), the Appeals Court overturned a variance for the construction of a garage that otherwise violated a front yard setback. One of the justifications for the grant of the variance, claimed the applicant, was that the variance allowed construction of the garage without removal of large oak trees. Similar to petitions requesting a variance to achieve a better view or reduce the amount of cuts and fills on a steep sloped lot, the court held that these factors do not rise justify a variance.

### JUDICIAL DECISIONS

#### ON THE REQUIREMENTS FOR A GRANT OF VARIANCE

##### ALL REQUIREMENTS MET

All three required findings must be met in order for a variance to be granted:

"Since the requirements for the grant of a variance are conjunctive, not disjunctive, a failure to establish any one of them is fatal" (*Guiragossian v. Board of Appeals of Watertown*, 21 Mass. App. Ct. 111, 115 [1986]).

"Each requirement of the statute must be satisfied before a variance may be granted" (*Wolfson v. Sun Oil Company*, 357 Mass. 87 [1970]).

##### ANALYSIS OF FINDINGS

In addition, the courts have reminded ZBA's that their conclusions must be in the form of analyses that support the findings set forth in the variance decision; simply copying the statutory findings language is insufficient.

Per *Wolfson v. Sun Oil Co.*, 357 Mass. 87, 89 (1970), "The specific findings necessary to satisfy the requirements for granting a variance are not met by a 'mere repetition of the statutory words.'"

##### PECULIARITY OF CONDITIONS

Any peculiarity in soils, shape, or topography must be unique within the zoning district where the parcel is located.

In *Planning Board of Watertown v. Board of Appeals of Watertown*, 5 Mass. App. Ct. 833 (1977), the court noted that the peculiarity must not affect the district as a whole.

Similarly, in *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423 (1984), the Appeals Court upheld a lower court's annulment of a variance, concluding that the property and its attendant geologic constraints, simply was not unique relative to the zoning district in which it lies.

**Finding No. 2 — Hardship:** When an applicant for a variance demonstrates financial, physical, or other personal difficulties—so-called hardships—the ZBA and the public at large may be sympathetic, and very often that sympathy leads to approval of the requested variance. However, sympathy with the applicant is rarely the appropriate basis for granting a variance, at least from a legal perspective.

Massachusetts courts have held that the hardship “. . . must relate to the premises for which the variance was sought” (*Hurley v. Kolligian*, 333 Mass. 170, 173 [1955]). In addition, “Unless circumstances relating to the soil conditions of the land, the shape of the land, or topography of the land cause the hardship, no variance may be granted lawfully” (*Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 331 [1993]). Thus, courts have routinely rejected personal hardships as meeting the test for variance approval.

**Finding No. 3 — The Public Good:** The ZBA must conclude that the variance can be granted “without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or bylaw.” This finding, more than the other two, allows the ZBA some subjective leeway in its decision-making process.

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

#### JUDICIAL DECISIONS ON HARDSHIP

##### PERSONAL HARDSHIP

In *Paulding v. Bruins*, 18 Mass. App. Ct. 707, 711 (1984), the Appeals Court upheld the grant of a variance where, due to the unique circumstances of the lot’s shape, without a variance, the lot would be unbuildable. In addition to the shape-hardship connection, the applicant argued that a variance was warranted due to the failing health of his father and the family’s financial difficulties. Even though the court upheld the grant of variance, it rejected as irrelevant these latter claims of hardship.

##### HARDSHIP RELATING TO GOVERNMENT ACTION

Such hardship is more likely to be recognized as legitimate.

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

##### ECONOMIC HARDSHIP

Massachusetts courts are not sympathetic to the claim that but for the grant of a variance, the applicant will suffer “economic” or “competitive” hardships.

See *39 Joy Street Condominium Association v. Board of Appeal of Boston*, 426 Mass. 485 (1998), where the Supreme Judicial Court, in a summarized review of several important variance holdings, stated: “We note additionally that ‘financial hardship to the owner alone is not sufficient to establish ‘substantial hardship’ and thereby justify a variance.’”

## Special Permits and Variances

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## Procedures

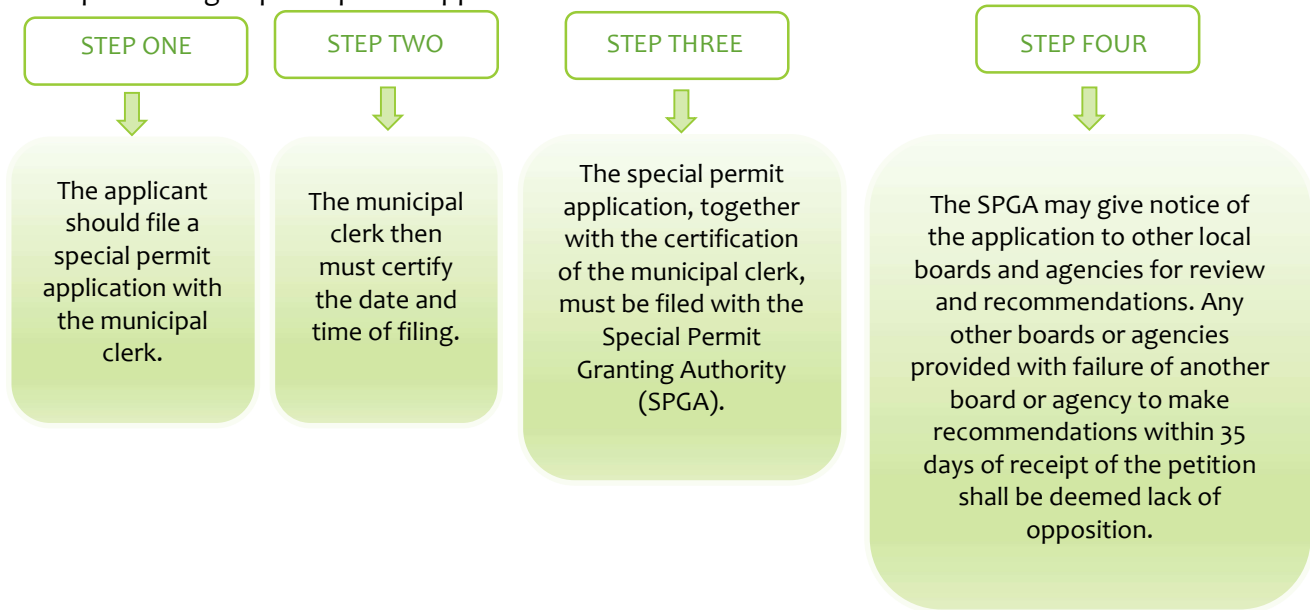
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## Special Permits and Variances

## The Filing Process

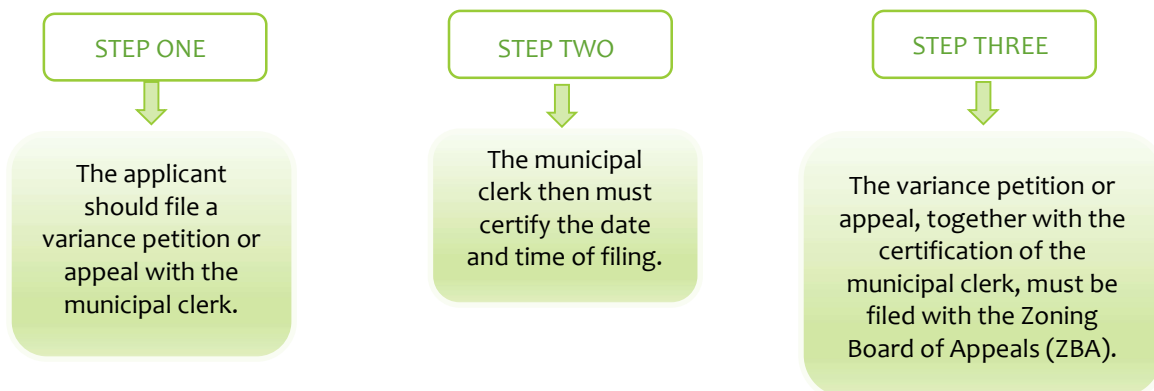
### SPECIAL PERMITS

Special permits are reviewed and granted or denied by the Special Permit Granting Authority. The steps for filing a special permit application are as follows:



### VARIANCES

Variance petitions are reviewed and granted or denied by the Zoning Board of Appeals. The steps for filing a variance petition are as follows:



Note: Special permit applications and variances petitions may be withdrawn without prejudice prior to the publication of the public hearing notice; thereafter, withdrawal of either requires board approval (the SPGA for special permits, and the ZBA for variance petitions).

## The Public Hearing

### WHY HAVE A PUBLIC HEARING?

In addition to being a statutory requirement both for special permits and variances, public hearings provide a valuable opportunity for interested people to provide and listen to testimony relating to the matter before the board. Public hearing and public meetings follow strict regulations and guidelines under Massachusetts law, and failure to follow them may render a land use decision indefensible.

### REQUIREMENTS FOR NOTIFYING THE PUBLIC

Under G.L. c. 40A, §§ 11 and 15, a public hearing notice must be:

- Published in a newspaper circulated within the community at least twice in successive weeks, with the first notice published at least 14 days before the public hearing;
- Posted in the city or town hall for at least 14 days before the public hearing;
- Sent by the board to “parties in interest” even if they live in another community. Assessors must certify the names and addresses of parties in interest to the relevant board (SPGA or ZBA). The SPGA or ZBA may accept a waiver of notice from, or an affidavit of actual notice to any party in interest, his stead, or any successor owner of record who may not have received a notice. The SPGA or ZBA may order special notice to any such person, giving at least 5 days but not more than 10 additional days to reply.

#### JUDICIAL DECISIONS

##### ON THE TIMELINE FOR PUBLISHING A PUBLIC HEARING NOTICE

The day of the public hearing should not count when determining the 14-day time period (Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 [1971]).

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

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

The 14-day requirement does not apply to mailing notices, per Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965): “If the Legislature had intended that the fourteen day requirement for notice by publication apply also to notice by mail, it would have done so explicitly.” Nevertheless, the notices must be mailed within a reasonable time, and “What constitutes reasonable notice depends upon the facts and circumstances of each case.”



### WHAT IS . . . A Party in Interest?

A “party in interest” is someone who has a greater stake in a land use decision than the public at large. The following parties in interest must be sent a postage prepaid notice of the public hearing:

- The petitioner
- Abutters
- Owners of land directly opposite on any public or private street or way
- Abutters to abutters within 300 feet of the applicant’s property line or the property subject to enforcement action
- The planning board
- The planning board of abutting communities
- The owner of the property subject to enforcement action if not the applicant.

Other important notes about public hearing notification:

- The ZBA or SPGA can continue a public hearing to a date certain and give public notice pursuant to the Open Meeting Law (G.L. c. 40A, §18) without having to send new notice by mail to parties in interest. “It frequently occurs that a case is not finished on the advertised hearing day. It would be awkward, indeed, if mailed notice was required of each successive session.” (See *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618 [1986].)
- **Boards must follow the Open Meeting Law** (G.L. c. 30A, §§ 18-25; 940 CMR 29.00, et seq.). According to these requirements, the meeting agenda must:
  - Be posted at least 48 hours in advance, excluding Saturdays, Sundays and legal holidays;
  - Contain the date, time, and place of the meeting;
  - Identify the matters about which a discussion or any actions can reasonably be anticipated by the chairperson.

## CONTENTS OF PUBLIC HEARING NOTICE

### A public hearing notice must include:

- The name of the applicant or appellant;
- A description of the property or area;
- The street address, if any, or other adequate identification of the location in question;
- The date, time, and location of the public hearing;
- The subject matter of the public hearing;
- The nature of action or relief requested.

### JUDICIAL DECISIONS

#### ON THE CONTENTS OF PUBLIC HEARING NOTICES

#### ERRORS ON NOTICE

While an error on a public hearing notice could be grounds for reversal of a decision, this is not automatically the case; In making a determination, courts will consider whether the error would have misled or confused the public.

In *Carson v. Board of Appeals of Lexington*, 321 Mass. 649 (1947), the court held that a notice of public hearing was not defective even though: it (a) incorrectly described the street location of the land in question (reason: it could hardly have referred to any other land, and therefore the interested parties were not misled); and (b) did not disclose the size of the proposed garage (reason: because the petitioner was a bus company, the court ruled that it was reasonably assumed the garage was intended for the storage of buses rather than one or two private automobiles). See also *Planning Board of Nantucket v. Board of Appeals of Nantucket*, 15 Mass. App. Ct. 733 (1983), in which a notice incorrectly specified the application was for relief under (the non-existent) section 6-C-4 of the bylaws; the court ruled that the notice was not deficient because the bylaw had no such section, and thus it was clear that section 6-B-4 must have been intended.

#### RELIEF SOUGHT V. RELIEF GRANTED

Notices that sufficiently described the proposed development have been upheld when the relief sought in the application differed from the relief granted.

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

#### LACK OF SPECIFICITY

Lack of specificity can lead to a ruling in favor of the appellant.

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

## CONDUCTING A PUBLIC HEARING

### Before opening a public hearing, make sure to:

- Properly publish the legal advertisement for the public hearing within the required timeframe;
- Mail the notice of public hearing to persons in interest;
- Check that the application file is complete and contains all submitted evidence;
- Provide board members with copies of the file documentation or give notice that the documentation is in the file and ready for review;
- Review the application and related material to ensure they are available for public inspection;
- Ensure that the date does not coincide with a state or municipal election, caucus, or primary held in the community, as this is prohibited by G.L. c. 40A, §11.
- Confirm that the facility at which the public hearing is taking place is appropriate in size and allows all members of the public to have appropriate access to view and hear the proceedings.
- Plan ahead if a large crowd is anticipated and set up additional overflow rooms with equipment that will allow attendees to view/hear the proceedings and ask questions. **A due process violation claim may be made when members of the public are denied the ability to access the proceedings.**
- Ensure that the Board has the necessary quorum for taking evidence. 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.

### JUDICIAL DECISIONS

#### ON DETERMINING THE NECESSARY QUORUM

Per *Merrill v. City of Lowell*, 236 Mass. 463 (1920), “In the absence of a statutory restriction the general rule is that a majority of a council or board is a quorum and a majority of the quorum can act.”

When a statute requires a unanimous decision in a matter before a zoning board of appeals, the quorum for such matter must also be all the members of the board. (See *Sesnovich v. Board of Appeals of Boston*, 313 Mass. 393 [1943]; *Real Properties, Inc. v. Board of Appeal of Boston*, 311 Mass. 430 [1942].)

## Special Permits and Variances

- Determine if the municipality has adopted the “Mullin Rule” in case any board members miss a session of the public hearing.

### WHAT IS . . . *the Mullin Rule*?

The so-called Mullin Rule, named after *Mullin v. Planning Board of Brewster*, 17 Mass. App. Ct. 139 (1983), and provided for under G.L. c.39, §23D, allows board members who missed one substantive public hearing session to still participate in the decision, but only if they provide the necessary written certificate and enter it into the record of proceedings that the member reviewed all materials submitted to the board during the missed session and reviewed either: 1) a videotape (with audio) of the missed session; 2) an audio tape of the missed session; or 3) a transcript for the missed session (minutes are not sufficient).

### When opening a public hearing:

- Read or summarize the legal notice for the public hearing (at the start of each public hearing session on the application).
- Explain the board’s meeting/hearing procedures to the public. People need to know (1) when it will be their turn to participate, (2) how they should seek recognition from the chairperson before participating, and (3) that written documentation will be accepted.

### While conducting a public hearing:

- Give the applicant a proper opportunity to present the application.
- Encourage board members to ask questions of the applicant.
- Encourage public participation in an orderly manner.
- Provide the public and the applicant a fair opportunity to be heard respectfully.
- Consider placing reasonable time restrictions on presentations and testimony, but make sure the restrictions are applied fairly and do not have the effect of denying a person the right to be heard.
- Refrain from making jokes during the process, as the applicant or attendees may take such levity as evidence that the board does not take the matter before it seriously.
- If an unexpectedly large crowd arrives and the facility cannot accommodate the crowd, then the hearing should be immediately continued to a new date and time at a location that will accommodate the crowd.

## Special Permits and Variances

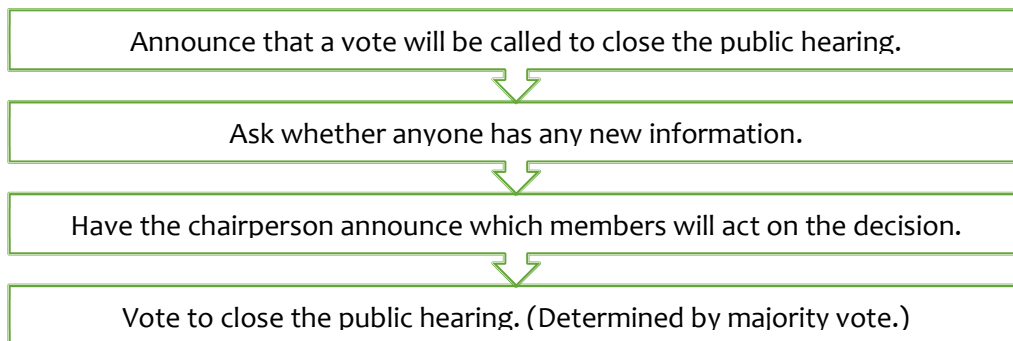
- If possible, the board should have an audio tape or video of the proceedings, both to assist with the preparation of minutes and to allow an absent member the opportunity to use the Mullin Rule, as appropriate.
- Make a clear record of the board's proceedings and attendance. Place all materials received during the public hearing process in the appropriate file and make sure that the file is available for public viewing. Also note the presence and any absence by each board member in the file and in the minutes.
- Be sure to keep the board's minutes as up to date as possible. It is critically important that there be an accurate record of the motions made and votes taken by the board.

### ProTip! – Create an Attendance Template

Create a meeting/public hearing attendance template. This should include the names of each board member, the date of each public hearing, recorded attendance of each board member, and a place to note if substantive testimony was taken for any session at which a member is absent.

### Closing the public hearing:

After all evidence has been presented and before the deadline for the public hearing has passed, the board should proceed with closing the public hearing. To do so, the board must:



### JUDICIAL DECISIONS

#### ON CLOSING A PUBLIC HEARING

Per *Milton Commons Associates v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111 (1982), a public hearing ends when rights of interested parties to present information and argue is cut off, not when the board concludes their deliberative session.

**Once the public hearing is closed, the board should not consider other evidence.** See *Caruso v. Pastan*, 1 Mass. App. Ct. 28 (1973), in which the court noted that the board of appeals should not have discussed the case with the planning board following the conclusion of its public hearing and prior to issuing its decision. (Nonetheless, the court determined that ZBA's decision was not invalid despite a private consultation between the ZBA and the town planning board after the public hearing and before its decision, only because there was nothing in the facts presented to the court to suggest that board was influenced by the conversation.

## Special Permits and Variances

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## The Final Decision

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## Special Permits and Variances



## Timeline

If timely action is not taken on a pending application, a constructive grant of the requested relief may occur and, so it is **critically** important to adhere to timelines. Consider making a list of deadlines to attach to an application file, and then note on the list each time an extension of a deadline is received.

### KEY DEADLINES: AN OVERVIEW

	By when must a public hearing be commenced?	When must the public first be notified of the public hearing?	When must a final action be reached?
<b>Special Permits</b>	<b>65 days from receipt of a special permit application</b> , unless a mutually agreed upon extension has been filed with the municipal clerk.	The first notice must be published <b>at least 14 days before the public hearing.</b>	<b>Within 90 days of the close of the public hearing</b> , unless a mutually agreed upon extension has been filed with the municipal clerk; <b>the decision must be written and filed within this timeframe.</b>
<b>Variances</b>	<b>65 days from receipt of a variance petition or appeal</b> , unless a mutually agreed upon extension has been filed with the municipal clerk.	The first notice must be published <b>at least 14 days before the public hearing.</b>	<b>Within 100 days of receipt of the petition or appeal</b> , unless a mutually agreed upon extension has been filed with the municipal clerk, <b>with an additional 14 days to file the decision.</b>

### Special Permits:

- The **SPGA must take “final action” within 90 days of the close of the public hearing.** The 90-day period may be extended in writing by mutual agreement, with the agreement filed with the municipal clerk’s office.
- “Final Action” means both voting on and filing the decision with the municipal clerk.
- If the proper deadlines are not observed (or proper extensions obtained), then a constructive grant may be claimed.

**Variances:**

- The **ZBA must take “action” within 100 days of the receipt of the application.** The 100-day period may be extended in writing by mutual agreement, with the agreement filed with the municipal clerk’s office.
- “Action” means voting on and reaching a decision; the board has an additional 14 days to file the written decision with the municipal clerk.
- If the decision is not filed within 114 days from receipt of the petition, then a constructive grant may be claimed.
- The ZBA must make a detailed record of its proceedings, including the vote of each member and the reasons for its decision, and file it with the municipal clerk.

**WHAT IS . . . a Constructive Grant?**

A constructive grant occurs when the board has failed to act in a timely manner and an application or petition may be approved following specific action taken by the petitioner. For a more detailed description regarding the constructive grant process, see G.L., c. 40A, §§9, 11 and 15.

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## Steps to Making a Final Decision

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### REVIEWING FINDINGS OF FACT AND LEGAL CONCLUSIONS

**Make Proper Findings of Fact.** Findings should be determined by majority vote **before the board votes to grant or deny requested relief (if applicable)**, because the findings will drive the ultimate result. To make the required findings, a board must:

- Review the local zoning criteria, statutory criteria, and all the evidence submitted during the public hearing.
- Poll each board member to determine whether each member took a view of the property. Be sure to note this in the minutes and in the decision, as a court may give more weight to a decision that is supported by a view. (Interestingly, in *Gamache v. Acushnet*, 14 Mass. App. Ct. 215 (1982) , the appellant claimed that such a visit actually constituted an improper consideration of evidence outside of the hearing, but the court disagreed because it is a common practice for board members to look over the property about which they are making a decision.)
- Vote to make findings of fact based on:
  - **The baseline details about the application:**
    - The applicant (and, if different, the owner of the property and the permission granted)
    - The property (address, zoning district, square footage, and frontage)
    - The relief sought (if any) and the local provisions that apply
    - What board members were present during the public hearing sessions
    - The dates of the public hearing sessions
  - **Local zoning criteria and the board's familiarity with local conditions.** Refrain from simply reciting the applicable criteria; say *why* the criteria are satisfied.
  - **Statutory criteria.** Again, be sure to specify why and how the criteria are satisfied.

**Make the required legal conclusions.** Review the legal criteria (local and statutory) required in or order to grant any requested relief. Vote to make the required legal conclusions by determining whether and how the required criteria have been satisfied, and why or why not.

**ProTip! – Create a Decision Template**

Create a template that sets out the local zoning criteria and statutory criteria to make sure that they are carefully reviewed and considered. It is important that the findings indicate **why** the applicable criteria were found to be satisfied – or not satisfied.

For example: “The Board voted to find that the required criteria under ZBL §X (that the proposed addition to the structure at the subject property shall not be substantially more detrimental to the neighborhood) was satisfied because (1) the proposed addition will result in a structure that is similar in size to the other structures in the neighborhood on a lot that is of a typical size in the neighborhood, (2) the final proposed structure will not overcrowd either the lot or adjacent lots, (3) nor will it impair any protected views of adjacent property owners, and (4) sufficient room is available to provide adequate parking.”

## REACHING THE DECISION

**Vote.** After reviewing the findings and legal conclusions voted by the board, vote to make the final decision, which will be **to grant, grant with conditions, or deny**. Remember the statutory requirements for voting:

- The grant of a special permit and any relief requires a supermajority vote of the SPGA (3/3, 4/5, or a two-thirds vote if the board has more than five members) (or simple majority for certain kinds of housing development, mixed-use, and parking).
- The grant of variance requires a supermajority vote of the ZBA (3/3 or 4/5).
- Unless the municipality has adopted the “Mullin Rule” described above, only members who attended all sessions of the public hearing may vote.

### JUDICIAL DECISIONS

#### ON VOTING REQUIREMENTS

A temporary vacancy on a board does not transform, for example, a five-member board to a four-member board; thus quorum and voting requirements are still those required for a five member board (*Gamache v. Acushnet*, 14 Mass. App. Ct. 215 [1982]).

Failure to obtain the necessary quorum of vote means the motion fails. See, for example, *Tanner v. Board of Appeals of Belmont*, 27 Mass. App. Ct. 1181 (1989)(rescript), where two members of a board voted in favor and two voted against, and the fifth member was absent; the application was defeated as it required four affirmative votes to grant a special permit.

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

**Address any and all relief the applicant has requested.** If the application requests any relief, the decision should have an introduction that sets out the basic overarching facts about the property, its ownership, and its zoning status common to *all* of the relief requested, and then deal separately, under different headings, with each request for relief. Make sure the decision addresses every request for relief and consider a catchall motion and vote that: “Any relief not expressly granted is hereby denied.”

**If the board votes to grant with conditions,** any imposed decisions must be reasonable, clearly explained, and within the board’s authority. Furthermore, they must not require additional approval by another entity, or that another substantive issue must be resolved, so that the decision is not actually final in its effect.

- **For special permits:** G.L. c. 40A §9 states that the board may “impose conditions, safeguards and limitations on time and use.” Examples of potentially reasonable conditions may include:
  - Deadlines on when to begin and finish phased construction (*Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 151 n.3 [1976]);
  - Limits on vehicles, number of students, gender of residents, noise, possession of substances, maintenance, landscaping, parking spaces (*Shuman v. Board of Aldermen of Newton*, 361 Mass. 758, 762 n.7 [1972]);
  - Sewer connection and bond (*Caruso v. Pastan*, 1 Mass. App. Ct. 28 [1973]);
  - Hours of operation and police details during periods of heavy traffic (*Mandracchia v. Zoning Board of Appeals of Westminster*, 5 LCR 3 [1997]);

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

- **For variances:** G.L. c. 40A §10 states that the board may “impose conditions, safeguards and limitations both of time and use,” including:
  - Conditions and limitations on the use of the property (e.g. the property’s use can be limited to a specified square footage or a building limited to a certain height or operations limited to daylight hours);
  - Conditions that “extract” a public benefit necessitated by the grant of the variance (e.g. roadway improvements, stormwater drainage, exterior lighting);
  - Limitations on the time period(s) within which the variance will be valid (e.g. the variance shall expire in three years from the date of issuance or the variance shall be exercisable only during the months of June, July and August).

**Note: Unlike a special permit, a variance may not be conditioned based upon “the continued ownership of the land or structures . . . by the applicant or any owner.”**

## WRITING THE DECISION

**Write a clear decision that is based upon the facts and the law.** The decision should be written clear, simple, and concise language, with the goal of allowing a person who is unfamiliar with the matter to read the decision and:

- Immediately be able to visualize the property;
- Easily understand any relief (if applicable) that was requested in the application;
- Grasp the action the board took regarding each matter and its reasons for those actions;
- Include the contents required in G.L. c. 40A, §11:
  - Contains the name and address of the owner;
  - Identifies the land affected;
  - Sets forth compliance with the statutory requirements for the issuance of such a variance or permit;
  - Certifies that copies of the decision and all plans referred to in the decision have been filed with the planning board and municipal clerk

## FILING AND MAILING THE DECISION

- The SPGA and ZBA are both required to make a detailed record of their proceedings, including the vote of each member and the reasons for its decision.
- **For special permits**, the SPGA must file its decision, including copies of the detailed record of their proceedings, with the municipal clerk **within 14 days after the decision has been reached**. Failure to file a written decision with the city or town clerk within 14 days does **not** result in constructive approval if the filing occurs within 90 days of the close of the public hearing.
- **For variances**, the ZBA must file its decision, including copies of the detailed record of their proceedings, with the municipal clerk **within 114 days from receipt of the petition**; otherwise a constructive grant may be claimed. Failure to file a written decision with the city or town clerk within this time frame may result in a constructive grant.

## Special Permits and Variances

- The board must mail notice of the decision to the petitioner, parties in interest, and every public hearing attendee who requested a notice. The notice must specify that any appeal must be made pursuant to G.L. c. 40A, § 17, and filed within 20 days after the date the decision was filed with the city or town clerk.
- The board must provide a certified copy of its decision to the applicant and the property owner, identifying the owner's name and address, the land affected, specifying compliance with the statutory requirements for issuance of a special permit or variance, and certifying that copies of the decision have been filed with the Planning Board and the city or town clerk.
- The city or town clerk must certify that 20 days have elapsed after the decision has been filed, and either that no appeal has been filed or that it has been filed within such time.

### RECORDING AND LAPSE OF FINAL DECISION

#### Special Permits:

- No special permit (or extension or modification) shall take effect until it is recorded in the registry of deeds, or recorded and noted on the certificate of title, with the special permit applicant or owner responsible for the resulting cost.
- A special permit may be exercised during an appeal; however, the exercise will be “at risk” of a successful appeal.
- **A special permit will lapse if not exercised within three years** (or a shorter time as provided for under local zoning or in the special permit), except for “good cause.” The life of the special permit does not include the time required to pursue or await determination of an appeal under G.L. c.40A, §17.

#### Variances:

- No variance (or extension or modification) takes effect until it is recorded (with the municipal clerk's certification of no appeal or a successful appeal) with the registry of deeds, or recorded and noted on the certificate of title, with the variance applicant or owner responsible for the resulting cost.
- **A variance will lapse if not exercised in one year.** The life of the variance does not include the time required to pursue or await determination of an appeal under G.L. c.40A, §17.
- Upon written request by an applicant, before a variance expires, a board has the discretion to extend the one-year life of a variance by six months. If the application is not granted within 30 days of the application and the one-year period lapses within those 30 days, then the variance lapses and may be reestablished only after notice and a new public hearing.

## Special Permits and Variances



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## Additional Resources

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## Special Permits and Variances

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## List of Statutes

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The statutes addressed in this module include but are not limited to:

Zoning Act:	G.L. c.40A
Special Permits:	G.L. c.40A, §9
Variances:	G.L. c.40A, §10
Hearing notice, recording decisions, etc.:	G.L. c. 40A, §11
Mullin Rule:	G.L. c.39, §23D
Open Meeting Law:	G.L. c.30A, §§18-25; 940 CMR 29.00 et seq.

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## Further Support

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**American Planning Association:** [www.planning.org](http://www.planning.org)

**American Planning Association-Massachusetts Chapter:** [www.APA-MA.org](http://www.APA-MA.org)

**Citizen Planner Training Collaborative:** [www.masscptc.org](http://www.masscptc.org)

**Executive Office of Housing and Livable Communities:** [www.mass.gov/eohlc/](http://www.mass.gov/eohlc/)

**Massachusetts Association of Planning Directors:** [www.massplanning.org](http://www.massplanning.org)

**Massachusetts Housing Partnership:** [www.mhp.net](http://www.mhp.net)

**Mass Planners List Serve:** [https://masscptc.org/mailman/listinfo/massplanners\\_masscptc.org](https://masscptc.org/mailman/listinfo/massplanners_masscptc.org)

**Planetizen:** [www.planetizen.com](http://www.planetizen.com)

**Massachusetts Regional Planning Agencies:**

**Berkshire Regional Planning Commission:** [www.berkshireplanning.org](http://www.berkshireplanning.org)

**Boston Region Metropolitan Planning Organization:** [www.bostonmpo.org](http://www.bostonmpo.org)

**Cape Cod Commission:** [www.capecodcommission.org](http://www.capecodcommission.org)

**Central Massachusetts Regional Planning Commission:** [www.cmrpc.org](http://www.cmrpc.org)

**Franklin Regional Council of Governments:** [www.frcog.org](http://www.frcog.org)

**Martha's Vineyard Commission:** [www.mvcommission.org](http://www.mvcommission.org)

**Merrimack Valley Planning Commission:** [www.mvpc.org](http://www.mvpc.org)

**Metropolitan Area Planning Council:** [www.mapc.org](http://www.mapc.org)

**Montachusett Regional Planning Commission:** [www.mrpc.org](http://www.mrpc.org)

**Nantucket Planning and Economic Development Commission:**  
[www.nantucket-ma.gov/departments/npedc/npedc.html](http://www.nantucket-ma.gov/departments/npedc/npedc.html)

**Northern Middlesex Council of Governments:** [www.nmcog.org](http://www.nmcog.org)

**Pioneer Valley Planning Commission:** [www.pvpc.org](http://www.pvpc.org)

**Old Colony Planning Council:** [www.ocpcrpa.org](http://www.ocpcrpa.org)

**Southeastern Regional Planning and Economic Development District:** [www.srpedd.org](http://www.srpedd.org)

## **APPENDIX A**

### **Change in Voting Standards for Granting Special Permits for Certain Project Types**

Chapter 358 of the Acts of 2020 (sometimes referred to as the economic development legislation of 2020) made several amendments to Chapter 40A of the General Laws, commonly known as the Zoning Act. Among these amendments are (1) changes to section 5 of the Zoning Act, which reduce the number of votes required to enact certain kinds of zoning ordinances and bylaws from a  $\frac{2}{3}$  supermajority to a simple majority; and (2) changes to section 9 of the Zoning Act, making similar changes to the voting thresholds for the issuance of certain kinds of special permits.

The Act reduces the number of votes needed for a Special Permit Granting Authority to issue a special permit to a majority vote, rather than a supermajority vote, for certain types of special permits promoting multifamily housing and mixed-use development deemed transit oriented. Special permits that now may be issued with only a simple majority vote include:

- 1) multifamily housing located within a half-mile of a commuter rail station, subway station, ferry terminal or bus station, provided not less than 10 percent of such housing will be affordable to and occupied by households with annual incomes less than 80 percent of area median income (AMI) as determined by the U.S. Department of Housing and Urban Development (HUD) and affordability is assured for at least 30 years with an affordable housing restriction.
- 2) mixed-use development in centers of commercial activity within a municipality, including town and city centers and other commercial districts, provided not less than 10 percent of the housing will be affordable to and occupied by households with annual incomes less than 80 percent of AMI and affordability is assured for at least 30 years with an affordable housing restriction; and
- 3) reduced parking space-to-residential unit ratios so long as such reduction in the parking requirement will result in the production of additional housing units. The Act does not require special permit granting authorities to issue these special permits, but it makes it easier for such special permits to be approved, as they will now be approved by a simple majority vote.

Note: the new statutory provisions apply to all communities; it is not an “opt-in” provision.

Any development containing a mix of residential and non-residential uses of any configuration will qualify for the majority vote threshold as long it is allowed either by-right or by special permit, in an eligible location. (*Guidance, updated May 20, 2021*). The Town of Shrewsbury had the foresight to plan for redevelopment of Shrewsbury Center even prior to the statutory revisions. The Town Center zoning is clear in its goals to promote appropriate in-fill development and re-development in this mixed-use area of town. The Town Center location and character qualify the Beal School site as an eligible location. In addition, the Planning Board has the authority to determine a land area as a highly suitable location for residential or mixed-use development based on its infrastructure, transportation access, or existing underutilized facilities.

The amended provisions of the Zoning Act are not optional. Communities do not need to adopt or opt-in to the statutory amendments; they apply regardless of whether local zoning has been updated to indicate as much. According to the Executive Office of Housing and Livable Communities (HLC) (formerly part of EOHED) Guidance, “A town or city does not have to take any action for the amendments to Chapter 40A to take effect. There is no “opt in” provision. The changes apply automatically to all cities and towns except Boston, which has its own zoning statute. (*March 15, 2021*)”



*City of Marlborough*  
**Department of Public Works**

135 NEIL STREET  
MARLBOROUGH, MASSACHUSETTS 01752  
TEL. 508- 624-6910  
\*TDD 508-460-3610

*THEODORE L. SCOTT, P.E.*  
INTERIM COMMISSIONER

March 11, 2024

Marlborough Planning Board

RE: Conflict of Interest Disclosure

Chair Fay and Board Members,

I wish to disclose to the public that, many years prior to my appointment as City Engineer, I had professional involvement in the Waters Edge project with the developer, Farooq Ansari. I no longer have any connection, financial or otherwise, to the project or with Mr. Ansari.

I have filed with both the City Clerk's office and the DPW Commissioner, as my appointing authority, a form disclosing the above facts pursuant to MGL c. 268A, section 23(b)(3).

Please contact me with any questions or if you wish to discuss further.

Sincerely,

Thomas DiPersio, Jr., PE, PLS  
City Engineer

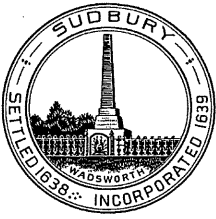
**FRAMINGHAM PLANNING BOARD**  
**NOTICE OF PUBLIC HEARING – AMENDMENTS TO THE FRAMINGHAM ZONING**  
**ORDINANCES, PLANNING BOARD RULES AND REGULATIONS, AND THE RULES AND**  
**REGULATIONS GOVERNING THE SUBDIVISION OF LAND**

Pursuant to MGL, c 40A, the Framingham Planning Board will hold a public hearing on Thursday April 4th, 2024 at 7:00 p.m. in the Blumer Community Room in the Memorial Building, located at 150 Concord Street, Framingham, AND/OR via remote conference, to review and make recommendations on the proposed amendments to the Framingham Zoning Ordinances, Planning Board Rules and Regulations, and the Rules and Regulations governing the Subdivision of Land to discuss a re-organization or re-structuring of these documents without making any substantial procedural or substantive changes to such Ordinances. These changes will allow the creation of a new resource that is designed to house the codified information in one convenient location, while also helping the public easily navigate the online information. The new advanced search filters will help users find more relevant information in less time. Chapters listed in the text of the draft amendments reference new chapters being created to simplify the documents. A copy of the full text of the draft amendments to the ordinance may be inspected during business hours in the Planning Board Office, Room 121 of the Memorial Building and available online at <https://www.framinghamma.gov/69/Planning-Board> under the Case Files link. Written comments should be submitted to [planningboard@framinghamma.gov](mailto:planningboard@framinghamma.gov) by 5:00 p.m. on Wednesday, April 3, 2024. The legal notice can be found in the MetroWest Daily Newspaper and on the Massachusetts Newspaper Publishers Association's (MNPA) website.

***Kristina Johnson, Chair, Framingham Planning Board***  
Publish, MetroWest Daily Newspaper: March 20, 2024 and March 27, 2024

Por favor, póngase en contacto con nuestra oficina para asistencia de traducción.  
Entre em contato com nosso escritório para assistência com tradução.





# Town of Sudbury

## Planning Board

PlanningBoard@sudbury.ma.us

Flynn Building  
278 Old Sudbury Road  
Sudbury, MA 01776  
978-639-3387  
Fax : 978-639-3314

www.sudbury.ma.us/planning

### LEGAL NOTICE PUBLIC HEARING SUDBURY PLANNING BOARD FOR THE MAY 6, 2024 ANNUAL TOWN MEETING

In accordance with the provisions of MGL Chapter 40A, Section 5, the Sudbury Planning Board will hold a public hearing on **March 27, 2024 at 7:30 PM** as a Virtual Meeting if allowed under the Open Meeting Law or, if not permitted, the meeting will be held in the Lower Town Hall, 322 Concord Road, Sudbury, Massachusetts, concerning the following subjects on the Warrant for the May 6, 2024 Annual Town Meeting:

1. Amend the Zoning Bylaw by modifying or inserting a section permitting multi-family zoning by-right to comply with Section 3A of Chapter 40A of the General Law also known as the MBTA Communities Zoning Act.
2. Amend the Zoning Bylaw by modifying or inserting language in Section 5623 Inclusion of Affordable Housing to add an exemption for development approved under the proposed Section 4700C.
3. Amend the Zoning Bylaw by modifying or inserting language in Section 6390A to change the appeal process for Site Plan Review from the Zoning Board of Appeals to a Court of Competent Jurisdiction.

A copy of the full text and maps of the proposed amendment can be viewed in the Planning and Community Development Department and Town Clerk's Office during normal business hours.

All those wishing to be heard on this matter should appear at the time and place designated above, or send written comments prior to the hearing to the Sudbury Planning Board at 278 Old Sudbury Road, Sudbury, MA 01776.

Stephen R. Garvin, Chair  
Sudbury Planning Board

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To be published in the MetroWest Daily News on March 13, 2024 and March 20, 2024.  
To be sent to the Department of Housing & Community Development, the Metropolitan Area Planning Council, and abutting Towns.  
To be posted in Town Hall.