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Zoning, Variances, & Abutter's Rights

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Zoning bylaws are the mechanism by which cities and towns regulate the use of land, including new construction, modifications to existing structures, building permits, and other land use issues. Zoning regulations vary from one municipality to another, and their primary purpose as defined by the Massachusetts Zoning Act is to “protect the health, safety, and general welfare” of the people living in any particular community. Without zoning bylaws and building codes, there is no telling the potentially dangerous structures that could result.

For homeowners, the bylaws rarely interfere with the goals of their home projects that are small in scope. Many projects that technically require building inspector oversight are completed without the requisite permits that can create insurance issues

beyond the scope of this newsletter. However, for larger projects, a building permit is often required. A municipality's building inspector must inspect the premises to ensure the project or proposed changes are made in accordance with the bylaws. Generally, in the event that a building inspector declines to issue a permit, homeowners can appeal to the local Zoning Board of Appeals for a *variance*. In general, variances are exceptions to the dimensional rules set out in the bylaws, given at the discretion of the Zoning Board of Appeals (ZBA).

Although inextricably linked to the legal system, unlike the arena of laws and courts, local zoning decisions appear to sometimes operate on a peculiar basis. One author notes, “Municipal regulation of land use in Massachusetts is an idiosyncratic exercise of power...each of our cities and towns have their own quirky and cherished customs.” (Bobrowski, Mark *Handbook of Massachusetts Land Use and Planning Law: Zoning, Subdivision Control, and Nonzoning Alternatives* 3; 2nd ed., Aspen 2002).

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More often than not, there exists a non-legal or at least inexact give and take between the developer, or homeowner, or taxpayer, or abutter, and the town zoning officials. For example, it is important to note that variances are only given in extraordinary situations (Levey, Brian C. *Massachusetts Zoning and Land Use Law* 271, Michie 1996). There is no such thing as a right to a variance, and the granting of a variance is in the sole discretion of the ZBA. The requirements are extremely strict.

M.G.L. 40A § 10 states that variances may only be granted upon a finding by the ZBA that:

“[1] owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and [2] especially affecting such land or structures but not affecting generally the zoning district in which it is located, [3] a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that [4] desirable relief may be granted without substantial detriment to the public good or substantially derogating from the intent or purpose of such ordinance or bylaw.” (numbering added).

All of the requirements of Section 10 must be met in order to qualify for a variance, and a ZBA’s decision is invalid unless the

board issues clear findings on each of the statutory requirements (*Mcneely, v. Board of Appeals of Boston* 358 Mass. 94, 103 (1970)).

But, what if your neighbor plans to construct a six-story storage shed within inches of your bathroom window, and miraculously obtains the necessary variance? What is your recourse?

To challenge the grant of a zoning variance, a person must have standing, commonly referred to as a “person aggrieved.” One is a “person aggrieved” if he or she suffers a “definite violation of a private right, a private property interest, or a private legal interest.” (*Harvard Square Defense Fund, Inc. v.*

Planning Bd. of Cambridge, 27 Mass. App. Ct. 491, 493, rev. denied, 405 Mass. 1204 (1989)).

In other words, to have standing, one must show an infringement of her legal rights, a particularized injury flowing from the zoning board's action that is special and different from the injury to the community at large. (*Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005)).

An abutter, the owner of neighboring or nearby property where a variance has been granted, may challenge the variance’s approval by a zoning board. Abutters are “parties in

interest” under G.L. c. 40A, § 11, entitled to notice of public board hearings and decisions, and therefore enjoy a rebuttable presumption as “persons aggrieved.” If the rebuttable presumption is challenged by the variance holder, and she produces evidence in support of the dispute, a court will decide whether an abutter is a “person aggrieved” on “all the evidence with no benefit to the abutter from the presumption.” (*Barvenik v. Bd. of Aldermen of Newton*, 33 Mass. App. Ct. 129, 131 (1992)). Yet, this does not mean the court *must* find an abutter’s claims meritorious to gain standing.

In *Bedford v. Trustees of Boston Univ.*, Boston University sought and obtained variances for improvements on buildings it purchased for the College of Engineering. (25 Mass. App. Ct. 372, 374 (1988)). The plaintiff, an abutter, challenged the variance and ultimately had the variance annulled in the Superior Court of Massachusetts. Boston University appealed this decision to the Appeals Court of Massachusetts, where it challenged the plaintiff’s standing. *Id.* at 372. In deciding the issue, the Appeals Court took all facts into consideration. It was established by evidence that disputes concerning parking

spots between the plaintiff’s employees and university students resulted from the variance’s approval. *Id.* at 377. Furthermore, the streets where improvements had been planned were very narrow, which created congestion. *Id.* All of these facts permitted a finding that the plaintiff in *Bedford* had standing. The injury suffered amounted to a particularized injury separate from the community and were particular to the plaintiff. (*Bedford*, 25 Mass. App. Ct. at 378).

Clearly, the complex issues regarding whether or not you have rights as an abutter are best navigated with the aid of an attorney. If you find yourself as an abutter to a suspect project, or wondering if your project has the requisite arguments to obtain a zoning variance, contact this office today to schedule a review of the issues involved in your matter.

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