45-23.1-7. Severability. - If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter or the application of the provision to other persons or circumstances shall not be affected thereby.

History of Section.
G.L. 1956, § 45-23.1-7; P.L. 1962, ch. 89, § 1; P.L. 1988, ch. 84, § 1) substituted "the provision" for "such provision" and made a punctuation change near the end of the section.

Reenactments. The 1988 Reenactment

CHAPTER 24

ZONING ORDINANCES

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45-24-1. Power of councils - Scope of ordinances. [Repealed effective July 1, 1993.1 - For the purpose of promoting the public health, safety, morals, or general welfare, the city council of any city, and the town council of any town, upon the approval of the financial town meeting of the town, shall have the power, in accordance with the provisions of this chapter, within the limits of the city or town, by ordinance, to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the location and use of buildings, structures, and land for trade, industry, residence, or other purposes, and to prohibit or limit uses of land in areas deemed to be subject to seasonal or periodic flooding.

History of Section.

P.L. 1921, ch. 2069, § 1; G.L. 1923, ch. 57, § 1; P.L. 1923, ch. 430, § 1; G.L. 1938, ch. 342, § 1; G.L. 1956, § 45-24-1; R.P.L. 1957, ch. 83, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "meeting of the town" for "meeting of such city" and "limits of the city" for "limits of such city" near the middle of the section and made several punctuation changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) made numerous punctuation changes throughout the section.

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 1; G.L. 1923, ch. 57, § 1; P.L. 1923, *ch.* 430, § 1; G.L. 1938, *ch.* 342, § 1; G.L. 1956, § 45-24-1; R.P.L. 1957, ch. 83, § 1), concerning powers of councils, was repealed by P.L. 1991, *ch.* 307, § 1, effective July 1, 1993. See § 45-24-28(c).

Cross References. Airport zoning, §§ 1-3-1 - 1-3-33.

Exemption of low rate housing projects, § 45-25-21.

Comparative Legislation. Zoning:

Conn. Gen. Stat. § 8-1 et seq.

Mass. Ann. Laws ch. 40A, § 1 et seq.

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.
3. Validity of ordinances.
4. Amendment or repeal of ordinance.
5. Judicial notice of ordinances.
6. Special zoning enabling acts.
7. Merging of substandard lots.

1. In General.

Zoning statute distinguished from Hazardous-Waste-Management Act. See Gryguc v. Bendick, 510 A.2d 937 (111 1986).

2. Constitutionality.

This section did not constitute an undue extension of the police power as to violate the U.S. Const., Amend. XIV or R.I. Const., Art. I, § 16. City of Providence v. Stephens, 47 R.I. 387, 133 A. 614 (1926).

3. Validity of Ordinances.

R.I. Coast., Art. I, § 10, does not apply to a proceeding attacking the validity of a zoning ordinance enacted under this section but only to persons accused of crimes. City of Providence v. Stephens, 47 R.I. 387, 133 A. 614 (1926).

A petitioner seeking to conduct the business of selling automobiles in a general business district cannot attack the validity of the zoning ordinance on which he relied when he filed his application for an exception or a variance by alleging the city council had no power to prohibit such business. Madden v. Zoning Bd. of Review, 89 R.I. 131, 151 A.2d 681 (1959).

Since compliance by a party with a local building ordinance would not afford that party a defense if that party's use of his property constituted a nuisance, there is no need for a court to pass on the validity of such ordinances. Commerce Oil Ref. Corp. v. Miner, 281 F.2d 465 (1st Cir.), cert. denied, 364 U.S. 910, 81 S. Ct. 274, 5 L. Ed. 225 (1960).

A town council is not authorized by this law to incorporate in a zoning ordinance any provision governing the division and subdivision of land. Kane v. Zoning Bd. of Review, 97 RL 152, 196 A2d 421 (1964).

Zoning ordinance merger provision, by which contiguous lots are merged to form individual lots under single ownership, has a valid purpose, where it operates to decrease congestion in the streets and to prevent the overcrowding of land by limiting the number of new dwellings. Brum v. Conley, 572 A.2d 1332 (R.I. 1990).

4. Amendment or Repeal of Ordinance.

Where an original ordinance is void an amendment thereto is likewise void unless it can be said to be complete and perfect in and of itself. Commerce Oil Ref. Corp. v. Miner, 170 F. Supp. 396 (D.R.I. 1959), rev'd on other grounds, 281 F.2d 465 (1st Cir.), cert. denied, 364 U.S. 910, 81 S. Cf. 274, 5 L. Ed. 2d 225 (1960).

Local legislatures have no authority to enact zoning regulations or to amend existing zoning regulations other than that conferred upon it in the pertinent provisions of the enabling legislation. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

Generally, under § 45-24-5, the several town councils may amend or repeal zoning ordinances without approval on the part of the financial town meeting. Mason v. Bowerman Bros., 95 R.I. 425, 187 A.2d 772 (1963).

A zoning ordinance amendment that reclassified a lot from residential to limited business-multifamily repealed the original ordinance to the extent that it conflicted with the amendment. Camara v. City of Warwick, 116 *R.I.* 395, 358 A.2d 23 (1976).

5. Judicial Notice of Ordinances.

The supreme court might well take judicial notice that many municipalities of this state have enacted zoning ordinances pursuant to the authority of the enabling act, chapter 24 of title 45, but it will not invoke the doctrine of judicial notice for the purpose of establishing the enactment of a municipal ordinance containing a provision repealing some prior municipal ordinance. Lincoln v. Cournoyer, 95 R.I. 280, 186 A.2d 728 (1962).

6. Special Zoning Enabling Acts.

An inadvertent reference to this chapter by the drafter in an act enabling earth-removal ordinances was deemed to refer to the special zoning enabling act under which a town's general zoning ordinance was passed, so that a statute which allowed the town to regulate all facets of an earth-removal operation did not supersede a zoning ordinance specifying the uses to which land in various zoning districts can be devoted. Kingsley v. Miller, 120 R.I. 372, 388 A.2d 357 (1978).

7. Merging of Substandard Lots.

Merger provision in a town zoning ordinance, requiring the combination of substandard lots, does not create a new subdivision, and owners who are denied permits to build residences on such lots are required to pursue applications for a variance or an exception. McKendall v. Town of Barrington, 571 A.2d 565 (R.I. 1990).

Collateral References. Accessory or incidental purposes, construction and application of provision of zoning ordinance permitting use for. 150 A.L.R. 494.

Application of zoning regulations to college fraternities or sororities. 25 A.L.R.3d 921.

Application of zoning regulations to motels or motor courts. 23 A.L.R.3d 1210.

Application of zoning regulations to radio or television facilities. 81 A.L.R.3d 1086.

Area of parcel that may be covered by building, validity of regulations as to. 27 A.L.R. 443.

Attack upon validity of zoning statute or ordinance as affected by provisions for variations, permits, etc. 136 A.L.R. 1378.

Billboards and outdoor advertising, regulation of, by zoning ordinances. 58 A.L.R.2d 1314.

Buffer provision in zoning ordinance as applicable to abutting land in adjoining municipality, 48 A.L.R.3d 1303.

Building height regulations, validity of. 8 A.L.R.2d 963.

Cemeteries, zoning regulations in relation to. 96 A.L.R.3d 921.

Churches, zoning regulations as affecting. 62 A.L.R.3d 197.

Constitutionality of variation provisions of zoning statutes or ordinances. 58 A.L.R.2d 1083.

Creation of restricted residence districts from which business buildings or multiple residences are excluded. 19 A.L.R. 1395; 33 A.L.R. 287; 38 A.L.R. 1496; 43 A.L.R. 668; 54 A.L.R. 1030; 86 A.L.R. 659; 117 A.L.R. 1117.

Governmental projects, applicability of zoning regulations to. 61 A.L.R.2d 970.

Intoxicating liquor, zoning regulations in respect to. 9 A.L.R.2d 877.

Laches as defense in suit by governmental entity to enjoin zoning violation. 73 A.L.R.4th 870.

Local use zoning of wetlands or flood plain as taking without compensation. 19 A.L.R.4th 756.

Lodging or boarding house conducted as a business, or taking roomers or boarders as incidental to principal use of premises as a home, as within prohibition of zoning statute or ordinance. 124 A.L.R. 1011.

Marketability of title as affected by zoning restrictions. 57 A.L.R. 1424.

Minimum area for house lots, or certain area proportionate to number of families to be housed, reasonableness and validity of zoning regulations prescribing. 96 A.L.R.2d 716.

Minimum dimensions or floor area of buildings, validity of zoning regulations prescribing. 149 A.L.R. 1440.

Ordinance protecting historic landmarks, 18 A.L.R.4th 990.

Ordinances regulating commercial video game enterprises, 38 A.L.R.4th 930.

Parking places, privately owned, zoning regulations as to. 29 A.L.R.2d 867.

Radio equipment as within zoning ordinance. 75 A.L.R.3d 1095; 81 A.L.R.3d 1086.

Religious groups, building restrictions as applied to. 148 A.L.R. 367.

Restrictions on use of real property, or remedies in respect of them, as affected by zoning law. 48 A.L.R. 1437; 54 A.L.R. 843

Subsequent alteration, addition, extension. or substitution of existing buildings. validity and construction of zoning or building ordinance prohibiting or regulating. 64 A.L.R. 920.

Validity and effect of "interim" zoning ordinance, 30 A.L.R.3d 1196.

Validity of "war zone" ordinances restricting location of sex-oriented businesses, 1 A.L.R.4th 1297.

Variations and exceptions based on esthetic considerations, in zoning regulations. 168 A.L.R. 44.

What constitutes "family" within meaning of zoning regulation. 71 A.L.R.3d 693.

Zoning ordinance regarding protest by neighboring property owners. 4 A.L.R.4th 732.

Zoning ordinance relating to operation of junkyard or scrap metal plant. 50 A.L.R.3d 837.

Zoning regulation prohibiting or restricting location of billiard rooms and bowling alleys. 100 A.L.R.3d 252.

Zoning regulations as applied to automatic vending machines. 11 A.L.R.3d 1004.

Zoning regulations as applied to homes or housing for the elderly. 83 A.L.R.3d 1103.

Zoning regulations in relation to cemeteries. 96 A.L.R.3d 921.

Zoning: residential off-street parking requirements. 71 A.L.R.4th 529.

45-24-2. Division into districts — Uniformity within districts. [Repealed effective July 1, 1993.1 - For any and all of the purposes enumerated in § 45-24-1, the city or town council may divide the municipality into districts of a number, shape, and areas it may deem best suited to carry out the purposes of this chapter; and within these districts it may regulate and restrict the erection, con-

struction, reconstruction, alteration, repair, or use of buildings, structures or land. These regulations and restrictions may include procedures and requirements in large scale development through the use of cluster or planned unit development techniques. All these regulations shall be uniform for each class or kind of building throughout each district but the regulations in one district may differ from those in other districts. The regulations may provide that a one bedroom apartment for the sole use of the parent or parents, or the in-law parent or parents, grandparent or grandparents, of the occupant or occupants of the principal residence, may be constructed, either as a permitted use or by special exception, in any residential zone; and that restrictions shall be imposed on the use so that the one bedroom apartment may not be used by persons who are not related as aforesaid.

History of Section.

P.L. 1921, ch. 2069, § 1; G.L. 1923, ch. 57, § 1; P.L. 1923, ch. 430, § 1; G.L. 1938, ch. 342, § 1; G.L. 1956, § 45-24-2; P.L. 1987, ch. 531, § 1; P.L. 1988, ch. 548, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) inserted "enumerated in § 45-24-1" following "the purposes" near the beginning of the section and made several substitutions for the words "said" and "such" and several minor stylistic changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) inserted a comma following "§ 45-24-1" near the beginning of the first sentence; made a minor stylistic change in the second sentence; substituted "The regulations" for "Such regulations" at the beginning of the last sentence; inserted a comma following "principal residence" near the middle of the last sentence; and substituted "the use so that the one bedroom apartment" for "such use so that the same" near the end of the last sentence, which substitution was previously made in 1988 by the compiler.

Compiler's Notes. Sections 2 and 3 of P.L. 1987, ch. 531 provides: "SECTION 2. The following special zoning enabling acts are hereby deemed amended to incorporate therein the additional requirements and grant of powers under sections 45-24-2 and 45-24-3 of the general laws as amended by this act;

"Chapter 2299 of the public laws of 1922, as amended (town of Westerly);

"Chapter 1277 of the public laws of 1926, as amended (town of Narragansett);

"Chapter 2065 of the public laws of 1933, as amended (town of West Warwick);

"Chapter 2233 of the public laws of 1935, as amended (town of Johnston);

"Chapter 2079 of the public laws of 1948, as amended (town of North Kingstown);

"Chapter 3125 of the public laws of 1953, as amended (town of New Shoreham);

"Chapter 101 of the public laws of 1973, as amended (town of South Kingstown);

"SECTION 3. All zoning ordinances currently in effect in the cities and towns of this state shall be held valid and properly enacted. The provisions of section 45-24-3 of the General Laws which require that zoning ordinances be in accordance with a comprehensive plan adopted in accordance with chapter 45-22 of the General Laws shall be effective from and after July 1, 1988."

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 1; G.L. 1923, ch. 57, § 1; P.L. 1923, ch. 430, § 1; G.L. 1938, ch. 342, § 1; G.L. 1956, § 45-24-2; P.L. 1987, ch. 531, § 1; P.L. 1988, ch. 548, § 1), concerning uniformity within districts, was repealed by P.L. 1991, eh. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES 3 DECISIONS

ANALYSIS

1. Constitutionality.
2. Change of zoning.
3. Uniformity requirement.

1. Constitutionality.

The regulated use within a district established under this section must be applicable to all property located within such district so as to avoid that discrimination which would be a denial of the equal protection of the laws, subject to the board of review's jurisdiction to grant a variance from regulations which, if applied to a parcel of land within

the district, cannot be met and, if insisted upon, would deprive the owner of the parcel of all beneficial use. Cole v. Zoning Bd. of Review, 102 R.I. 498, 231 A.2d 775 (1967).

2. Change of Zoning.

If a residential area has become commercialized a change of zoning is not within the jurisdiction of the board of review. Assembly of God Church v. Zoning Bd. of Review, 91 R.I. 259, 162 A.2d 554 (1960).

The zoning board cannot grant a variance by determining that a multi-unit apartment building is in harmony with the character of the neighborhood where the neighborhood was restricted to single-family dwellings, since the power to make said judgment is vested exclusively in the council. Staller v. Cranston Zoning Bd. of Review, 100 R.I. 340, 215 A.2d 418 (1965).

3. Uniformity Requirement.

The imposition of conditions on land rezoned by amendment pursuant to § 45-24-4.1 before the 1976 amendment of that section did not violate the uniformity requirement of this section simply because those conditions were not imposed on land in the same use category but not covered by the amendment. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

Collateral References. Construction and application of provisions authorizing variations in application of, and special exceptions to, zoning regulations. 168 A.L.R. 13.

Construction and application of provisions of zoning regulations respecting permissible use, where lot or parcel is divided by zone boundary lines. 58 A.L.R.3d 1241.

Limitation of area zoning, validity of zoning law as affected by. 165 A.L.R. 823.

"Spot zoning," small area within limits of a zone in which use different from or inconsistent with those permitted in the larger area as. 51 A.L.R.2d 263.

Validity of zoning regulations with respect to uncertainty and indefiniteness of district boundary lines. 39 A.L.R.2d 766.

What zoning regulations are applicable to territory annexed to a municipality. 41 A.L.R.2d 1463.

45-24-3. General purposes of ordinances. [Repealed effective July 1, 1993.] - Regulations shall be made in accordance with a comprehensive plan prepared and adopted in accordance with chapter 22 of this title and designed to lessen congestion in the streets; to secure safety from fire, flood, panic, and other dangers; to promote the public health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the town or municipality. The provision which requires that zoning ordinances be in accordance with a comprehensive plan adopted in accordance with chapter 22 of this title shall be effective on July 1, 1989.

History of Section.

P.L. 1921, ch. 2069, § 1; G.L. 1923, ch. 57, § 1; P.L. 1923, ch. 430, § 1; G.L. 1938, ch. 342, § 1; G.L. 1956, § 45-24-3; P.L. 1987, ch. 531, § 1; P.L. 1988, ch. 160, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "The regulations" for "Such regulations" at the beginning of the next-to-last sentence; substituted "the town" for "such town" near the end of the next-to-last sentence; and made two punctuation changes in the first sentence.

Compiler's Notes. Sections 2 and 3 of P.L. 1987, ch. 531 provides: "SECTION 2. The following special zoning enabling acts are hereby deemed amended to incorporate therein the additional requirements and grant of powers under sections 45-24-2 and 45-24-3 of the general laws as amended by this act;

"Chapter 2299 of the public laws of 1922, as amended (town of Westerly);

"Chapter 1277 of the public laws of 1928, as amended (town of Narragansett);

"Chapter 2065 of the public laws of 1933, as amended (town of West Warwick);

"Chapter 2233 of the public laws of 1935, as amended (town of Johnston);

"Chapter 2079 of the public laws of 1948, as amended (town of North Kingstown);

"Chapter 3125 of the public laws of 1953, as amended (town of New Shoreham);

"Chapter 101 of the public laws of 1973, as amended (town of South Kingstown);

"SECTION 3. All zoning ordinances currently in effect in the cities and towns of this state shall be held valid and properly enacted. The provisions of section 45-24-3 of the General Laws which require that zoning ordinances be in accordance with a comprehensive plan adopted in accordance with chapter 45-22 of the General Laws shall be effective from and after July 1, 1988."

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 1; G.L. 1923, ch. 57, § 1; P.L. 1923, ch. 430, § 1; G.L. 1938, ch. 342, § 1; G.L. 1956, § 45-24-3; P.L. 1987, ch. 531, § 1; P.L. 1988, ch. 160, § 1), concerning general purposes of ordinances, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Comprehensive plan.
2. Amendatory power.
3. Validity.
4. Zoning guides and standards.
5. Spot zoning.
6. Variance.

1. Comprehensive Plan.

The requirement set out in this section that the zoning regulations conform to a comprehensive plan is mandatory and strict compliance therewith is required of a local legislature when it enacts a zoning ordinance. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

The reason for the statutory requirement of a "comprehensive plan" is to avoid an arbitrary, unreasonable or capricious exercise of the zoning power, resulting in haphazard or piecemeal zoning. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

It is the court's opinion that the phrase "comprehensive plan" was not intended to preclude change and preserve inviolate use districts established in an original zoning ordinance, but that it contemplates revision and change in the regulations to whatever extent that may be accomplished by a valid exercise of the police power delegated to the local legislature. Hadley v. Harold Realty Co., 97 R.I. 403, 198 A.2d 149, 199 A.2d 121 (1964).

When a relatively small area is rezoned for multi-family dwellings and that small area remains completely surrounded, with the exception of the eastern boundary, by predominately one-family homes in an A zone (one-family dwellings), the city council has not acted in accordance with the comprehensive plan as required by this section. Toole v. May-Day Realty Corp., 101 R.I. 379, 223 A.2d 545 (1966).

It was in accordance with a comprehensive plan to zone for commercial use a parcel of four lots which adjoined a residential area on one side when all other property on both sides of the highway on which the parcel was located as far as the eye could see in either direction was devoted to commercial use. Willey v. Town Council, 106 R.I. 544, 106 R.I. 839, 261 A.2d 627 (1970).

Although it was contemplated in zoning land as residential that certain nonconforming tracts within the zone would be rezoned "Business D" on request of the owners, the rezoning of a tract as "Business D" on condition that, if not used for an automobile sales agency, it would be rezoned residential did not conform to a comprehensive plan. Oury v. Greany, 107 R.I. 427, 267 A.2d 700 (1970).

The requirements that a zoning ordinance be made in accordance with a comprehensive plan is mandatory and strict compliance therewith by the local legislatures is necessary. Camara v. City of Warwick, 116 R.I. 395, 358 A.2d 23 (1976).

Local legislatures must strictly comply with the requirement that zoning regulations be made in accordance with the local comprehensive plan. Mesolella v. City of Providence, 439 A.2d 1370 (R.I. 1982).

The phrase "comprehensive plan" was intended by the General Assembly to require that zoning power be exercised in accordance with police power and that every rule-making act bear a rational relationship to public health, safety, morals, and general welfare. Johnson & Wales College v. DiPrete, 448 A.2d 1271 (R.I. 1982).

2. Amendatory Power.

The limit of power of local legislatures in the enactment of a zoning ordinance apply to an exercise of the amendatory power only to the extent that the change effected by such amendment must be in conformity with the comprehensive plan, because haphazard or

improper zoning may result as well from an exercise of the amendatory power as from an exercise of the power to enact an original ordinance. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

Local legislatures have no authority to enact zoning regulations or to amend existing zoning regulations other than that conferred upon it in the pertinent provisions of the enabling legislation. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

The provisions of this section as contemplated by the legislature when it conferred the amendatory power was that the amended regulation, being in accord with the comprehensive plan, be not contrary to the public interest. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

When changing zoning regulations by amending a part of the ordinance, the local legislature is required to have such change conform to the comprehensive plan of zoning in effect in the municipality, this requirement being mandatory. Town & Country Mobile Homes v. Inspector of Bldgs., 93 R.I. 383, 175 A.2d 556 (1961).

A town may amend its zoning ordinance to exempt from its provisions the erection by the town or any of its agencies of a building for governmental purposes and an amendment exempting such erection for "public or municipal purposes" will be construed as such an amendment. Nunes v. Town of Bristol, 102 R.I. 729, 232 A.2d 775 (1967).

Requirements of a zoning ordinance, other than that it be made in accordance with a comprehensive plan, are directory only and absent some extraordinary circumstance, the trial justice need not consider allegations of noncompliance with these directory provisions. Camara v. City of Warwick, 116 R.I. 395, 358 A.2d 23 (1976).

A zoning amendment is a legislative act and as such the amendment can go no further than the enabling act. Camara v. City of Warwick, 116 R.I. 395, 358 A.2d 23 (1976).

A zoning ordinance amendment is required to conform to the comprehensive plan of zoning in effect in the community and need not conform with the master plan adopted by the planning board. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976); Roberts v. City of Woonsocket, 575 F.2d 339 (1st Cir. 1978).

This section prohibits any arbitrary or discriminatory exercise of the amendatory power and an action will lie to invalidate a conditional amendment on the ground that it is arbitrary and not in keeping with the comprehensive plan because it bears no reasonable relationship to the public health, safety and welfare. Sweetman v. Town of Cumberland, 117 R.I. 134,364 A.2d 1277 (1976); Roberts v. City of Woonsocket, 575 F.2d 339 (1st Cir. 1978).

Zoning ordinance amendment complied with the statutory requirement of comprehensiveness in zoning, where the classification was consistent with the zoning pattern in the area. Verdecchia v. Johnston Town Council, 589 A.2d 830 (R.I. 1991).

3. Validity.

Since amendment of a zoning ordinance is a legislative act, there is an initial presumption that it is valid. Camara v. City of Warwick, 116 R.I. 395, 358 A.2d 23 (1976).

Where the facts and circumstances of the individual case do not raise inferences of illegal spot zoning, the presumption of validity of the town council's action in amending the zoning ordinance includes the presumption that the amendment was in accordance with the comprehensive plan. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

A plaintiff bears a heavy burden in attempting to invalidate a zoning ordinance because it does not follow a comprehensive plan in accordance with this section, and a court may strike down an amendment only if the amendment bears no reasonable relationship to the public health, safety or welfare. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976); Roberts v. City of Woonsocket, 575 F.2d 339 (1st Cir. 1978).

The party challenging a zoning amendment has the burden of proving that the so-called comprehensive plan has not been followed. Mesolella v. City of Providence, 439 A.2d 1370 (R.I. 1982).

If an amendment to a local zoning ordinance reasonably relates to the public health, safety, or welfare, then the comprehensive plan remains intact and the amendment is valid. Mesolella v. City of Providence, 439 A.2d 1370 (R.I. 1982).

Local ordinances drawing distinction between a college and a religious institution in reference to dormitories and imposing off-street parking requirements applicable solely to colleges violated plaintiff-college's right to equal protection under the fourteenth amendment, where the record contained no evidence that established any sort of rational basis for such distinction, nor was there evidence in record that provided a rationale for the *city* to establish differing parking requirements. Johnson & Wales College v. DiPrete, 448 A.2d 1271 (R.I. 1982).

4. Zoning Guides and Standards.

The provisions set out in this section establish the objectives that are to be accomplished through an exercise of the zoning power by a local legislature. It is clear from the language used that they were intended to

constitute norms and standards that would guide the local legislature in an exercise of the conferred power. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961); Hadley v. Harold Realty Co. 97 R.I. 403, 198 A.2d 149, 199 A.2d 121 (1964).

It was congestion and hazard and not traffic increase that was within the contemplation of the legislature in providing in this section that zoning regulations should be "designed to lessen congestion in the streets * * *." Such fact was not competent for the testimony of a non-expert witness. Thomson Methodist *Church* v. Zoning Bd. of Review, 99 R.I. 675, 210 A.2d 138 (1965).

5. Spot Zoning.

The validity of spot zoning in a particular case depends upon whether the zoning authority operated within the limitations prescribed by the enabling act. D'Angelo v. Knights of Columbus Bldg. Ass'n, 89 R.I. 76, 151 A.2d 495 (1959).

"Spot zoning" is a term normally applied to changes in the zoning classification of a relatively small tract of land, making its use incompatible with the rest of the district. Verdecchia v. Johnston Town Council, 589 A.2d 830 (R.I. 1991).

6. Variance.

It was error for the trial court to uphold a special exception granted by the board of zoning review, where there was no finding by either the board or the trial court of adequate provision for sewage treatment for the proposed development. Guiberson v. Roman Catholic Bishop, 112 R.I. 252, 308 A.2d 503 (1973).

Collateral References. Airport and airport sites, zoning regulations as affecting. 161 A.L.R. 1232.

Areas or open spaces for light and air, validity of building regulation requiring. 9 A.L.R. 1040; 59 A.L.R. 518.

Schools, colleges, universities, and the like, zoning regulations as applied to. 64 A.L.R.3d 1087; 64 A.L.R.3d 1138; 74 A.L.R.3d 14; 74 A.L.R.3d 136.

Tourist camps, zoning regulations as to. 22 A.L.R.2d 793.

45-24-4. Hearings on general ordinances. [Repealed effective July 1, 1993.] - (a) No ordinance which is general in scope shall be enacted, amended, or repealed until after a public hearing has been held upon the question of the enactment, amendment, or repeal of the ordinance, before the *city* or town council, as the case may be, or a committee or commission authorized by the city or town council to investigate and make recommendations concerning the proposed ordinance, who shall give first notice of a public hearing specifying the time and place of the hearing by publication of the notice in a newspaper of general circulation within the city or town at least once each week for three (3) successive weeks prior to the date of the hearing, at which hearing, opportunity shall be given all persons interested to be heard upon the matter of the proposed ordinance. The newspaper notice containing a statement of the proposed amendments to the ordinance shall be inserted once in its entirety, and, thereafter, a weekly formal legal notice shall be inserted stating that a public hearing will be held specifying the time and place of the hearing. The subsequent formal notices shall include a reference to the original advertisement which gave a full description.

(b) Where a proposed amendment to an existing ordinance includes a change in an existing zoning map, the hearing notice requirement cited above shall be supplemented by written notice of the time, place, date, nature, and purpose of the public hearing to all owners of real property within the area of proposed change and within two hundred feet (200') of the perimeter of the real property

proposed for change by regular mail postage prepaid at least seven (7) days prior to the date of the public hearing.

History of Section.

P.L. 1921, ch. 2069, § 2; G.L. 1923, ch. 57, § 2; P.L. 1931, ch. 1762, § 1; G.L. 1938, ch. 342, § 2; G.L. 1956, § 45-24-4; P.L. 1967, ch. 173, § 1; P.L. 1976, ch. 114, § 1; P.L. 1981, ch. 417, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) assigned subsection designations and made several substitutions for the words "said" and "such" and several punctuation changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1), in subsection (a), inserted a comma following "which hearing" near the end of the first sentence, inserted a comma preceding and following the word "and" and following the word "thereafter" in the second sentence, and in the last sentence inserted the word "a" preceding the words "reference" and "full".

Compiler's Notes. Section 1 of P.L. 1987, ch. 424 provides: "Where a proposed amendment to an existing ordinance includes a change in an existing zoning map in the town of Little Compton, the hearing notice requirement cited in section 45-24-4 of the general laws shall be supplemented by written notice of the time, place, date, nature and purpose of such public hearing to all owners of real property as of December 31, of the previous year, within the area of proposed change and within two hundred feet (200') of the perimeter of the real property proposed for change by regular mail postage prepaid at least seven (7) days prior to the date of said public hearing."

Section 1 of P.L. 1990, ch. 160 provides: "The city of Providence shall be exempt from giving the notice to persons and in the manner required by the second paragraph of this section of the general laws of 1956, as amended, with respect to any comprehensive amendment to its existing zoning ordinance introduced by any member of the city council during the years 1990-91."

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 2; G.L. 1923, ch. 57, § 2; P.L. 1931, ch. 1762, § 1; G.L. 1938, ch. 342, § 2; G.L. 1956, § 45-24-4; P.L. 1967, ch. 173, § 1; P.L. 1976, ch. 114, § 1; P.L. 1981, ch. 417, § 1), concerning hearings in general ordinances, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Notice requirement.
2. Sufficiency of notice.

1. Notice Requirement.

Provisions relating to advertising on proposed amendment are in form and substance mandatory conditions precedent to proper exercise of power delegated to council, and failure to conform thereto is not a mere irregularity which may be waived. Rhode Island Home Bldrs. v. Budlong Rose Co., 77 R.I. 147, 74 A.2d 237 (1950); Johnson & Wales College v. DiPrete, 448 A.2d 1271 (R.I. 1982).

The fact that the city may voluntarily have given notice by mail in instances involving specific amendments to the zoning ordinance at other times is no basis for holding that it is required to do that which it is not compelled to do in enacting comprehensive zoning ordinance by the enabling act or the ordinance. Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 136 (1959).

Substantial changes in a proposed amendment to a town zoning ordinance as advertised required that the altered amendment be advertised and a new hearing held before the town council had jurisdiction to enact the amendment as altered. DeLucia v. Town of Jamestown, 107 R.I. 179, 265 A.2d 636 (1970).

One elementary proposition that is applicable when considering proposed modifications of a zoning ordinance is that adequate notice of the modifications is a jurisdictional prerequisite. Quigley v. Town of Glocester, 520 A.2d 975 (111. 1987).

The failure of a town council to comply with the open meetings law or the notice requirements of this section in enacting a new zoning ordinance does not constitute a violation of due process; the ordinance is a legislative act, and procedural due process does not require that affected individuals receive notice or have an opportunity to be heard. Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield ex rel. Rainville, 719 F. Supp. 75 (D.R.I. 1989).

2. Sufficiency of Notice.

There is no merit to complainant's contention that the zoning ordinance, insofar as it applies to his property, deprives him of constitutional rights because he did not receive written notification of the hearing on the proposed new ordinance, since neither the enabling act nor the zoning ordinance required the giving of such notice. Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 136 (1959).

Amendment to zoning ordinance was invalid for lack of adequate notice of hearing where newspaper publication stated time and place of hearing and that copies of the proposal were filed in clerk's office but failed to reasonably inform landowners in the community of the nature of the change and whether it would affect zoning classifications of their land. Federal Bldg. & Dev. Corp. v. Town of Jamestown, 112 R.I. 478, 312 A.2d 586 (1973).

The same test used to determine sufficiency of notice under this section was applied to § 45-24-4.1, that is, whether the notice was sufficient to inform an ordinary layman lacking expertise in zoning matters of the property affected and the changes sought. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

45-24-4.1. Specific **ordinances. [Repealed effective July 1, 1993.1** — (a) No ordinance making a specific change in the zoning map shall be enacted, amended, or repealed until after a public hearing, at which opportunity shall be given all persons interested to be heard, has been held upon the question of the enactment, amendment, or repeal of the ordinance, before the city or town council, or a committee or commission authorized by the city or town council to investigate and make recommendations concerning the proposed ordinance, as the case may be, who shall first give written notice of the time and place of a public hearing, and the nature and purpose thereof, to all owners of any real property within two hundred feet (200') of the perimeter of the real property which is the subject matter of the proposed amendment, enactment, or repeal, by registered or certified mail at least seven (7) days before the date of the hearing and by publication of the notice in a newspaper of general circulation within the city or town at least once each week for three (3) successive weeks prior to the date of the hearing. Provided, however, notwithstanding the provisions of § 45-24-2, the town or city council may, in approving a zone change, limit the change to one of the permitted uses in the zone to which the subject land is rezoned, and impose such limitations and conditions and restrictions, including without limitation, conditions or restrictions requiring the petitioner to obtain a permit or approval from any and all state or local governmental agencies or instrumentalities having jurisdiction over the land and use which are the subject of the zoning change upon the effectiveness or continued effectiveness of the zoning change and/or upon the use of the land as it deems necessary. The responsible town or city official shall cause the limitations and conditions so imposed to be clearly noted on the zoning map; provided, however, in the case of a conditional zone change, the limitations, restrictions, and conditions shall not be noted on the zoning map until the zone change has become effective. If the permitted use for which the land has been rezoned is abandoned or if the land is not used for that purpose for a period of two (2) years or more after the zone change becomes effective, the town or city council may, after a public hearing as hereinbefore set forth, change the land to its original zoning use before the petition was filed. If any limitation, condition, or restriction in an ordinance is held to be invalid by a court in any action, that holding shall not cause the remainder of the ordinance to be invalid.

(b) A newspaper notice containing a statement of the proposed amendments to the ordinance shall be inserted once in its entirety,

and, thereafter, a weekly formal legal notice shall be inserted stating that a public hearing will be held specifying the time and place of the hearing. Subsequent formal notices shall include a reference to the original advertisement which gave full description.

History of Section.

G.L. 1956, § 45-24-4.1; P.L. 1967, ch. 173, § 3; P.L. 1972, ch. 256, § 1; P.L. 1974, ch. 203, § 1; P.L. 1976, ch. 114, § 1; P.L. 1977, ch. 30, § 1; P.L. 1978, ch. 35, § 1; P.L. 1978, ch. 156, § 1; P.L. 1988, ch. 658, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) assigned subsection designations and made several substitutions for the words "such" and "said" and several minor stylistic changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch, 354, § 1) substituted "the petition" for "such petition" near the end of the next-to-last sentence of subsection (a), inserted the word "a" preceding "reference to the original" in the second sentence of subsection (b), and made several punctuation changes throughout the section.

Compiler's Notes. Section 2 of P.L. 1988, ch. 658 provides that the amendment to this section by that Act shall take effect upon its passage and shall be retroactive (i) to all zoning ordinance amendments heretofore adopted by any city or town council pursuant to the authority granted by § 45-24-4.1, and (ii) to all special exceptions and variances heretofore granted by a board pursuant to the authority granted by § 45-24-19(b) and § 45-24-19(c). Notwithstanding anything to the contrary contained in any such zoning ordinance amendment, any section, clause or part thereof that provides that the failure to obtain any permit or to satisfy any other requirement in such ordinance within the time period prescribed therein shall result in a reversion back to the original zoning classification shall be deemed to require prior notice and hearing pursuant to § 45-24-4.1 whether or not the requirement of such notice and hearing is expressly set forth therein.

Delayed Repealed Sections. This section (G.L. 1956, § 45-24-4.1; P.L. 1967, ch. 173, § 3; P.L. 1972, ch. 256, § 1; P.L. 1974, ch. 203, § 1; P.L. 1976, ch. 114, § 1; P.L. 1977, ch. 30, § 1; P.L. 1978, ch. 35. § 1; P.L. 1978, ch. 156, § 1; P.L. 1988, ch. 658, § 1), concerning specific ordinances, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Constitutionality.
2. Notice.
3. Construction with other statutes.

1. Constitutionality.

This section is not unconstitutional on its face as a denial of equal protection or due process because it does not authorize a wholly arbitrary differentiation per se and because it is subject to § 45-24-3, which prohibits any arbitrary or discriminatory exercise of the amendatory power in making zoning regulations. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

2. Notice.

The notice requirements of this section did not apply to a petition on which a hearing was held prior to the effective date of this section and decision rendered after such effective date. Carpionato v. Town Council, 104 R.I. 490, 244 A.2d 861 (1968).

The fact that severe weather conditions prevented many interested persons from attending the advertised hearing on a proposed amendment to the town zoning ordinance did not deprive such persons of an opportunity to be heard as required by this section nor invalidate the amendment. Willey v. Town Council, 106 R.I. 544, 106 R.I. 839, 261 A.2d 627 (1970).

Publication at least once each week for three (3) successive weeks was not construed to mean that a full three weeks, or 21 days, must elapse between initial publication and the hearing. Sullivan v. Faria, 112 R.I. 132, 308 A.2d 473 (1973).

In order to determine whether notice was sufficient under this section, the court applied the same test it used under §§ 45-24-4 and 45-24-18, that is, whether the notice was sufficient to inform an ordinary layman lacking expertise in zoning matters of the property affected and the changes sought. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

Even though the notice received by plaintiff did not identify the property to be rezoned by map, by address or by metes and bounds, it satisfied the notice requirements of this section since it informed plaintiff on what road the property was located and that it was within 200 feet of his own land. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

Notices addressed to husband "et ux." gave wives who were co-owners of property adequate notice of hearing. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

Even though town council had once rendered a decision that denied a petition for a zoning amendment, the council could at a subsequent meeting, without further notice and advertising, reverse itself and amend the zoning ordinance on a validly made motion to reconsider. Johnson v. Eldredge, 430 A.2d 1069 (RI. 1981).

The portion of an ordinance which provides for automatic reversion of property to a designation as a waterfront business, if a building permit is not obtained within three years from the date of enactment of the ordinance, violates the notice requirement set out in this section. Greenwich Bay Yacht Basin Assocs. v. Washburn, 560 A.2d 945 (R.I. 1989).

3. Construction with Other Statutes.

Prior to this section's 1976 amendment, which deleted a 1972 proviso permitting a town or city council in approving a zoning change to limit such change to one of the permitted uses in the zone to which the subject land is rezoned, the imposition of conditions on land rezoned by amendment did not violate the uniformity requirement of § 45-24-2 simply because those conditions were not imposed on land in the same use category but not covered by the amendment. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

45-24-4.2. Notice to adjoining cities and towns - Limited equity housing cooperative state advocate. [Repealed effective July 1, 1993.1 - *(a) Adjoining cities or towns - Parties in interest.* The city or town council of any city or town, the boundary of which is within an area that might be affected by any proposed ordinance or the amendment or repeal of any existing ordinance, or by any proceedings before the zoning board or board of review of any adjoining city or town where a landowner in an area would be entitled to notice of the proposed change or proceedings, except that the area is beyond the boundary of the particular city or town, shall be entitled to notice and shall be a party in interest in all proceedings and shall have the same standing and rights of appeal as a landowner, entitled to notice, who is located in the city or town.

(b) Limited equity housing cooperative state advocate. The governor shall designate a state department, e.g., the department of administration, and/or a quasi public state housing organization, e.g., the Rhode Island housing mortgage finance corporation and/or other public, quasi public, or private, nonprofit housing organization, as he or she may select, as an advocate for all limited equity housing cooperatives involved in a presentation to a local zoning board of review, and that advocate organization(s) shall be a party in interest in all proceedings and shall have the same standing and rights of appeal as a landowner, entitled to notice, who is located in the respective city or town of the local zoning board of appeal.

History of Section.

G.L. 1956, § 45-24-4.2; P.L. 1968, ch- 270, § 1; P.L. 1986, ch. 256, § 3; P.L. 1988, ch. 84, § 104.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § Ii substituted "the amendment or repeal" for "amendment or appeal" and "the zoning board or board of review" for "the zoning or board of review" near the beginning of subsection (a); substituted "`select as an advocate" for "select as advocate" near the middle of subsection (b); and made several substitutions for the word "such" and several minor stylistic changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) added the present section heading, which heading was first added in 1988 by the compiler; deleted the word "housing" preceding "finance corporation" near the beginning of subsection (b), which deletion was previously made in 1988 by the compiler; inserted

a comma following the word "proceedings" near the end of subsection (a); and made several punctuation and stylistic changes throughout subsection (b).

Delayed Repealed Sections. This section (G.L. 1956, § 45-24-4.2; P.L. 1968, ch. 270, § 1; P.L. 1986, ch. 256, § 3; P.L. 1988, ch. 84, § 104), concerning notice to adjoining cities and towns, and the limited equity housing cooperative state advocate, was repealed by P.L. 1991, ch. 307, § 1. effective July 1. 1993. See § 45-24-28(c).

Collateral References. Buffer provision in zoning ordinance as applicable to abutting land in adjoining municipality, 48 A.L.R.3d 1303.

45-24-4.3. Adjoining cities or towns - Water resources protected. [Repealed effective July 1, 1993.] - The city or town council of any city or town where there is a municipal, public, or quasi public water source, or where there is a private water source that is used or is suitable for use as a public water source that is within one thousand feet (1,000') of an area that might be affected by any proposed ordinance or amendment or repeal of any existing ordinance, or by any proceedings before the zoning board or board of review of any adjoining city or town, shall be entitled to due notice of the proceedings and shall be a party in interest in all the proceedings and shall have the same standing and rights of appeal as a landowner, entitled to notice, who is located in the city or town.

History of Section.

G.L. 1956, § 45-24-4.3; P.L. 1968, ch. 271, § 1; P.L. 1988, ch. 84, § 104.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "amendment or repeal" for "amendment or appeal" near the middle of the section and made several substitutions for the word "such" throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1), near the beginning of the section, substituted "municipal, public, or" for "municipal or public or", inserted a comma following "water source", and made a minor stylistic change; and inserted a comma following "city or town" near the end of the section.

Delayed Repealed Sections. This section (G.L. 1956, § 45-24-4.3; P.L. 1968, ch. 271, § 1; P.L. 1988, ch. 84, § 104). concerning notice to adjoining cities and towns, was repealed by P.L. 1991. ch. 307, § 1. effective July 1, 1993. See § 45-24-28rcL.

45-24-4.4. Notice to governing body - Water resources protected. [Repealed effective July 1, 1993.] - The governing body of any state or municipal water department or agency, special water district, or private water company that has riparian rights to a surface water resource and/or surface water shed that is used or suitable for use as a public, potable water source that is within one thousand (1,000) feet of any real property which is the subject matter of any proposed enactment or amendment or repeal of an ordinance, or of any appeals to the zoning board of review and appeals, shall be entitled to due notice of the proceedings, and shall be a party in interest, and shall have the standing and rights of appeal as an owner of real property pursuant to the provisions of § 45-24-4.1, provided, however, that the governing body of any state or municipal water department or agency, special water district, or private water company has filed with the building inspector a map survey, which shall be kept as a public record, showing areas of surface water resources and/or water sheds and parcels of land within one thousand (1,000) feet thereof, in the city or town.

History of Section.
P.L. 1984, ch. 302, § 1.
Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "repeal of an ordinance" for "repeal of any such ordinance" near the middle of the section and made several substitutions for the words "such" and "said" throughout the section.
The 1991 Reenactment (P.L. 1991, ch. 354, 1) inserted a comma following "review and appeals" near the middle of the section, and inserted a comma following "special water district" near the end of the section.
Delayed Repealed Sections. This section (P.L. 1984, ch. 302, § 1), concerning notice to governing body, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-4.5. Notice to cities and towns - Parties in interest. [Repealed effective July 1, 1993.1 - The city or town council of any city or town which owns a municipal, public, or quasi public water source located outside of its municipal borders shall be considered a party in interest in any proceedings before the zoning board, board of review, planning board, city, town council of the city, or town where the water source is located when the matter being considered is located within one thousand feet (1,000') of the property line. In such case, notice shall be given to the city or town owning the water source in the same manner as all other required notices.

History of Section.
P.L. 1988, ch. 250, § 1.
The 1991 Reenactment (P.L. 1991, ch. 354, § 1) substituted 'board, city, town" for "board, or city or town" and "the property line" for "said property line" in the first sentence, and made several punctuation and stylistic changes throughout the section.
Delayed Repealed Sections. This section (P.L. 1988, ch. 250, § 1), concerning notice to cities and towns, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-5. Amendment and repeal of ordinances - Landowners' protests. [Repealed effective July 1, 1993.1 - The city or town council, as the case may be, shall have power, after a public hearing as herein provided, from time to time, to amend or repeal an ordinance and thereby change the regulations or districts; provided, that, if there shall be filed in the office of the city or town clerk of the city or town on or before the day of the hearing or within three (3) days thereafter, a written protest against the proposed amendment or repeal signed and acknowledged by the owners of twenty percent (20%) or more of the street frontage of the property proposed to be affected, or by the owners of twenty percent (20%) or more of the street frontage directly opposite the property proposed to be affected, or by the owners of the property abutting on twenty percent (20%) or more of the boundary line between the property proposed to be affected and the property immediately in the rear thereof, when there is no street between the properties, no amendment or repeal shall be passed except by a three-fifths (3/5) vote of the city or town council and the approval of the mayor of the town or city, or if disapproved by the mayor, by a like vote as may be required by law to enact an ordinance in the case of disapproval by the mayor of the town or city. The word "owner" as used in this section shall not be construed to include attaching creditors or lien holders other than mortgagees.

History of Section.

P.L. 1921, ch. 2069, § 2; G.L. 1923, ch. 57, § 2; P.L. 1931, ch. 1762, § 1; G.L. 1938, ch. 342, § 2; G.L. 1956, § 45-24-5.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84. § 1) made several substitutions for "such", "any such", and "said" and several minor stylistic changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) inserted a comma following "three (3) days thereafter" in the first sentence.

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 2; G.L. 1923, ch. 57, § 2; P.L. 1931, ch. 1762, § 1; G.L. 1938, ch. 342, § 2; G.L. 1956, § 45-24-5), concerning amendment and repeal of ordinances, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

Cross References. Housing projects, zoning to allow, § 45-25-24.

Redevelopment projects, zoning and rezoning, §§ 45-32-10, 45-32-19, 45-32-42.

NOTES TO DECISIONS

ANALYSIS

1. General powers of council.
2. Notice.
3. Conformity to comprehensive plan.
4. Limitation on powers of board of review.
5. Amendatory enactments.

1. General Powers of Council.

Petitioner did not have the right to a review of the city council's action in amending a zoning ordinance as the action is clearly legislative and in no sense judicial. Rhode Island Home Bldrs. v. Hunt, 74 R.I. 255, 60 A.2d 496 (1948); Alianiello v. Town Council, 83 R.I. 395, 117 A.2d 233 (1955).

An exercise of the power to amend the provisions of a zoning ordinance, like the power to enact a zoning ordinance, is limited to that conferred in the enabling statute. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

Generally the several town councils may amend or repeal zoning ordinances without approval on the part of the financial town meeting. Mason v. Bowerman Bros., 95 R.I. 425, 187 A.2d 772 (1963).

2. Notice.

The fact that the city may voluntarily have given written notice in instances involving specific amendments to the zoning ordinance at other times is no basis for holding that it is required to do that which it is not compelled to do by the enabling act or the ordinance. Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 136 (1959).

3. **Conformity to Comprehensive Plan.**

Zoning ordinance amendments are subject to the statutory requirements of comprehensiveness. D'Angelo v. Knights of Columbus Bldg. Ass'n, 89 R.I. 76, 151 A.2d 495 (1959).

The limit of power of local legislatures in the enactment of a zoning ordinance apply to an exercise of the amendatory power only to the extent that the change effected by such amendment must be in conformity with the comprehensive plan, because haphazard or improper zoning may result as well from an exercise of the amendatory power as from an exercise of the power to enact an original ordinance. Cianciarulo v. Tarro, 92 R.I. 352, 168 A.2d 719 (1961).

When changing zoning regulations by amending a part of the ordinance, the local legislature is required to have such change conform to the comprehensive plan of zoning in effect in the municipality, this requirement of § 45-24-3 being mandatory. Town & Country Mobile Homes v. Inspector of Bldgs., 93 R.I. 383, 175 A.2d 556)1961).

A relatively small area should not be rezoned for multi-family dwellings when that small area remains completely surrounded, with the exception of the eastern boundary, by predominately one-family homes in an A zone (one-family dwellings). Toole v. May-Day Realty Corp.,. 101 R.I. 379, 223 A.2d 545 (1966).

The rezoning of property from a residential to a business use on the condition that the land rezoned shall be devoted exclusively to the business use for which application to rezone was made, or otherwise remain residential, constitutes zoning without regard to the public health, safety, and welfare, concern for which is basic to that comprehensiveness contemplated in this act. Oury v. Greany, 107 R.I. 427, 267 A.2d 700 (1970).

4. Limitation on Powers of Board of Review.

Action of board in approving limited extension of a factory by permitting erection of an addition in a more restricted area did not amount to an amendment of the zoning ordinance where the addition merely covered additional portions of lots already partly occupied. Bruzzi v. Board of Appeals, 84 R.I. 220, 122 A.2d 877 (1956).

Power of board of review to grant exceptions did not include the right to permit multiple dwellings in an area containing almost 160,000 square feet of land which was part of an area restricted to one family use since to do so would effect a substantial change in the lines of the zone which is reserved to the

council by this section. Adams v. Zoning Bd. of Review, 86 R.I. 396, 135 A.2d 357 (1957).

Where the town council amended the zoning ordinance by changing the zoning of two lots from residental to limited business on condition that an office building be erected and operated upon the two lots, the zoning board of review could not pass upon the validity of such a condition on an appeal from the refusal of the building inspector to grant a permit for the erection of a restaurant on the two lots. Arc-Lan Co. v. Zoning Bd. of Review, 106 R.I. 474, 261 A.2d 280 (1970).

5. Amendatory Enactments.

A town may amend its zoning ordinance to exempt from its provisions the erection by the town or any of its agencies of a building for governmental purposes and an amendment exempting such erection for "public or municipal purposes" will be construed as such an amendment. Nunes v. Town of Bristol, 102 R.I. 729, 232 A.2d 775 (1967).

It was not an abuse of discretion for the town council to amend the zoning ordinance by changing from residential to commercial zoning a parcel of four lots which adjoined a residential area on one side when all other property on both sides of the highway on which the parcel was located as far as the eye could see in either direction was devoted to commercial use. Willey v. Town Council, 106 R.I. 544, 106 R.I. 839, 261 A.2d 627 (1970).

Collateral References. Notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation, 96 A.L.R.2d 449.

Rezoning or amendment of zoning regulations as affecting persons who have purchased or improved property in reliance upon original regulations. 138 A.L.R. 500.

Validity and construction of provisions of zoning statute or ordinance respecting protest or petition by property owners. 4 A.L.R.2d 335.

Variance as related to or affecting amendment, modification, or repeal of regulation. 168 A.L.R. 21.

45-24-6. Penalties for ordinance violations - Injunction.

[Repealed effective July 1, 1993.] - The city or town council of the town or city, as the case may be, shall have power to provide a penalty for the violation of any ordinance enacted under the authority of this chapter by a fine not exceeding one hundred dollars ($100) for each offense, and to provide that each day of the existence of any violation shall be deemed a separate offense, the fine to inure to the town or city, and may also cause suit to be brought in the supreme or superior court in the name of the city to restrain the violation of, or to compel compliance with, the provisions of the ordinance.

History of Section.

P.L. 1921, ch. 2069, § 3; G.L. 1923, ch. 57, § 3; G.L. 1938, ch. 342, § 3; G.L. 1956, § 45-24-6.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § U substituted "the" for "such" and "any such" throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § ii, near the middle of the section, inserted the word "a" preceding "fine not exceeding", inserted a comma following "each offense", and deleted the word "such" preceding "violation shall".

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 3; G.L. 1923, ch. 57, § 3; G.L. 1938, ch. 342, § 3; G.L. 1956, § 45-24-6), concerning penalties for ordinance violations, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Aggrieved person.
2. Proof of nuisance.
3. Enforcement.
   -Civil and punitive remedies.
5. Intervention by adjoining landowners.
6. Appeals.
7. Jurisdiction.

1. Aggrieved Person.

Under this section and § 45-24-7 assigning

responsibility for the protection of the public interest in the preservation and maintenance of the integrity of the zoning laws to the local government, such government becomes an aggrieved person within the meaning of § 45-24-20 and may appeal thereunder whenever the public interest is affected by the action of a zoning board. City of East Providence v. Shell Oil Co., 110 R.I. 138, 290 A.2d 915 (1972).

In a zoning dispute, the local government may apply for certiorari in the supreme court, even though it was not judicially involved at the superior court level, Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

2. Proof of Nuisance.

Unless the town had shown that a trailer park was a nuisance or a threat to the public health, this section provided no authority for injunctive relief for violation of a zoning ordinance and the town must resort to the penal sanctions contained in its ordinance. Town of Glocester v. Olivo's Mobile Home Court, Inc., 111 R.I. 120, 300 A.2d 465 (1973).

3. Enforcement.

Only the town, through its solicitor, can initiate actions to enforce local zoning ordinances pursuant to the statute which prescribes the exclusive manner in which actions can be initiated in keeping with the legislative intent to exclude individual landowners from the institution of unnecessary litigation that would burden the courts and harass the affected landowners. Town of Coventry v. Hickory Ridge Campground, Inc., 111 R.I. 716, 306 A.2d 824 (1973).

In accordance with §§ 45-24-6 and 45-24-7, only the municipality, through its town solicitor, may initiate proceedings to enforce local zoning ordinances. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980).

4. -Civil **and Punitive Remedies.**

A town or city has available to it for violations of zoning ordinances a punitive remedy that may be sought through criminal proceedings and an injunctive remedy that may be sought by way of civil proceedings. The two proceedings must, however, be brought separately and cannot be joined, even though both actions may be maintained at the same time. City of Warwick v. Aptt. 497 A.2d 721 (R.I. 1985).

5. Intervention by Adjoining Landowners.

Although intervention by an adjoining landowner in a proceeding brought by the town solicitor in the name of the town pursuant to this section and § 45-24-7 was not permissible, § 8-6-2 provides that rules of court procedure take precedence over prior inconsistent procedural legislation so that adjoining landowners can now invoke the mandatory provisions of R.C.P. 24 and be permitted to intervene if they demonstrate that the town solicitor's representation of their interests is inadequate. Town of Coventry v. Hickory Ridge Campground, Inc., 111 R.I. 716, 306 A.2d 24 (1973).

6. Appeals.

Defendant's appeal from judgment ordering him to remove a trailer which violated town zoning ordinance was denied, where his constitutional objections were improperly raised, there was no indication that the town acted arbitrarily, and he neglected to avail himself of existing zoning grievance procedures. Town of Foster v. Lamphere, 117 R.I. 541, 368 A.2d 1238 (1977).

7. Jurisdiction.

This section clearly provides a town with the authority to enact penalties for violations of town ordinances, but it in no way overrules § 12-3-1 in regard to which court has jurisdiction to try such offenses. Town of Glocester v. Tillinghast, 416 A.2d 1178 (R.I. 1980).

This section reinforces § 12-3-1 by reminding the reader that any equitable action must be brought in the superior or supreme courts. Town of Glocester v. Tillinghast, 416 A.2d 1178 (R.I. 1980).

This section and § 45-24-7, which are read in pari materia, confer exclusive jurisdiction of these matters upon the courts and preclude a local legislative body from making a similar grant of such jurisdiction to the zoning board and from designating the building inspector as the proper party to bring such actions. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980).

Collateral References. Violation of zoning ordinance or regulation as affecting or creating liability for injuries or death. 31 A.L.R.2d 1469.

45-24-7. Judicial aid in enforcement of ordinances. [Repealed effective July 1, 1993.] - The supreme court and the superior court, within their respective jurisdictions, or any justice of either of those courts in vacation, shall, upon due proceedings in the name of a town or city instituted by its town or city solicitor, have power to issue any extraordinary writs or to proceed according to the course of equity or both:

(a) To restrain the erection, alteration, or use of any building, structure, or other thing erected, altered, or used in violation of the provisions of any ordinance enacted under the authority of this chapter, and to order its removal or abatement as a nuisance;

(b) To compel compliance with the provisions of any ordinance enacted under the authority of this chapter; and

(c) To order the removal by the owner of any building, structure, or other thing existing in violation of any ordinance enacted under the provisions of this chapter, and to authorize some official of the town or city in default of the removal by the owner to remove it at the expense of the owner.

History of Section.

P.L. 1921, ch. 2069, § 4; G.L. 1923, ch. 57, § 4; G.L. 1938, ch. 342, § 4; G.L. 1956, § 45-24-7.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) assigned subdivision designations, and made several substitutions for the words "such" and "said" and several punctuation changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch, 354, § 1) inserted a comma preceding and following "or use of any building, structure" in subdivision (a), added the word "and" at the end of subdivision (b), and inserted a comma following "this chapter" near the middle of subdivision (c).

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 4; G.L. 1923, ch. 57, 4; G.L. 1938, ch. 342, § 4; G.L. 1956, § 45-24-7), concerning judicial aid in enforcement of ordinances, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Limitation on enforcement.
3. -Powers of board of review.
4. Aggrieved person.
5. Mandamus.
6. Appeals.
7. Initiation of actions.
8. Intervention.
9. Unauthorized permits.

1. In General.

The legislature conferred upon the local legislatures authority to invoke judicial assistance by the institution of an appropriate proceeding in the name of the municipality through the action of the city or town solicitor and in so doing the legislature intended to limit the exercise of jurisdiction by the courts in the enforcement of zoning ordinances to such proceedings only as *were* brought in the name of a municipality by its designated municipal legal officer and in so doing intended to exclude individual landowners from the institution of unnecessary litigation that would only burden the courts. Lincoln v. Cournoyer, 95 R.I. 280, 186 A.2d 728 (1962).

This section and § 45-24-6 together disclose a complete overall legislative scheme for the enforcement of zoning provisions and confer exclusive jurisdiction in those matters upon the courts, precluding a local legislative body from effectively making a similar grant of such jurisdiction to the zoning board. Mauran v. Zoning Bd., 104 R.I. 604, 247 A.2d 853 (1968).

2. Limitation on Enforcement.

Adjacent owners are not entitled to enforce compliance with building permit, since that is the exclusive duty of city officials. Mastrati v. Strauss, 75 R.I. 417, 67 A.2d 29 (1949).

This section requires that any equitable actions brought in the name of the municipality pursuant to § 45-24-6 for the enforcement thereof must be brought by the municipality

only, exclusively through its city or town solicitor; and precludes the local legislature from effectively designating the building inspector to bring such actions. Mauran v. Zoning Bd., 104 R.I. 604, 247 A.2d 853 (1968).

Only the town, through its solicitor, can initiate actions to enforce local zoning ordinances pursuant to the statute which prescribes the exclusive manner in which actions can be initiated in keeping with the legislative intent to exclude individual landowners from the institution of unnecessary litigation that would burden the courts and harass the affected landowners. Town of Coventry v. Hickory Ridge Campground, Inc., 111 R.I. 716, 306 A.2d 824 (1973).

Judicial aid in the enforcement of ordinances is to be sought only by cities or towns, acting through their solicitors, and not by zoning boards themselves. Barrington School Comm'n v. Rhode Island State Labor Relations Bd., 120 R.I. 470, 388 A.2d 1369 (1978).

It was error to issue injunctive relief without first balancing the equities where the present owner had no prior knowledge of the violations committed by their predecessors in title. City of East Providence v. Rhode Island Hosp. Trust Nat'l Bank, 505 A.2d 1143 (R.I. 1986).

3. -Powers of Board of Review.

The remedies granted to the city or town by this section for violations of the zoning ordinance are exclusive and the zoning board of review may not base refusal of an exception or variance upon prior violations of the ordinance by the petitioner. Wyss v. Zoning Bd. of Review, 99 R.I. 562, 209 A.2d 225 (1965).

4. Aggrieved Person.

Under § 45-24-6 and this section assigning responsibility for protection of public interest in the preservation and maintenance of integrity of zoning laws to local government, such government becomes an aggrieved person within the meaning of § 45-24-20 and may appeal thereunder whenever public interest is affected by the action of a zoning board. City of East Providence v. Shell Oil Co., 110 R.I. 138, 290 A.2d 915 (1972).

In a zoning dispute, the local government may apply for certiorari in the supreme court, even though it was not judicially involved at the superior court level. Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

5. Mandamus.

Where plaintiffs alleged that proposed multifamily units would cause their property to diminish in value, clearly a private or particular interest to be protected, and although the plaintiffs might have prevailed on the issue of standing, their effort to seek the issuance of a writ of mandamus was properly rejected, since there was a question of discretion vested not only in the solicitor but also in the bulding inspector. O'Neill v. Carr, 522 A.2d 1213 (R.I. 1987).

6. Appeals.

Defendant's appeal from judgment ordering him to remove a trailer which violated town zoning ordinance was denied, where his constitutional objections were improperly raised, there was no indication that the town acted arbitrarily, and he neglected to avail himself of existing zoning grievance procedures. Town of Foster v. Lamphere, 117 R.I. 541, 368 A.2d 1238 (1977).

7. Initiation of Actions.

In accordance with § 45-24-6 and this section, only the municipality, through its town solicitor, may initiate proceedings to enforce local zoning ordinances. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980); Town of Charlestown v. Beattie, 422 A.2d 1250 (R.I. 1980).

Section 45-24-6 and this section, which are read in pari materia, confer exclusive jurisdiction of these matters upon the courts and preclude a local legislative body from making a similar grant of such jurisdiction to the zoning board and from designating the building inspector as the proper party to bring such actions. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980).

8. Intervention.

Although the supreme court has permitted intervention in suits brought by a town to enjoin zoning violations, only the town has standing to initiate the action. Town of Charlestown v, Beattie, 422 A.2d 1250 (R.I. 1980).

Termination of the right of intervenors to relief cannot supersede and cut off the town's right to maintain an action under this section. Town of Charlestown v. Beattie, 422 A.2d 1250 (R.I. 1980).

9. Unauthorized Permits.

An unauthorized issuance of a building permit could not vitiate the town's right to have zoning violations enjoined. Town of Charlestown v. Beattie, 422 A.2d 1250 (R.I. 1980).

Collateral References. Remedies to compel municipal officials to enforce zoning regulations. 35 A.L.R.2d 1135.

45-24-8. Reimbursement against owner for work by town in removal of structures. [Repealed effective July 1, 1993.] - When, under the provisions of any judgment, order, or decree, in any proceeding under § 45-24-7, any work is done or materials furnished by an official of a town or city or by the order of the official, at the expense of the owner, in removing a building, structure, or other thing unlawfully existing, the value of the work and material may be recovered in an action of the case, brought in the superior court against the owner, and if the work or materials shall have been done or furnished by or at the cost of the town or city, the official shall cause the same to be brought in the name of the city or town.

History of Section.
P.L. 1921, ch. 2069, § 4; G.L. 1923, ch. 57, § 4; G.L. 1938, ch. 342, § 4; G.L. 1956, § 45-24-8.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) inserted "under § 45-24.7" following "proceeding" near the beginning of the section; made a punctuation change near the beginning of the section and near the middle of the section; and made several substitutions for "such", "said", and "any such" throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) substituted "against owner for work by town" for "of town for work" in the section heading, and substituted "the official" for "such official" near the middle of the section.

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 4; G.L. 1923, ch. 57, § 4; G.L. 1938, ch. 342, § 4; G.L. 1956, § 45-24-8), concerning reimbursement against owner for work by town in removal of structures, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-9. Priority in judicial proceedings. [Repealed effective July 1, 1993.] - Upon the entry of any case or proceeding brought under the provisions of this chapter, including pending appeals and appeals hereinafter taken to the superior court, referred to in § 45-24-20, the court shall, at the request of either party, advance the case, so that the matter shall be afforded precedence on the calendar, and shall thereupon be heard and determined with as little delay as possible.

History of Section.
P.L. 1921, ch. 2069, § 4; G.L. 1923, ch. 57, § 4; G.L. 1938, ch. 342, § 4; G.L. 1956, § 45-24-9; P.L. 1972, ch. 19, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "the superior court" for "said court" and made a punctuation change near the middle of the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) inserted a comma following "court shall", "either party", and "the calendar".

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 4; G.L. 1923, ch. 57, § 4; G.L. 1938, ch. 342, § 4; G.L. 1956, § 45-24-9; P.L. 1972, ch. 19, § 1), concerning priority in judicial proceedings, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-10. Preexisting uses saved. [Repealed effective July 1, 1993.] - No ordinance enacted under the authority of this chapter shall prevent or be construed to prevent the continuance of the use of any building or improvement for any purpose to which the building or improvement is lawfully devoted at the time of the enactment of the ordinance.

History of Section.

P.L. 1921, ch. 2069, § 5; G.L. 1923, ch. 57, § 5; G.L. 1938, ch. 342, § 5; G.L. 1956, § 45-24-10.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "the building" for "such building" near the end of the section and "the ordinance" for "such ordinance" at the end of the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) made a minor stylistic change in the section heading.

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 5; G.L. 1923, ch. 57, § 5; G.L. 1938, ch. 342, § 5; G.L. 1956, § 45-24-10), concerning preexisting uses saved, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Purpose of section.
2. Nonconforming use.
3. -Abandonment and discontinuance.
4. -Change in ownership.
5. Improvements.

1. Purpose of Section.

Some incidental loss to or curtailment of unrestricted use of property by some owners in zoned district is unavoidable, but regulations must be made with reasonable consideration of the character of the district and its particular suitability for particular use with a view to conserving value of buildings and encouraging the most appropriate use of the land throughout such municipality. East Providence Mills, Inc. v. Zoning Bd. of Review, 51 R.I. 428, 155 A. 531 (1931).

2. Nonconforming Use.

Petitioner who had started construction and expended a considerable sum when area zoning was changed was entitled to a variance permitting compliance with the previous zoning even though he knew of the pending change at the time he started construction. Harrison v. Hopkins, 48 R.I. 42, 135 A. 154 (1926).

A nonconforming use which existed at the time of adoption of the original ordinance cannot be used as a basis for rezoning one lot for another use. D'Angelo v. Knights of Columbus Bldg. Ass'n, 89 R.I. 76, 151 A.2d 495 (1959).

Where a ballet school located in an agricultural residence district in which a "school or college" was a permitted use, applied to the zoning board for and received "a special exception to operate the Brae Crest School of Ballet as continuation of the present operation," the zoning board acted without authority and whatever legality might inhere in the operation of the school was not the result of any relief within the power of the zoning board to grant but from the zoning ordinance as a permitted use or under this section as a nonconforming use. Olean v. Zoning Bd. of Review, 101 R.I. 50, 220 A.2d 177 (1966).

An automobile junkyard operated in violation of an automobile junkyard licensing ordinance is not a valid preexisting use within the meaning of this section. Town of Scituate v. O'Rourke, 103 R.I. 499, 239 A.2d 176 (1968).

A nonconforming use is an alienable property interest. Town of Coventry v. Glickman, 429 A.2d 440 (R.I. 1981).

3. -Abandonment and Discontinuance.

Discontinuance of a nonconforming use is not sufficient to show that the use has been abandoned; the circumstances surrounding the discontinuance must indicate an intention to abandon the use and the vested rights therein. A.T. & G., Inc. v. Zoning Bd. of Review, 113 R.I. 458, 322 A.2d 294 (1974); Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

Where a five year discontinuance of a nonconforming use was unaccompanied by any overt act or failure to act indicating an intent to abandon, it was insufficient to extinguish the vested right in the nonconforming use. Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

The superior court properly reversed the decision of the zoning board that a nonconforming use, a two-family dwelling in a one-family dwelling zone, had been abandoned where the only evidence of intent to abandon in addition to discontinuance of the nonconforming use was the change from a two to a

one family sewer assessment. Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

The local legislature does not have authority to enact a zoning ordinance provision that a legally nonconforming use that is discontinued for more than two years may not be renewed. Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

The mere discontinuance of a nonconforming use for a period of time does not constitute an abandonment of that use. Rather there must also exist an intent to abandon. Town of Coventry v. Glickman, 429 A.2d 440 (R.I. 1981).

Nonuse of a nonconforming use is not conclusive evidence of abandonment. Town of Coventry v. Glickman, 429 A.2d 440 (R.I. 1981).

Proof of abandonment of a nonconforming use must be borne by the party asserting abandonment. Town of Coventry v. Glickman, 429 A.2d 440 (R.I. 1981).

Abandonment cannot be proven by the mere passage of time but requires an intent on the part of the owner to relinquish the nonconforming use. M.B.T. Constr. Corp. v. Edwards, 528 A.2d 336 (R.I. 1987).

Ordinance which would terminate a partially destroyed nonconforming use if reconstruction were not started within a year of the date of a casualty loss limited and restricted the owner's rights under this section by setting up an absolute time limit, and was therefore invalid and void. M.B.T. Constr. Corp. v. Edwards, 528 A.2d 336 (R.I. 1987).

To establish abandonment, proof of two factors is required: (1) Intent to abandon; and (2) some overt act, or failure to act, which would lead one to believe that the owner neither claims nor retains any interest in the subject matter of the abandonment. Washington Arcade Assocs, v. Zoning Bd. of Review, 528 A.2d 736 (R.I. 1987).

Mere discontinuance of a noncomformimg use for a period of time does not, ipso facto, constitute an abandonment of that use. Washington Arcade Assocs. v. Zoning Bd. of Review, 528 A.2d 736 (R.I. 1987).

4. -Change **in Ownership.**

A mere change in ownership does not destroy a nonconforming use. Town of Coventry v. Glickman, 429 A.2d 440 (R.I. 1981).

5. Improvements.

Since the term "improvement" in this section describes land which has been converted from its natural state to a different state and condition for the use and enjoyment of man, the use of land as parking area for camper trailers could be described as "improvement". Town of Little Compton v. Round Meadows, Inc., 108 R.I. 478, 276 A.2d 471 (1971).

Gasoline station signs constituted "improvements" within meaning of statute saving preexisting uses and amendatory zoning ordinance that would alter the status of the signs which was a nonconforming use were void as not being in conformity with the state enabling act. American Oil Co. v. City of Warwick, 116 R.I. 31, 351 A.2d 577 (1976).

Collateral References. Addition of another activity to existing nonconforming use as violation of zoning ordinance, 61 A.L.R.4th 724.

Changes, after adoption of zoning regulations, in respect of nonconforming existing use. 87 A.L.R.2d 4.

Construction of new building on premises devoted to nonconforming use as violation, 10 A.L.R.4th 1122.

Nonconforming use, right to resume, after period of non-use or of a different use from that in effect at or before the time of zoning. 56 A.L.R.3d 14; 56 A.L.R.3d 138; 57 A.L.R.3d 279.

Ownership of nonconforming business or use, change in, as affecting right to continuance thereof. 9 A.L.R.2d 1039.

Power to terminate lawful nonconforming use existing when zoning ordinance was passed, after use has been permitted to continue. 22 A.L.R.3d 1134.

Right to repair or reconstruct building operating as nonconforming use after damage or destruction. 57 A.L.R.3d 419.

Volume, change in volume or intensity, or means of performing nonconforming use, 61 A.L.R.4th 806.

45-24-11. Creation of vested rights or incumbrances not intended. [Repealed effective July 1, 1993.1 - Nothing in this chapter or in any ordinance enacted under the authority of this chapter shall create or be construed to create any vested rights in any person, firm, or corporation, or to be or create any incumbrance upon the title of any person, firm, or corporation in any property affected by the ordinance.

History of Section.

P.L. 1921, ch. 2069, § 6; G.L. 1923, ch. 57, § 6; G.L. 1938, ch. 342, § 6; G.L. 1956, § 45-24-11.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "in any ordinance" for "any ordinance" near the beginning of the section, made two punctuation changes near the end of the section, and substituted "the ordinance" for 'any such ordinance" at the end of the section.

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 6; G.L. 1923, ch. 57, § 6; G.L. 1938, ch. 342. § 6; G.L. 1956, § 45-24-11), concerning creation of vested rights or incumbrances not intended, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

1. **In General.**

Under this section complainant has no vested right to the classification in which his property was placed by a zoning ordinance which was later changed by amendment thereto. Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 136 (1959).

45-24-12. Regulation of nuisances and of trades and industry. [Repealed effective July 1, 1993.1 - The provisions of this chapter, or off any ordinance enacted under the authority of this chapter, shall not be deemed to abolish any existing remedies relating to nuisances, or to repeal any existing provisions of statutory law or ordinances relating to the erection, alteration, or construction of buildings or other structures, or restricting the use thereof, or regulating businesses, trades, or industries, or relating to nuisances; provided, that the enactment, amendment, or repeal of any ordinance under the authority of this chapter shall not be construed to be in any manner an exercise of any authority given by the provisions of chapters 18, 19, and 24 of title 23; and provided, further, that after the passage of this chapter, the exercise by the city council of any city or the town council of any town of any authority given by the provisions of chapters 18, 19, and 24 of title 23, shall not create any vested rights in any person, firm, or corporation, or render the city liable in any manner to any person, firm, or corporation.

History of Section.

P.L. 1921, ch. 2069, § 7; G.L. 1923, ch. 57, § 7; G.L. 1938, ch. 342, § 7; G.L. 1956, § 45-24-12.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "provisions of chapters" for "provisions of said chapters" near the end of the section and made several punctuation changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1), near the end of the section, inserted the word "and", preceding "24 of title 23", inserted a comma following "this chapter", and substituted "render the city" for "render said city".

Delayed Repealed Sections. This section (P.L. 1921, ch. 2069, § 7; G.L. 1923, ch. 57, § 7; G.L. 1938, ch. 342, § 7; G.L. 1956, § 45-24-12), concerning regulation of nuisances and of trades and industry, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

Collateral References. Cement plant as nuisance, 82 A.L.R.3d 1004.

Constitutionality of zoning based on size of commercial or industrial enterprises or units. 7 A.L.R.2d 1007.

Exclusion from municipality of industrial activities inconsistent with residential character. 9 A.L.R.2d 683.

Filling stations and garages as subjects of variations and exceptions. 168 A.L.R. 72.

Flight of aircraft as nuisance, 79 A.L.R.3d 253.

Garage as part of house with which it is physically connected within zoning regulations. 7 A.L.R.2d 593.

Garages, zoning regulations as to. 40 A.L.R. 351; 55 A.L.R. 372; 84 A.L.R. 1147.

Gas filling stations, zoning regulations as to. 18 A.L.R. 101; 29 A.L.R. 450; 34 A.L.R.

507; 42 AI.R. 978; 49 A.L.R. 767; 55 A.L.R. 256; 79 A.L.R. 918; 96 A.L.R. 1337.

Keeping of dogs as nuisance, 11 A.L.R.3d 1399.

Laundry or dry cleaning establishment as nuisance, 41 A.L.R.3d 1236.

Nuisance, question whether automobile gas filling or supply station constitutes, as affected by zoning or similar ordinances, or absence thereof 124 A.L.R. 387.

Permissible activities under zoning laws permitting greenhouses and nurseries. 40 A.L.R.2d 1459.

Undertaking establishment, restrictions on location of. 165 A.L.R. 1112.

Undertaking establishments as subjects of variations and exceptions. 168 A.L.R. 85.

Validity of zoning measure prohibiting or regulating removal or exploitation of oil, minerals, soil, sand, gravel, stone, or other natural product within municipal limits. 10 A.L.R.3d 1226.

Validity of zoning regulation prohibiting residential use in industrial district. 38 A.L.R.2d 1141.

What enterprise or activity is permissible in business zone. 128 A.L.R. 1214.

Zoning requirements prescribing conditions of business or manufacturing designed to avoid nuisance or annoyance. 173 A.L.R. 271.

Zoo as nuisance, 58 A.L.R.3d 1126.

45-24-13. Selection of board of review - Power to make special exceptions. [Repealed effective July 1, 1993.] - The city council of any city or the town council of any town shall provide for the selection and organization of a board of review, and, in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the board of review may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained, or where the exception is reasonably necessary for the convenience or welfare of the public.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-13.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § ii substituted "the board of review" for "said board of review" near the middle of the section and substituted "the exception" for "such exception" near the end of the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1), near the middle of the section, inserted a comma preceding "in the regulations" and following "of this chapter".

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-13), concerning selection of board of review, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Powers of board.
3. Variances.
4. Existing uses.
5. Harmonious uses.
6. Matters considered.
7. Findings of board.
8. Conditions and safeguards.
9. Discretion.

1. In General.

Provisions of zoning ordinance vesting in the board of review, subject to definitely expressed standards or limitations, a discretion to grant in specific instances set out in the ordinances exceptions therefrom were valid. Barbara Realty Co. v. Zoning Bd. of Review, 87 R.I. 100, 138 A.2d 818 (1958).

Local legislatures are authorized to prescribe certain exceptions to the terms of the zoning ordinance which exceptions subject to appropriate conditions and safeguards, may be granted upon application therefor by the board of review pursuant to such general or specific rules as are set out in the ordinance by the local legislature. Monforte v. Zoning Bd. of Review, 93 R.I. 447, 176 A.2d 726 (1962).

2. Powers of Board.

City council had no authority to give zon-

ing board of review blanket authority to exercise legislative power delegated to city council by enabling act. Flynn v. Zoning Bd. of Review, 77 R.I. 118, 73 A.2d 808 (1950).

Where the power to designate zoning classifications is vested exclusively in a city council, a variance granted by a zoning board on the ground that the area had been improperly zoned is invalid as there is no power in board to establish zones. Abbott v. Zoning Bd. of Review, 78 R.I. 84, 79 A.2d 620 (1951).

Where the power to make and amend zoning ordinances lay in the city council it was arbitrary and illegal for the zoning board to grant a variance for location of a lumber yard in an area classified by ordinance as residential on the ground that the ordinance was improper. Matteson v. Zoning Bd. of Review, 79 R.I. 121, 84 A.2d 611 (1951).

Power to vary terms of zoning ordinance is conferred exclusively upon boards of review and cannot be exercised by building inspector. Mello v. Bd. of Review, 94 R.I. 43, 177 A.2d 533 (1962).

Ordinance clothing zoning board with blanket authority to allow or disallow, in its discretion, any enumerated uses was an unlawful delegation of the council's authority. Bailey v. Zoning Bd. of Review, 94 R.I. 168, 179 A.2d 316 (1962).

The board's assumption that it had a wide latitude under the ordinance to act by way of exception to alleviate the traffic conditions that accompany the operation of a shopping center by granting an exception to use land zoned for residential purposes to be used for offstreet parking to service the needs of a shopping center, was an illegal use of the zoning power and a misconception of the purpose of zoning legislation. Cole v. Zoning Bd. of Review, 94 R.I. 265, 179 A.2d 846 (1962), afl'd, 102 R.I. 498, 231 A.2d 775 (1967).

A board of review is without authority to grant an exception for the conversion of a nonconforming use to a business use in a district predominately zoned residential solely by reason that other nonconforming uses in said district were subsequently rezoned as business uses, such act clearly constituting a usurpation of powers exclusively delegated to the municipal legislature by the general assembly. Gallagher v. Zoning Bd. of Review, 95 R.I. 225, 186 A.2d 325 (1962).

A zoning board of review had no power to grant a special permit to use land in a residential district for a horseriding ring where such action is not authorized by the zoning ordinance. McNalley v. Zoning Bd. of Review, 102 R.I. 417, 230 A.2d 880 (1967).

In the absence of an ordinance providing therefor, a zoning board of review had no power to grant a special exception to permit the owner of a new and used car business to use adjoining ground in a limited residence zone for new and used car parking in connection with such business. Rafanelli v. Zoning Bd. of Review, 103 R.I. 208, 236 A.2d 262 (1967).

3. Variances.

The extension of a nonconforming use is particularly one for the exercise of discretion of the local zoning board since it demands a knowledge of the surrounding property. Drabble v. Zoning Bd. of Review, 52 R.I. 228, 159 A. 828 (1932).

Power of board to grant exceptions is limited and was intended to be used sparingly and only in exceptional cases so as to not deprive a property owner of the reasonable and beneficial use of his property. Harte v. Zoning Bd. of Review. 80 R.I. 43, 91 A.2d 33 (1952).

If a residential area has become commercialized a change of zoning is not within the jurisdiction of the board of review. Assembly of God Church v. Zoning Bd. of Review, 91 R.I. 259, 162 A.2d 554 (1960).

The power of a zoning board of review to make exceptions to the terms of a zoning ordinance is controlled by the pertinent provisions thereof. Cole v. Zoning Bd. of Review, 94 R.I. 265, 179 A.2d 846 (1962), affd, 102 R.I. 498, 231 A.2d 775 (1967).

A board of review is not without jurisdiction to grant an exception where the present use is nonconforming if an application for the same is made pursuant to the terms of a valid ordinance and supported by legal evidence. Gallagher v. Zoning Bd. of Review, 95 R.I. 225. 186 A.2d 325 (1962).

A board of review is without authority to grant an exception for the conversion of a nonconforming use to a business use in a district predominantly zoned residential solely by reason that other nonconforming uses in said district were subsequently rezoned as business uses, such act clearly constituting a usurpation of powers exclusively delegated to the municipal legislature by the general assembly. Gallagher v. Zoning Bd. of Review, 95 R.I. 225, 186 A.2d 325)1962).

The power to grant an exception is a broad power which is exercised sparingly and with discretion to the end that only the board would be able to relieve against the arbitrary effect of a literal enforcement of the provisions of the ordinance. Zawirski v. Zoning Bd. of Review, 96 R.I. 110, 189 A.2d 683 (1963).

The board should have declined to hear an application seeking an exception or variation where title to a substantial portion of the lot was in dispute. Baril v. Zoning Bd. of Review, 97 R.I. 212, 196 A.2d 834 (1964).

A board of review is without jurisdiction to grant successive exceptions for a use of the same character on the same tract to which the prior grant applied. Bernstein v. Zoning

Bd. of Review, 99 R.I. 494, 209 A.2d 52 (1965).

A variance is granted only upon a showing of hardship. Hicks v. Zoning Bd. of Review, 527 A.2d 1136 (R.I. 1987).

Exceptions are granted when convenience and welfare will be substantially served or an appropriate use of neighboring property will not be substantially injured. Hicks v. Zoning Bd. of Review, 527 A.2d 1136 (R.I. 1987).

Evidence supported findings that it was necessary for petitioner, who sought a special exception for performing automobile repairs, to develop his business in a garage adjacent to his residence in order to support himself, his wife, and two children and permit him to care for his sick wife in emergency situations. Hicks v. Zoning Bd. of Review, 527 A.2d 1136 (R.I. 1987).

4. Existing Uses.

Zoning board's refusal to allow exception was reversed as an abuse of discretion where original fixing of zone border was an unnecessary restriction on the existing use of that property. East Providence Mills, Inc. v. Zoning Bd. of Review, 51 R.I. 428, 155 A. 531 (1931).

Owner who built an extension under a permit from building inspector prior to organization of board of review was entitled to common law rights prior to organization of review board. Lamothe v. Zoning Bd. of Review, 81 R.I. 96, 98 A.2d 918 (1953).

5. Harmonious Uses.

Special exception to allow addition of store to house in residential district was justified under this section where filling stations and stables were allowed by the ordinance in the area and where other stores were already there. Jacques v. Zoning Bd. of Review, 64 R.I. 284, 12 A.2d 222 (1940).

Zoning board of review did not abuse its discretion in refusing exception to zoning ordinance for installation of cement block tamping machine in business district where there was no such business in the general area. Spirito v. Zoning Rd. of Review, 64 R.I. 411, 12 A.2d 727 (1940).

Zoning board of review did not abuse discretion in granting variance for use of a dwelling house situated next to a hospital as a funeral parlor. Mitten Hosp. v. Zoning Bd. of Review, 67 R.I. 295, 23 A.2d 191 (1941).

Zoning board of review could allow specific exception for establishment of funeral home to ordinance restricting area to residences, filling stations, stables or air fields, if exception was found in harmony with general purposes of zoning. Buckminster v. Zoning Bd. of Review, 69 R.I. 396, 33 A.2d 199 (1943).

Granting of variance for funeral home in 14-room house which was outmoded as a single family dwelling in area zoned residential but located between areas of business and commercial properties was not arbitrary or an abuse of discretion. Messinger v. Zoning Bd. of Review, 81 R.I. 159, 99 A.2d 865 (1953).

Action of board in granting permission for use of 19-room house located on a large tract of land in a residential zone as a convalescent home for a period of two years was not an abuse of discretion where the evidence showed that house could not be sold as a private residence. Guenther v. Zoning Bd. of Review, 85 R.I. 37, 125 A.2d 214 (1956).

6. Matters Considered.

The primary purpose of a hearing on an application for an exception is to assist the board of review to determine if said exception is consistent with the general welfare and not to test the strength of conflicting personal desires and interests or to poll the neighborhood. Jacques v. Zoning Bd. of Review, 64 R.I. 284, 12 A.2d 222 (1940).

A zoning board is not bound to accept the evidence of the objectors or a poll of the neighborhood but considers all the evidence. D'Acchioli v. Zoning Bd. of Review, 74 R.I. 327, 60 A.2d 707 (1948).

Finding that exception, if granted, would devalue surrounding property constituted a finding that surrounding property would be substantially injured within meaning of ordinance limiting action of zoning board of review and exception was properly refused. Hazen v. Zoning Bd. of Review, 90 R.I. 108, 155 A.2d 333 (1959).

While it is true that a board of review should not ordinarily grant an exception where the area of land involved is unusually extensive, such a circumstance is not necessarily controlling. Gallagher v. Zoning Bd. of Review, 95 R.I. 225, 186 A.2d 325 (1962).

The board of review, in granting an exception, should limit its consideration to whether the applicant has established a right to a grant of an exception as provided in the ordinance, and not concern itself with the effect thereof on the objective of the zoning ordinance. Kraemer v. Zoning Bd. of Review, 98 R.I. 328, 201 A.2d 643 (1964), rev'd on other grounds, 100 R.I. 20, 210 A.2d 650 (1965).

Information in application and on plot plan is competent evidence from which board could reasonably infer that exception sought would not unduly conflict with public interest. Gardiner v. Zoning Bd. of Review, 101 R.I. 681, 226 A.2d 698 (1967).

An application for an exception for a particular use should not be denied either for lack of proof that there is a community or a neighborhood need for its establishment or because the proof is that there is no such

need; nor should a use be permitted on the sole ground that it will serve the community or neighborhood needs or accommodate the public. Nani v. Zoning Bd. of Review, 104 R.I. 150, 242 A.2d 403 (1968).

7, **Findings** of Board.

In granting an exception, it was incumbent upon the board to make a finding as to the effect of the exception, as granted, upon the public convenience and welfare; and, if such finding be negative, the board was without authority to act affirmatively. Center Realty Corp. v. Zoning Bd. of Review, 96 R.I. 76, 189 A.2d 347 (1963).

A petitioner for an exception to permit the building of an addition to a nursing home located in a residence district was not entitled to an exception as a nonconforming use where the board found that "the appropriate use of neighboring property will be substantially or permanently injured" by the proposed use. Health Havens, Inc. v. Zoning Bd. of Review, 101 R.I. 258, 221 A.2d 794 (1966).

A decision of a board of review which is not in writing with findings of fact and legal conclusions set out, but consists of a stenographic transcript of the comments of the individual board members and a recordation of their votes in which the members do not relate their conclusions of law to evidentiary matter is impossible of judicial review and must be remanded for clarification and completion of the board's decision. May-Day Realty Corp. v. Board of Appeals, 107 R.I. 235, 267 A.2d 400 (1970).

8. Conditions and Safeguards.

It is not necessary that conditions and safeguards be imposed unless there is competent probative evidence that necessitates such imposition. Industrial Dev. Found. v. Zoning Bd. of Review, 100 R.I. 123, 211 A.2d 648 (1965).

While the act permits a zoning board to impose certain conditions when granting an exception, such an imposition is not a condition precedent before the board can exercise its authority. Richardson v. Zoning Bd. of Review, 101 R.I. 194, 221 A.2d 460 (1966).

9. Discretion.

Zoning boards discretionary decision to allow rebuilding on lot under required size would not be reversed where buildings in immediate area were on similar lots and it was not suggested that the lot could be used for any other beneficial purpose. Morgan v. Zoning Bd. of Review, 52 R.I. 338, 160 A. 922 (1932).

Zoning board did not abuse its discretion in refusing exception where applicant failed to carry the burden of proof as to need therefor. Caldarone v. Zoning Bd. of Review, 74 11.1. 196, 60 A.2d 158 (1948).

A zoning board abuses its discretion in granting a variance for use of land for business in an area zoned by ordinance for residential purposes on the ground that the area has become unsuitable for residential use and denial of the variance would result in an undue hardship to the applicant. since the effect of such ruling would be to amend the zoning ordinance. Allan v. Zoning Bd. of Review, 79 R.I. 413, 89 A.2d 364 (1952).

Zoning board abused its discretion by granting an exception to one who purchased lots zoned for one-family dwelling houses for the express purpose of building a super market with parking lot, since it constituted a change of a district zoned for residential purposes into a zone for business. Harte v. Zoning Bd. of Review. 80 RI. 43, 91 A.2d 33 (1952).

Although the tenant corporation showed a substantial loss for a period of two prior years the owner realty corporation had showed a profit from the rental, therefore it follows that the granting of a variance to the owner was so arbitrary as to constitute an abuse of discretion. Gallagher v. Zoning Bd, of Review, 95 R.I. 225, 186 A.2d 325 (1962).

Unless board acts on its own knowledge and makes that fact known in its decision there must be some evidence in the record to support it or else the decision will he deemed an abuse of discretion vested in it by ordinance. Zawirski v. Zoning Bd. of Review, 96 R.I. 110, 189 A.2d 683 (1963.

It was not an abuse of discretion to grant an exception to permit the erection of a building of more than 12.700 square feet for the assembly, service, and sale of heavy duty trucks on a four-acre tract in a district zoned for heavy industrial use where the objector's residence was within 100 feet of the proposed building and within 25 feet of an interstate highway. Richardson v. Zoning Bd. of Review, 101 R.I. 194, 221 A.2d 460 (1966).

Where the board gave no reasons for denying the special exception requested by the petitioner and there was no competent evidence to offset that offered by the petitioner in support of such special exception the denial of the application was arbitrary and an abuse of the discretion with which the hoard is vested and will be reversed by the court. Goldstein v. Zoning Bd. of Review, 101 R.I. 728, 227 A.2d 195 (1967).

Collateral References. Changes, after adoption of zoning regulations, in respect of nonconforming existing use, discretion of board as to. 87 A.L.R.2d 4.

Constitutionality of zoning ordinance authorizing boards, commissions, etc., to vary provisions thereof. 58 A.L.R2d 1083.

Variation or exception, agencies and proceedings for authorization of. 168 A.L.R. 100.

45-24-14. Composition of board of review - Open hearings - Auxiliary members. [Repealed effective July 1, 1993.1 - The board of review shall consist of five (5) members, each to hold office for the term of five (5) years; provided, however, that the original selection shall be made for terms of one, two (2), three (3), four (4), and five (5) years, respectively. The chairperson or, in his or her absence, the acting chairperson, may administer oaths and compel the attendance of witnesses. The mayor of any city or the town council of any town shall have the right to name an auxiliary or sixth (6th) member of the board of review of the city or town, as the case may be, who shall sit as an active member when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board. All hearings of the board shall be open to the public.

(1) The mayor of the city of Newport shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that city, to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(2) The town council of the town of Tiverton shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(3) The town council of the town of Smithfield shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town, to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(4) The town council of the town of East Greenwich shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(5) The town council of the town of West Greenwich shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town, to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(6) The town council of the town of Middletown shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(7) The town council of the town of North Smithfield shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(8) The mayor of the city of Warwick, subject to the approval of the city council shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that city, to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(9) The town council of the town of Glocester shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(10) The town council of the town of Portsmouth shall have the right to name an additional auxiliary or seventh (7th) member, of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(11) The mayor of the city of Central Falls shall have the right to appoint with the approval of the city council an additional auxiliary or seventh (7th) member of the board of review of that city, to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(12) In addition to the membership of the board of review of the city of Providence, the board shall consist of two (2) additional members. Each of the additional members of the board of review of the city of Providence shall be members of the city council elected to the board forthwith after May 19, 1975, by the city council from its members to serve for his or her term of office. The board of review of the city of Providence shall elect a chairperson and a secretary from its membership.

(13) The town council of the town of Jamestown shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(14) The town council of the town of Little Compton shall have the right to name two (2) additional auxiliary members or seventh (7th) and eighth (8th) members of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(15) The town council of the town of West Warwick shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(16) The town council of the town of Johnston shall have the right to name an additional auxiliary or seventh (7th) member of the

board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(17) The town council of the town of Coventry shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(18) The town council of the town of Hopkinton shall have the right to name two (2) additional auxiliary or seventh (7th) and eighth (8th) members of the board of review of that town to sit as active members, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(19) The town council of the town of Richmond shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(20) The mayor of the city of Woonsocket shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that city to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(21) The town council of Warren shall have the right to name an additional auxiliary or seventh (7th) member of the board of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(22) The town council of Scituate shall have the right to name an additional auxiliary or seventh (7th) member of the zoning board of review of the town of Scituate to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(23) The town council of the town of Barrington shall have the right to name an additional auxiliary or seventh (7th) member of the zoning board of review of the town of Barrington to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon request of the chairperson of the board.

(24) The town council of the town of Lincoln shall have the right to name an additional auxiliary or seventh (7th) member of the zoning board of review of the town of Lincoln to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon the request of the chairperson of the board.

(25) The town council of the town of Cumberland shall have the right to name an additional auxiliary or seventh (7th) member of the zoning board of review of the town of Cumberland to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon the request of the chairperson of the board.

(26) The town council of the town of Bristol shall have the right to name an additional auxiliary or seventh (7th) member of the board

of review of that town to sit as an active member, when and if a member of the board is unable to serve at any hearing, upon the request of the chairperson of the board.

History of Section.
G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; P.L. 1949, ch. 2293, § 1; G.L. 1956, § 45-24-14; P.L. 1965, ch. 39, § 1; P.L. 1969, ch. 68, § 1; P.L. 1970, ch. 131, § 1; P.L. 1970, ch. 150, § 1; P.L. 1970, ch. 176, § 1; P.L. 1971, ch. 59, § 1; P.L. 1972, ch. 11, § 1; P.L. 1973, ch. 108, § 1; P.L. 1973, ch. 234, § 1; P.L. 1974, ch. 194, § 1; P.L. 1974, ch. 211, § 1; P.L. 1975, ch. 11, § 1; P.L. 1975, ch. 117, § 1; P.L. 1975, ch. 210, § 1; P.L. 1976, ch. 19, § 1; P.L. 1976, ch. 92, § 2; P.L. 1977, ch. 105, § 1; P.L. 1978, ch. 314, § 1; P.L. 1979, ch. 263, § 1; P.L. 1979, ch. 404, § 1; P.L. 1980, ch. 62, § 1; P.L. 1982, ch. 104, § 1; P.L. 1983, ch. 171, § 1; P.L. 1984, ch. 138, § 1; P.L. 1985, ch. 27, § 1; P.L. 1985, ch. 56, § 1; P.L. 1986, ch. 220, § 1; P.L. 1986, ch. 460, § 1; P.L. 1987, ch. 204, § 1; P.L. 1988, ch. 84, § 104; P.L. 1990, ch. 64, § 1; P.L. 1991, ch. 23, § 1; P.L. 1991, ch. 85, § 1; P.L. 1991, ch. 384, § 1.

Reenactments. The 1980 Reenactment (P.L. 1980, ch. 366) substituted "May 19, 1975" for "the effective date of this Act" in subdivision (12) and made a spelling change.

The 1988 Reenactment (P.L. 1988, ch. 84, § 1) assigned subdivision designations; deleted, following the introductory paragraph, "Provided, however, that the terms of the members of said board in the town of Coventry shall expire on the last day in May of 1965, and the town council shall thereupon appoint five (5) members each to serve a one (1) year term beginning on June 1, 1965, or until their successors are duly appointed and qualified."; deleted, from the beginning of the subdivisions, "Provided, further, however, that"; and made several substitutions for the words "such" and "said" and numerous minor stylistic changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) added "-Auxiliary members" at the end of the section heading, deleted the word "councilmanic" preceding "members to serve" near the end of the second sentence in subdivision (12), and made numerous punctuation changes throughout the section.

Compiler's Notes. Section 2 of P.L. 1975, ch. 210 read: "Nothing herein contained shall in any way affect or alter any other part or provision of this title, chapter or section, or any appointments heretofore or hereafter made thereunder, all of which remain in full force and effect."

This section as it appears above has been edited by the compiler to incorporate the changes made by the 1991 reenactment of title 45 by P.L. 1991, ch. 354, which were not included in the 1991 amendments. For the extent of the reenactment changes, see the reenactment note above.

This section was amended by three Acts (P.L. 1991, ch. 23, § 1; P.L. 1991, ch. 85, § 1; and P.L. 1991, ch. 384, § 1) passed by the 1991 General Assembly. Inasmuch as the three Acts do not appear to be in conflict with each other (except for the subdivision designations; see below), the section as set forth above incorporates the amendments by all three Acts.

P.L. 1991, ch. 85, § 1. and P.L. 1991, ch. 384, § 1 enacted identical amendments to this section. Both Acts added a subdivision (25). As a subdivision (25) had already been added by P.L. 1991, ch. 23, § 1, the provision added by P.L. 1991, chs. 85 and 384, has been redesignated as subdivision (26).

In 1991, the compiler, in subdivision (25), inserted a comma following "active member" and "hearing"; and, in subdivision (26), inserted a comma following "active member" and substituted "upon the request of for "upon request, of'.

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; P.L. 1949, ch. 2293, § 1; G.L. 1956, § 45-24-14; P.L. 1965, ch. 39, § 1; P.L. 1969, ch. 68. § 1; P.L. 1970, ch. 131, § 1; P.L. 1970, ch. 150, § 1; P.L. 1970, ch. 176, § 1; P.L. 1971, ch. 59, § 1; P.L. 1972, ch. 11, § 1; P.L. 1973. ch. 108, § 1; P.L. 1973, ch. 234, § 1; P.L. 1974, ch. 194, § 1; P.L. 1974, ch. 211, § 1; P.L. 1975, ch. 11, § 1; P.L. 1975, ch. 117, § 1; P.L. 1975, ch. 210, § 1; P.L. 1976, ch. 19, § 1; P.L. 1976, ch. 92, § 2; P.L. 1977, ch. 105, § 1; P.L. 1978, ch. 314, § 1; P.L. 1979, ch. 263, § 1; P.L. 1979, ch. 404, § 1; P.L. 1980, ch. 62, § 1; P.L. 1982, ch. 104, § 1; P.L. 1983, ch. 171, § 1; P.L. 1984, ch. 138, § 1; P.L. 1985, ch. 27, § 1; P.L. 1985, ch. 56, § 1; P.L. 1986, ch. 220, § 1; P.L. 1986, ch. 460, § 1; P.L. 1987, ch. 204, § 1; P.L. 1988, ch. 84, § 104; P.L. 1990, ch. 64, § 1; P.L. 1991, ch. 23, § 1; P.L. 1991, ch. 85, § 1; P.L. 1991, ch. 384, § 1), concerning composition of board of review, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Number of members.
2. Auxiliary member.
3. Conduct of members.
4. Disqualified member.

1. Number of Members.

A city zoning board of review composed of only three members is not legally constituted, so that decisions by such a board are invalid. Menard v. Zoning Bd. of Review, 83 R.I. 283, 115 A.2d 533 (1955).

It was the plain intent of the legislature in enacting this law to provide that a zoning board of review when conducting hearings and arriving at their decisions should at all times consist of five participating members. The fact that the petitioners agreed to the procedure adopted by the board when the chairman continued to conduct the meeting but did not vote is of no significance. The statutory provision that the board of review shall consist of five members is a jurisdictional requirement and cannot be altered by the parties nor can the parties vest the board with jurisdiction not granted by the enabling act. Bove v. Board of Review, 95 R.I. 197, 185 A.2d 751 (1962).

The 1949 amendment to this section, providing for a sixth auxiliary member to sit in the absence of one of the regular members, made five participating members essential to jurisdiction and action by the board in which four members voted affirmatively and the chairman abstained was void. Kent v. Zoning Bd. of Review, 102 111 258, 229 A.2d 769 (1967).

2. Auxiliary Member.

The third sentence provides a method whereby five members of the board will always be available to sit at hearings and thus make up the number which the general assembly deemed necessary for a legal hearing. May-Day Realty Corp. v. Zoning Bd. of Review, 77 R.I. 469, 77 A.2d 539 (1950).

The right to name an auxiliary or sixth member of a board of review is a duty imposed on the naming authority and not as a mere privilege extended to it. May-Day Realty Corp. v. Zoning Bd. of Review, 77 R.I. 469, 77 A.2d 539 (1950).

3. Conduct of Members.

Objections raised by certiorari to the participation of board member who made public statements derogative of actions of remonstrators prior to zoning board hearings was sufficient to show bias and prejudice since board members are charged quasi-judicial powers. Barbara Realty Co. v. Zoning Bd. of Review, 85 R.I. 152, 128 A.2d 342 (1957); Barbara Realty Co. v. Zoning Bd. of Review, 87 R.I. 100, 138 A.2d 818 (1958).

4. Disqualified Member.

Having disqualified himself from participating in the ultimate decision on the application to use land as a gasoline service station and having requested the alternate member to sit as an active member, it was clearly the duty of the chairman of the zoning board of review to take no part in the conduct of the hearing. The hearing before six members was a nullity under the act. Bove v. Board of Review, 9.5 R.I. 197, 185 A.2d 751 (1962).

45-24-14.1. Auxiliary members - Authority to vote. [Repealed effective July 1, 1993.] - In the event that any matter before a board of review is likely to be continued for more than one hearing, the chairperson may request that an auxiliary member participate at the hearings, and the auxiliary member shall be authorized to vote on the matter when and if an active member becomes unable to serve at those hearings. Provided, however, that the chairperson of the board of review of the town of Portsmouth may request that two (2) auxiliary members participate at the hearing and one or both auxiliary members shall be authorized to vote on the matter when and if one or two (2) active members become unable to serve at any such hearings.

History of Section.

P.L. 1985, ch. 52, § 1; P.L. 1988, ch. 122, § 1; P.L. 1988, ch. 322, § 1.

Reenactments. The 1988 Reenactment

(P.L. 1988, ch. 84, § 1) substituted "those hearings" for "any such hearings" at the end of the first sentence and substituted "the" for the words "such" and "said" throughout the first sentence.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) inserted a comma following "at the hearings" near the middle of the first sentence, and, in the second sentence, substituted "the hearing" for "such hearing", "the matter" for "such matter", and "become" for "becomes", which substitutions were previously made in 1988 by the compiler.

Delayed Repealed Sections. This section (P.L. 1985, ch. 52, § 1; P.L. 1988, ch. 122, § 1; P.L. 1988, ch. 322, § 1), concerning auxiliary members, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-15. Records of board. [Repealed effective July 1, 1993.] - The board shall keep minutes of its proceedings, showing the vote of each member upon each question or, if absent or failing to vote, indicating that fact, and shall keep records of its examinations and other official actions, all of which shall be filed immediately in the office of the board and shall be a public record.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-15.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "indicating that fact" for "indicating such fact" near the middle of the section.

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-15), concerning records of board, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Record on appeal.
2. Right to abstain from voting.

1. Record on Appeal.

This chapter does not require the zoning board of review to keep a stenographic record of its proceedings if it makes a reasonably accurate summary of the testimony, facts and grounds for its decision. Jacques v. Zoning Bd. of Review, 64 R.I. 284, 12 A.2d 222 (1940).

Supreme court remanded for trial de novo a decision refusing exception to ordinance because board did not set out grounds of decision, although requested by applicant, even though board made a stenographic report of proceedings. Berg v. Zoning Bd. of Review, 64 R.I. 290, 12 A.2d 225 (1940).

Supreme court would remand papers to zoning board of review for clarification where its decision did not set forth facts upon which it was based but merely recited that the board "viewed the property and neighborhood". Buckminster v. Zoning Bd. of Review, 68 R.I. 515, 30 A.2d 104 (1943).

Where no finding of facts and no reasons for decisions by zoning board of review appeared in the record the supreme court remanded papers to board of appeals without prejudice to the right of the petitioner to file a new proceeding with a newly created board of appeals. Heroux v. Zoning Bd. of Review, 82 R.I. 237, 107 A.2d 303 (1954).

Decision of board was arbitrary and invalid where it refused to consider transcript of evidence prepared by its own stenographer and failed to state what evidence the board did consider in reaching its decision. Del Toro v. Zoning Bd. of Review. 82 R.I. 317, 107 A.2d 460 (1954).

In an appeal from action of a zoning board in denying petitioners' request for special exceptions and/or variances, where the record certified to the court contains neither the applications for building permits, nor appeals therefrom to the zoning board, nor any papers purporting to contain the requests for relief, nor a proper transcript, nor a reasonable summary of the proceedings before the board, so that the court cannot ascertain from the record the reasons on which the board's decision is based, the court cannot review the board's decision, but will quash it without prejudice. Russell v. Zoning Bd. of Review, 100 R.I. 728, 219 A.2d 475 (1966).

While a summary of statements made by the petitioner and remonstrants at the hearing before the board complies with the requirements of this section, it would be more helpful to the supreme court if, in performing its duty under the statute, it had the advantage of a written transcript. Didonato v. Zoning Bd. of Review, 104 R.I. 158, 242 A.2d 416 (1968).

2. Right to Abstain from Voting.

The 1949 amendment to § 45-24-14 eliminated the right to abstain from voting implied in this section and action of the board granting a petitioner the right to build a single-family dwelling on an under-sized lot because of hardship, in which four members voted affirmatively and the chairman abstained, was void. Kent v. Zoning Bd. of Review, 102 R.I. 258, 229 A.2d 769 (1967).

45-24-16. Appeals to board of review. [Repealed effective July 1, 1993.]

- Appeals to the board of review may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. The appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing, with the officer from whom the appeal is taken and with the board of review, a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the. record upon which the action appealed from was taken.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-16.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "The appeal" for "Such appeal" at the beginning of the second sentence and made a punctuation change near the middle of the first sentence.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) made several punctuation changes in the second sentence.

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, 45-24-16), concerning appeals to board of review, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Power of board.
2. Persons aggrieved.
3. Time for appeal.
4. Procedure.
5. Exhaustion of administrative appeals.

1. Power of Board.

Although the power of the building inspector is restricted to enforce the zoning ordinances as enacted, the power of the board is much broader and it may provide relief in hardship cases on appeal. Ajootian v. Zoning Bd. of Review, 85 11.I. 441, 132 A.2d 836 (1957).

2. Persons Aggrieved.

Adjoining property owner is entitled to a hearing on proposed construction of building in an established zone. Madden v. Zoning Bd. of Review, 48 R.I. 175, 136 A. 493 (1927).

A tenant at sufferance did not have sufficient interest to support an application for a variance. Gallagher v. Zoning Bd. of Review, 95 11.I. 225, 186 A.2d 325 (1962).

3. Time for Appeal.

An appeal was not taken by adjoining property owner within a reasonable time where formal appeal was not taken until the work done under the building permit was substantially completed even though verbal objections had been made prior thereto. MacGregor v. Zoning Bd. of Review, 94 R.I. 362, 180 A.2d 811 (1962).

Where an appeal was not filed within 30 days from the date of the issuance of the building permit, the board did not err in denying it on the issue of timeliness, further the board was bound by the provisions of the ordinance providing that appeals must be taken within a reasonable time but in no case shall such reasonable time exceed 30 days. MacGregor v. Zoning Bd. of Review, 94 111 362, 180 A.2d 811 (1962).

A municipal ordinance passed pursuant to this and related sections, which provide for an appeal within a reasonable time, cannot abridge such right of appeal by arbitrary time limit. Hartunian v. Matteson, 109 R.I. 509, 288 A.2d 485 (1972).

Although question not squarely before court in this case, it held that, if it were, it probably would be constrained to hold that a rule adopted by a zoning board of review pursuant to this section limiting time of appeal to an arbitrary period from the date of the decision appealed from, rather than from the time when appellant was chargeable with

knowledge of such decision would be invalid as contrary to the intent of the general assembly. Hartunian v. Matteson, 109 R.I. 509, 288 A.2d 485 (1972).

Where appeal, *although* filed more than 30 days after building permits issued, was filed day after petitioners learned nature of construction, appeal was reasonable and not untimely. Hardy v. Zoning Bd. of Review, 113 R.I. 375, 321 A.2d 289 (1974).

The determination of the timeliness of appeal must depend upon the peculiar facts of the instant case. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980).

A reasonable time for the appeal from the grant of a building permit does not necessarily begin to run the moment the permit is issued or the construction commenced. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980).

4. Procedure.

Applicants for a building permit who are denied such permit by the building inspector should appeal to the zoning board of review from such ruling and making him and his records a part of the proceedings. Kent v. Zoning Bd. of Review, 102 R.I. 258. 229 A.2d 769 (1967).

Where a zoning board order has been appealed under this section a party to the proceeding may not circumvent this administrative procedure by seeking injunctive relief in the courts. Hartunian v. Matteson, 109 R.I. 509, 288 A.2d 485 (1972). See also Hartunian v. Matteson, 108 R.I. 938, 278 A.2d 867 (1971).

5. Exhaustion of Administrative Appeals.

Exhaustion of the administrative appeal provided for in this section is not required as a prerequisite to a civil suit where an attempt to have the board of review grant a special exemption or variance would be futile. Annicelli v. Town of East Kingstown, 463 A.2d 133 (R.I. 1983).

45-24-17. Stay of proceedings on appeal. [Repealed effective July 1, 1993.] - An appeal shall stay all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of review, after the notice of appeal shall have been filed with him or her, that by reason of facts stated in the certificate a stay would in his or her opinion cause ¡mminent peril to life or property. In such a case, proceedings shall not be stayed other than by a restraining order which may be granted by the board of review or by a court of competent jurisdiction on application therefor, and upon notice to the officer from whom the appeal is taken and on due cause shown.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-17.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) made two punctuation changes and a spelling change near the beginning of the second sentence.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1), near the beginning of the second sentence, inserted the word "a" preceding "case" and substituted "stayed other than" for "stayed otherwise, than"; and inserted a comma following "application therefor" near the end of the second sentence.

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-17), concerning stay of proceedings on appeal, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-18. Hearing of appeals to board. [Repealed effective July 1, 1993.1 - The board of review shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-18.

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45.24-18), concerning hearing of appeals to board, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Remand.
2. Notice.
3. Sufficiency of notice.
4. Waiver of notice.
5. Appearance.
6. Historic zoning review.

1. Remand.

Hearings held by zoning board, subsequent to a remand by superior court, shall be conducted with the interest of the parties involved in mind and in the manner and subject to the notice requirements of this section. Thibodeau v. Zoning Bd. of Review, 108 R.I. 410, 276 A.2d 283 (1971).

2. Notice.

The statutory notice of hearing on an application for an exception is not given to poll the neighborhood on the question involved but is to give interested parties an opportunity to present facts which would assist the zoning board in determining whether to grant or deny the application. Petrarca v. Zoning Bd. of Review, 78 R.I. 130, 80 A.2d 156 (1951).

A public notice of appeal concerning the moving of a dwelling "from lot #7 to lot #300" was a proper constructive notice under this section since it properly described the property even though the zoning board of review found that the application was for removal of the dwelling from one location to another on the same lot. Signore v. Zoning Be. of Review, 98 R.I. 26, 199 A.2d 601 (1964).

Where notice of hearing was signed by the clerk of the board of review rather than the building inspector as provided by the ordinance, the board did not lack jurisdiction since property owner entitled to notice received same and all petitioners were either present at the hearing or appeared by petition. Titus v. Zoning Bd. of Review, 99 R.I. 211, 206 A.2d 630 (1965).

Notice under this section is a jurisdictional prerequisite and such notice must also advise concerning the precise character of the relief sought and the specific property for which that relief is sought. Carroll v. Zoning Be. of Review, 104 R.I. 676, 248 A.2d 321 (1968).

3. Sufficiency of Notice.

Since public notice and notice to interested parties is required to be given of the hearing on appeal, board was without jurisdiction where variance in question affected both lots 52 and 165 and the application and advertisement only set out the proposal as involving lot 52. Mello v. Board of Review, 94 R.I. 43, 177 A.2d 533 (1962).

Where advertisement of the pendency of hearing on extension of home for elderly persons was published in a daily newspaper circulated in the city such notice constituted a sufficient compliance with the requirements of this section without personal notice to the owners of land in the prescribed area. Tuite v. Zoning Bd. of Review, 95 R.I. 12, 182 A.2d 311 (1962).

Notice given of hearing by zoning board on application for exception or variance was adequate under this section though it misstated the identity of one of the applicants, where it gave the time of hearing and the relief sought and correctly identified the other applicant and the land involved. Carroll v. Zoning Bd. of Review, 104 R.I. 676, 248 A.2d 321 (1968).

Notice of an appeal from the decision of the building inspector granting a permit for the erection of a restaurant on lots 78 and 79 which referred only to lot 79 was deficient although the tax assessors had on the day of the filing of the appeal merged the two lots into lot 79 for tax purposes. Boggs v. Zoning Bd. of Review, 107 R.I. 80, 264 A.2d 923 (1970).

The same test used to determine sufficiency of notice under this section was applied to § 45-24-4.1, that is, whether the notice was sufficient to inform an ordinary layman lacking expertise in zoning matters of the property affected and the changes sought. Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

Notice of hearing on application for zoning relief must be reasonably calculated to inform interested parties of the pendency of the action, of the precise character of the relief sought, and of the particular property to be affected, but need not necessarily be letter-perfect; where, however, a notice incorrectly described the affected property's lot number, and the remaining language insufficiently identified the property, the notice was fatally defective as there was a possibility that an interested person could be misled into inaction or left in doubt concerning the specific properties involved. Paquette v. Zoning Bd. of Review, 118 R.I. 109, 372 A.2d 973 (1977).

4. Waiver of Notice.

Petitioner waived right to object to lack of personal notice *where* he appeared with counsel at the hearing and availed himself of the full opportunity to show cause against the permit for garage, did not object to the failure of notice, and never claimed that such failure prejudiced him. Hirsch v. Zoning Bd. of Review, 56 R.I. 463, 187 A. 844 (19361.

5. Appearance.

Petitioner's appearance before the board was proof that she had an opportunity to present facts. Perrier v. Board of Appeals, 86 R.I. 138, 134 A.2d 141 (1957).

There was no merit in petitioner's *contention* that the optionee of land had no standing before the board of review to seek a special exception or variance since the owner of the land joined in the application, and was represented at the hearing by counsel. Cranston Jewish Center v. Zoning Bd. of Review, 93 R.I. 364, 175 A.2d 296 (1961j.

6. Historic Zoning Review.

In appeals from decisions of historic *zoning* commissions under § 45-24.1-7 where ordinance provided for appeals under this section, the board does not merely exercise appellate jurisdiction, limited as it were to a review of the record compiled at a hearing held by the commission, rather it is authorized to consider the question de novo. Hayes v. Smith, 92 R.I. 173, 167 A.2d 546 (19611.

45-24-19. Powers of board of review - Vote required for action. (Repealed effective July 1, 1993.1 - (1) The board of review shall have the following powers:

(a) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of this chapter or of any ordinance adopted pursuant thereto.

(b) To hear and decide special exceptions to the terms of the ordinance, upon which the board is authorized to pass under the ordinance.

(c) To authorize, upon appeal in specific cases, a variance in the application of the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(2) (a) In exercising the above-mentioned powers, the board may, in conformity with the provisions of this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make an order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal was taken.

(b) In granting a special exception or a variance pursuant to the authority granted by subsections (1)(b) and (1)(c), the board may impose reasonable conditions with respect thereto which are consistent with the purposes to be served by the special exception or variance; provided, however, that if the board or the ordinance imposes a time period within which to fulfill the conditions or to act upon the special exception or variance, and the conditions include obtaining the approval or consent of a state or local agency, board, or instrumentality, then the time period shall be tolled during (i) the pendency before the agency, board, or instrumentality of an application or petition for the approval or consent, and during the pendency of all appeals, administrative, or judicial, therefrom, and (ii) the pen-

dency of any appeal from the granting of any special exception or variance.

(3) The concurring vote of three (3) members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative officer, and the concurring vote of four (4) members of the board shall be required to decide in favor of the applicant on any matter within the discretion of the board upon which it is required to pass under the ordinance or to effect any variation in the application of the ordinance.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-19; P.L. 1988, ch. 658, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) assigned subsection designations; and made several substitutions for the word "such" and several minor stylistic changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) assigned the subdivision designations "(a)" and "ft)" in subsection (2); substituted "subsections (1)(b) and (1)(c)" for "(b) and (c) of this section" near the beginning of subsection (2)(b); corrected a typographical error in the word "or" preceding "local agency, board," near the end of subsection (2)(b) and substituted "the" for "such" throughout subsection (2)(b), which correction and substitution were previously made in 1988 by the compiler; deleted "such" preceding "special exception" in subsection (2)(b)(ii); and made several punctuation changes throughout the section.

Compiler's Notes. Section 2 of P.L. 1988, ch. 658 provides that the amendment to this section by that Act shall take effect upon its passage and shall be retroactive (i) to all zoning ordinance amendments heretofore adopted by any city or town council pursuant to the authority granted by § 45-24-4.1, and (ii) to all special exceptions and variances heretofore granted by a board pursuant to the authority granted by § 45-24-19(b) and § 45-24-19(c). Notwithstanding anything to the contrary contained in any such zoning ordinance amendment, any section, clause or part thereof that provides that the failure to obtain any permit or to satisfy any other requirement in such ordinance within the time period prescribed therein shall result in a reversion back to the original zoning classification shall be deemed to require prior notice and hearing pursuant to § 45-24-4.1 whether or not the requirement of such notice and hearing is expressly set forth therein.

In 1991, commas were inserted following "agency" and "board" the first time those words appear in the first sentence of subsection (2)(b).

Delayed Repealed Sections. This section (G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, 45-24-19; P.L. 1988, ch. 658, § 1), concerning powers of board of review, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

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1. In General.

This section did not apply where town enacted zoning ordinance under a special act. Baker v. Zoning Bd. of Review, 82 R.I. 432, 111 A.2d 353 (1955).

2. Authority and Jurisdiction **of Board.**

Zoning board of review does not have original jurisdiction to pass on change from one nonconforming use to a different nonconforming use. Garreau v. Zoning Bd. of Review, 75 R.I. 44, 63 A.2d 214 (1949).

Zoning board of review had no jurisdiction of petition to permit the subdivision of a lot. Noonan v. Zoning Bd. of Review, 90 R.I. 466, 159 A.2d 606 (1960).

The authority conferred upon boards of review by this section is limited in scope to that expressly conferred by statute. Noonan v. Zoning Bd. of Review, 90 R.I. 466, 159 A.2d 606 (1960).

Although zoning ordinance did not confer upon board of review authority to hear and determine applications for relief from lot-line restrictions, such jurisdiction of the board of review is prescribed in the enabling act which can neither be enlarged nor restricted by provisions of the zoning ordinance. Reynolds v. Zoning Bd. of Review, 96 R.I. 340, 191 A.2d 350 (1963).

Jurisdiction of boards of review conferred by this section can neither be expanded nor diminished by the terms of an ordinance. Lincourt v. Zoning Bd. of Review, 98 R.I. 305, 201 A.2d 482 (1964).

A zoning board of review is without jurisdiction to amend the provisions of the zoning ordinance in the guise of granting a variance or an exception. Charles Land Co. v. Zoning Bd. of Review, 99 R.I. 161, 206 A.2d 453 (1965).

A zoning board has authority, in a proper case, to vary the terms of an ordinance requiring a minimum square footage and a board's statement to the contrary in denying a request for such a variance indicated that the board misconceived its authority under the act. Russell v. Zoning Bd. of Review, 100 R.I. 728, 219 A.2d 475 (1966).

The powers conferred on the board by this section and others of the general enabling act are to prevent a confiscatory deprivation of the property owner's right to a desired use valid at common law and to avoid an unnecessary harsh restriction. Goldstein v. Zoning Bd. of Review, 101 R.I. 728, 227 A.2d 195 (1967).

This section grants the same powers to the zoning board as are possessed by the officer from whom the appeal was taken; the board clearly has the same authority as a building inspector to consider petitioner's intended uses. Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303 (R.I. 1980).

3. Board Exceeds Jurisdiction.

For cases where the board was found to have exceeded its jurisdiction, see Lamothe v. Zoning Bd. of Review, 81 R.I. 96, 98 A.2d 918 (1953); Bergson Co. v. Zoning Bd. of Review, 91 R.I. 134, 161 A.2d 414 (1960); Duclos v. Zoning Bd. of Review, 101 R.I. 537, 225 A.2d 520 (1967); Slawson v. Zoning Bd. of Review, 102 R.I. 552, 232 A.2d 362 (1967).

4. Appeal from Administrative Officer.

Only by appeal is a claim of right properly before the board for determination; all other remedies invoke the board's discretion. Garreau v. Zoning Bd. of Review, 75 R.I. 44, 63 A.2d 214 (1949).

It was the clear duty of the board in acting on the petitioner's appeal to assume the validity of the amendment on which the building inspector relied in refusing the use permit, since nithing in the enabling act can be construed as conferring on boards of review jurisdiction to pass on the validity of zoning ordinances or amendments thereto. Town & Country Mobile Homes, Inc. v. Zoning Bd. of Review. 91 R.I. 464, 165 A-2d 510 (1960).

5. -Building Inspector.

Where an applicant's permit was revoked by a building inspector, on grounds he was without authority to encroach on lot-line provisions of an ordinance, the applicant's appeal is from a decision of a building inspector as provided by this section and fact the parties treated it as if it were an application for a variance, does not deprive the board of review the jurisdiction thus obtained. Reynolds v. Zoning Bd. of Review, 96 R.I. 340, 191 A.2d 350 (1963).

Where owners of a lot containing less than the minimum area required by the zoning ordinance for a single-family dwelling, but whose area would have been adequate before the amendment of the ordinance, were refused by the building inspector a permit for a single-family dwelling, their recourse to the zoning board of review should be by appeal from the ruling of the inspector. Kent v. Zoning Bd. of Review, 108 R.I. 258, 229 A.2d 769 (1967).

6. Special Exceptions.

As a condition precedent to the grant of a special exception, an applicant must establish that the relief sought is reasonably necessary for the convenience and welfare of the public. Toohey v. Kilday, 415 A.2d 732 (R.I. 1980).

To satisfy the prescribed standard, the applicant need show only that neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals. Toohey v. Kilday, 415 A.2d 732 (R.I. 1980).

A zoning board of review may not deny granting a special exception to a permitted use on the ground that the applicant has failed to prove that there is a community need for its establishment. Toohey v. Kilday, 415 A.2d 732 (R.I. 1980).

The lay judgments of neighboring property owners on the issue of the effect of the proposed use on neighborhood property values and traffic conditions have no probative force in respect of an application to the zoning board of review for a special exception. Toohey v. Kilday, 415 A.2d 732 (R.I. 1980).

7. Variance.

The ultimate purpose of the hearing on an application for a variance is to preserve the spirit of the ordinance and do substantial justice to the applicant. Kent v. Zoning Bd. of Review, 74 R.I. 89, 58 A.2d 623 (1948).

Board's grant of a variance from an ordinance is available to any successor to title of original petitioner. Mastrati v. Strauss, 75 R.I. 417, 67 A.2d 29 (1949).

The true variance provided by this section, is designed to preserve the constitutionality of the statute and it is invoked to avoid the confiscatory effect that would follow a literal enforcement of some term of a zoning ordinance operating to deprive an owner of all beneficial use of his land. Reynolds v. Zoning Bd. of Review, 96 R.I. 340, 191 A.2d 350 (1963); Rozes v. Smith, 120 R.I. 515, 388 A.2d 816 (1978).

Where variance was sought for a permitted use, a showing that relief, if granted, would not be contrary to public interest was not necessary. Lincourt v. Zoning Bd. of Review, 98 R.I. 305, 201 A.2d 482 (1964).

The variance contemplates a departure from the terms of the ordinance in order to preclude confiscation of property while the exception contemplates a permitted use when under the terms of the ordinance the prescribed conditions therefor are met. Kraemer v. Zoning Bd. of Review, 98 R.I. 328, 201 A.2d 643 (1964).

When the board of review grants a use by way of a variance that is not contemplated by the terms of the ordinance, the use so granted must be consistent with the purposes and objectives of the zoning ordinance. Kraemer v. Zoning Bd. of Review, 98 R.I. 328, 201 A.2d 643 (1964).

In granting variances, boards of review should not authorize a greater degree of relief than is necessary to achieve a beneficial use. Standish-Johnson Co. v. Zoning Bd. of Review, 103 R.I. 487, 238 A.2d 754 (1968).

This section, by providing for application for a variance, makes available relief from prohibition in zoning ordinance against expansion of a nonconforming use. Gartsu v. Zoning Bd. of Review, 104 R.I. 719, 248 A.2d 597 (1968).

Award of variance was never intended to afford relief from a mere personal inconvenience experienced by a property owner or as a guise to guarantee such an individual a more profitable use of his property. Gartsu v. Zoning Bd. of Review, 104 R.I. 719, 248 A.2d 597 (1968).

Where relief is sought from regulations that govern the enjoyment of a permitted use of property, such as lot size, deprivation of all beneficial use of the property need not be shown; demonstration of something more than a mere inconvenience will suffice. Rozes v. Smith, 120 R.I. 515, 388 A.2d 816 (1978).

A variance may not be granted to the owner of a substandard lot where such lot was created by the deliberate conduct of the applicant. Rozes v. Smith, 120 R.I. 515, 388 A.2d 816 (1978).

The granting of a variance is proper only upon a showing that literal adherence to the relevant zoning ordinances would result in unnecessary hardship and that the granting of the variance would not be contrary to the public interest. Rhode Island Hosp. Trust Nat'l Bank v. East Providence Zoning Bd. of Review, 444 A.2d 862 (R.I. 1982).

8. Deviation.

The type of relief sought is more akin to a deviation than to a true variance where the petitioner seeks relief from a setback requirement of a permitted use, and in such case he need only demonstrate that the effect of enforcement would amount to something more than a mere inconvenience. Gara Realty, Inc. v. Zoning Bd. of Review, 523 A.2d 855 (R.I. 1987).

9. Hardship Cases.

Hardship to the owner in depriving him of all beneficial use of his property, unless outweighed by public welfare, must be given consideration in the administration of zoning ordinances. Morgan v. Zoning Bd. of Review, 52 R.I. 338, 160 A. 922 (1932).

Hardship referred to in this section is restricted use of petitioner's land and not physical infirmity of the petitioner. Winters v. Zoning Bd. of Review, 80 R.I. 275, 96 A.2d 337 (1953); Patalano v. Zoning Bd. of Review, 112 R.I. 533, 312 A.2d 580 (1973).

Provisions of this section granting authority on board to grant variance upon showing of unnecessary hardship was intended to prevent the indirect taking of land without compensation by depriving the owner of all beneficial use thereof. Denton v. Zoning Bd. of Review, 86 R.I. 219, 133 A.2d 718 (1957).

Where a literal application of the zoning regulations would result in unnecessary hardship owner was entitled to relief, and it matters not that he purchased the lot knowing of the zoning restrictions. Denton v. Zoning Bd. of Review, 86 R.I. 219, 133 A.2d 718 (1957).

Mere inconvenience or additional expense necessary to make the land available for beneficial uses does not establish an unnecessary hardship within the meaning of this section. Franco v. Zoning Bd. of Review, 90 R.I. 210, 156 A.2d 914 (1959).

To be entitled to a variance it must be established that an application of the terms of the ordinance deprives applicant of all beneficial use of the property. Berard v. Zoning Bd.

of Review, 87 R.I. 244, 139 A.2d 867 (1958); Franco v. Zoning Bd. of Review, 90 R.I. 210, 156 A.2d 914 (1959); Laudati v. Zoning Bd. of Review, 91 R.I. 116, 161 A.2d 198 (1960).

Where it is shown that a literal application of the terms of the ordinance completely deprives an owner of all beneficial use of his land, this would be proof of hardship that would require the board to grant relief so as to prevent complete confiscation of the land without compensation. Hazen v. Zoning Bd. of Review, 90 R.I. 108, 155 A.2d 333 (1959); Tuite v. Zoning Bd. of Review, 95 R.I. 12, 182 A.2d 311 (1962), affd, 96 R.I. 307, 191 A.2d 155 (1963).

When a board of review is passing upon an application for relief from a building regulation or lot-line restriction it may properly exercise its authority to vary the terms of such provision without requiring the applicant to establish that a literal enforcement thereof would deprive him of all beneficial use of the land. Reynolds v. Zoning Bd. of Review, 96 R.I. 340, 191 A.2d 350 (1963).

That applicants would be deprived of the most profitable use of their land is not of itself proof of unreasonable and unnecessary hardship amounting to confiscation. Sundin v. Zoning Bd. of Review, 98 R.I. 161, 200 A.2d 459 (1964).

Unnecessary hardship exists only when all beneficial use has been lost and the grant of a variance becomes necessary to avoid an indirect confiscation. Rhode Island Hosp. Trust Nat'l Bank v. East Providence Zoning Bd. of Review, 444 A.2d 862 (R.I. 1982).

10. Determination of Hardship.

For cases where no undue hardship was found, see Winters v. Zoning Bd. of Review, 80 R.I. 275, 96 A.2d 337 (1953); Caccia v. Zoning Bd. of Review, 83 R.I. 146, 113 A.2d 870 (1955); May-Day Realty Corp. v. Board of Appeals, 92 R.I. 442, 169 A.2d 607 (1961); Sewall v. Zoning Bd. of Review, 93 R.I. 109, 172 A.2d 81 (1961); Williams' Estates, Inc. v. Zoning Bd. of Review, 94 R.I. 490, 182 A.2d 314 (1962); Rego v. Zoning Rd. of Review, 95 R.I. 50,182 A.2d 425 (1962); Somyk v. Zoning Bd. of Review, 99 R.I. 255, 207 A.2d 34 (1965); Mount Pleasant Realty & Constr. Co. v. Zoning Bd. of Review, 100 R.I. 31, 210 A.2d 877 (1965); Health Havens, Inc. v. Zoning Bd. of Review, 101 R.I. 258, 221 A.2d 794 (1966); Smith v. Zoning Bd. of Review, 104 R.I. 1, 241 A.2d 288 (1968); Didonato v. Zoning Bd. of Review, 104 R.I. 158, 242 A.2d 416 (1968); Gartsu v. Zoning Bd. of Review, 104 R.I. 719, 248 A.2d 597 (1968); Weaver v. United Congregational Church, 120 R.I. 419, 388 A.2d 11 (1978).

For cases where undue hardship was found, see Bourget v. Zoning Bd. of Review, 94 R.I. 334, 180 A.2d 594 (1962); Saravo Bros. Constr. Co. v. Zoning Bd. of Review, 102 R.I. 442, 231 A.2d 9 (1967); Didonato v. Zoning Bd. of Review, 104 R.I. 158, 242 A.2d 416 (1968); Coderre v. Zoning Bd. of Review, 105 R.I. 266, 251 A.2d 397 (1969).

A mere showing of a more profitable use that would result in a financial hardship if denied does not satisfy the requirements necessary for a variance. Rhode Island Hosp. Trust Nat'l Bank v. East Providence Zoning Bd. of Review, 444 A.2d 862 (R.I. 1982).

11. Procedure.

Zoning board of review having general jurisdiction over subject matter had jurisdiction to grant variance under zoning ordinance, even though application for variance was based on wrong paragraph of zoning act, where such objection was raised for first time in supreme court. Miriam Hosp. v. Zoning Bd. of Review, 67 R.I. 295, 23 A.2d 191 (1941).

An application to the board for a variance must be construed in the nature of an "appeal" within the meaning of that term as it is used in subsection (1)(c) and such application is also in the nature of an "appeal" as that term is used in § 45-24-18. Mello v. Board of Review, 94 R.I. 43, 177 A.2d 533 (1962).

All five members of the presently constituted zoning board must participate in rendering a decision. Kent v. Zoning Bd. of Review, 102 R.I. 258, 229 A.2d 769 (1967); Dresser v. A.T. & G., Inc., 118 R.I. 66, 372 A.2d 67 (1977).

Where there has been a change in the composition of a board of review made subsequent to the rendering of a decision which the court remands for clarification, completion and/or supplementation of the record on which the decision was based, a hearing de novo on the application for relief is a jurisdictional condition precedent to a valid decision. Coderre v. Zoning Bd. of Review, 103 R.I. 575, 239 A.2d 729 (1968); Dresser v. AT. & G., Inc., 118 R.I. 66, 372 A.2d 67 (1977).

12. Standing.

Where the board acted upon the application as one solely for an exception under the ordinance, the remonstrators could not urge that the decision was wrong because there was no evidence of hardship on the applicant. Harrison v. Zoning Bd. of Review, 74 R.I. 135, 59 A.2d 361 (1948).

A holder of an option on a piece of real estate is not entitled to claim a hardship under this section. Tripp v. Zoning Bd. of Review, 84 R.I. 262, 123 A.2d 144 (1956).

A tenant at sufferance did not have sufficient interest to support an application for a variance. Gallagher v. Zoning Bd. of Review, 95 R.I. 225, 186 A.2d 325 (1962).

One who had contracted with the owner to

purchase the land in question on the condition that a variance be obtained to permit erection of a gasoline filling station thereon had no standing to petition for such a variance where the owner did not join in the petition and the terms of the sale contract were not in the record. Packham v. Zoning Bd. of Review, 103 R.I. 467, 238 A.2d 387 (1968).

13. Issues.

The applicant on a petition to the board to exercise its discretion for an exception or variation to a zoning ordinance cannot raise the issue of constitutionality, either of the enabling act or of the ordinance. Allen v. Zoning Bd. of Review, 75 R.I. 321, 66 A.2d 369 (1949).

The board of review upon acquiring jurisdiction on appeal may grant variances, modify decisions appealed from and may give due regard to the possible use of the land as zoned. Ajootian v. Zoning Bd. of Review, 85 R.I. 441, 132 A.2d 836 (1957).

The property owner is not required to prove a loss of all beneficial use in order to establish a right to relief nor is the board required to find that the relief sought will serve the convenience or welfare of the public. Viti v. Zoning Bd. of Review, 92 R.I. 59, 166 A.2d 211 (1960).

14. Burden of Proof.

Burden of proof is on one attempting to establish a variance to show that relief sought is not contrary to public interest, and that an enforcement of the terms of the ordinance will result in unnecessary hardship. Winters v. Zoning Bd. of Review, 80 R.I. 275, 96 A.2d 337 (1953); Pistachio v. Zoning Bd. of Review, 88 R.I. 285, 147 A.2d 461 (1959).

This section casts upon the applicant for a variance the burden of showing a "peculiar" hardship. Caldarone v. Zoning Bd. of Review, 87 R.I. 15, 137 A.2d 419 (1957); Laudati v. Zoning Bd. of Review, 91 R.I. 116, 161 A.2d 198 (1960); Benoit v. Zoning Bd. of Review, 95 R.I. 46, 182 A.2d 432 (1962); Mount Pleasant Realty & Constr. Co. v. Zoning Bd. of Review, 100 R.I. 31, 210 A.2d 877 (1965).

Application for variance will be denied where the only evidence in support of variance is that the zoning ordinance when applied to particular property will result in less profitable use. Berard v. Zoning Bd. of Review, 87 R.I. 244, 139 A.2d 867 (1958); Hazen v. Zoning Bd. of Review, 90 R.I. 108, 155 A.2d 333 11959); Laudati v. Zoning Bd. of Review, 91 R.I. 116, 161 A.2d 198 i1960i; Benoit v. Zoning Bd. of Review, 95 R.I. 46, 182 A.2d 432 (1962).

The standards of burden of proof for a special exception or variance under subsections (1)(b) and (tic) are not the applicable standards when the relief sought is from building regulations as distinguished from limitations of use. H.J. Bernard Realty Co. v. Zoning Bd. of Review, 96 R.I. 390, 192 A.2d 8 (1963).

Where no legal evidence of unnecessary hardship being imposed on an applicant for an exception or variance appears in the record, the review board cannot, in the absence for such evidence, act judicially to find unnecessary hardships. Pettine v. Zoning Bd. of Review, 96 R.I. 404, 192 A.2d 433 (1963).

A zoning variance may be granted by the board of review on ground that literal enforcement of the ordinance would result in unnecessary hardship but it was incumbent upon the applicants to prove that unless it was granted they would lose all beneficial use of their land. Sundin v. Zoning Bd. of Review, 98 R.I. 161, 200 A.2d 459 (1964).

To obtain a variance, an applicant must demonstrate by probative evidence that a literal application of the terms of the ordinance would deprive him of all beneficial use of his property; however, statements of economic unfeasibility that are mere conclusions and are unsupported by financial statements or cost data do not constitute probative evidence. Gaglione v. DiMuro, 478 A.2d 573 (R.I. 1984).

15. Special Knowledge of Board.

The board of review acting within its authority may predicate its decision upon the well-recognized presumption that zoning boards of review have a special knowledge as to matters that are particularly related to the administration of a zoning ordinance. Trovato v. Chiaradio, 95 R.I. 326, 186 A.2d 736 (1963).

The zoning board may acquire special knowledge through an inspection of the property, and this and the knowledge they are presumed to have constitutes competent evidence to support the decision of the board. Trovato v. Chiaradio, 95 R.I. 326, 186 A.2d 736 (1963).

Where it is clear that the board acquired information concerning the effect of the variance sought on the use of the land in question through its inspection and reached its decision on the basis of its knowledge concerning those matters which are related to an effective administration of the zoning ordinance, the board's denial of petitioner's application for a variance is supported by legally competent evidence in the record. Charles Land Co. v. Zoning Bd. of Review, 99 R.I. 161, 206 A.2d 453 (1965).

When the record discloses that the minority of a board of review reached its decision on basis of disclosed knowledge acquired by its observation of the premises and by the expertise imputed to them as members of a board of review the decision is supported by legally competent evidence in the record and

will not be disturbed. Schofield v. Zoning Bd. of Review, 99 R.I. 204, 206 A.2d 524 (1965).

16. Discretion of Board.

Where there is conflict in evidence as to whether literal enforcement of ordinance would result in complete deprivation of all beneficial use of land and where there is legal evidence on which board could base its decision denying variance, it could not be said that there was an abuse of discretion. Laudati v. Zoning Bd. of Review, 91 R.I. 116, 161 A.2d 198 (1960).

It is the duty of a board of review to exercise the fact-finding power conferred upon it to such an extent that the ultimate facts upon which its decision rests are sufficiently stated to enable the court to intelligently determine on review by certiorari that error of law either does or does not inhere in that decision. Noyes v. Zoning Bd. of Review, 94 R.I. 15, 177 A.2d 529 (1962). See also Noyes v. Zoning Bd. of Review, 95 R.I. 201, 186 A.2d 70 (1962).

While it is desirable for board of review to adhere to language employed by statute, ordinance or opinions of court it will not be fatal when it is clear that the decision is supported by evidence even though it states the applicable standard in loose rather than exact language. Lincourt v. Zoning Bd. of Review, 98 R.I. 305, 201 A.2d 482 (1964).

Where, after the issuance of a permit for a permitted use and during the pendency of an appeal from the issuance of the permit, the zoning ordinance was changed to make the proposed use unlawful, the zoning board of review, in determining the right to build under the permit in violation of changed zoning ordinance was required to find the extent to which substantial performance was undertaken in reliance on the permit in good faith. Shalvey v. Zoning Bd. of Review, 99 R.I. 692, 210 A.2d 589 (1965).

17. **Abuse** of Discretion.

For cases where an abuse of discretion was found, see Thomas v. Zoning 6d. of Review, 84 R.I. 330, 124 A.2d 859 (19.561; Madden v. Zoning Bd. of Review, 89 R.I. 131, 151 A.2d 681 (1959); Sewall v. Zoning Rd. of Review, 93 R.I. 109, 172 A2d 81 (1961); V.S.H. Realty, Inc. v. Zoning Bd. of Review. 103 R.I. 16, 234 A.2d 355 (1967); Lincoln Plastic Prods. Co. v. Zoning Bd. of Review, 104 R.I. 111, 242 A.2d 301 (1968).

For cases where no abuse of discretion was found, see Ricci v. Zoning Bd. of Review, 72 R.I. 58, 47 A.2d 923 (1946); Crudeli v. Zoning Bd. of Review, 73 R.I. 301, 55 A.2d 284 (1947); Allen v. Zoning Bd. of Review, 75 R.I. 321, 66 A.2d 369 (1949); Lawson v. Zoning Bd. of Review. 85 R.I. 54. 125 A.2d 199 (1956); May-Day Realty Corp. v. Board of Appeals, 92 R.I. 442, 169 A.2d 607 (1961); Sewall v. Zoning Bd. of Review, 93 R.I. 109, 172 A.2d 81 (1961); Gallagher v. Zoning Bd. of Review, 95 R.I. 225, 186 A.2d 325 (1962); Reynolds v. Zoning Bd. of Review, 95 R.I. 437, 187 A.2d 667, affd, 96 R.I. 340, 191 A.2d 350 (1963); DeFelice v. Zoning Bd. of Review, 96 R.I. 99, 189 A.2d 685 (1963); Titus v. Zoning Bd. of Review, 99 R.I. 211, 206 A.2d 630 (1965); Cole v. Zoning Bd. of Review, 102 R.I. 498, 231 A.2d 775 (1967); Westminster Corp. v. Zoning Bd. of Review, 103 R.I. 381, 238 A.2d 353 (1968); Reynolds v. Board of Review, 103 R.I. 535, 238 A.2d 764 (1968); Town of Warren v. Frost, 111 R.I. 217, 301 A.2d 572 (1973).

18. Mandamus.

Petition for writ of mandamus to require certain officers of city to grant petitioners a permit to construct a gasoline station driveway over a sidewalk after zoning board granted variance for gasoline station was properly denied when the petition did not show the petitioners had acquired title to or clear legal interest in the land. Son Oil Co. v. Macauley, 72 R.I. 206, 49 A.2d 917 (1946).

Collateral References. Grant of new application for variance or special exception after denial of previous application, 52 A.L.R.3d 494.

Who may apply for variance or special exception, 89 A.L.R.2d 663.

45-24-20. Appeals to superior court. [Repealed effective July 1, 1993.] - (a) Any person or persons jointly or severally aggrieved by a decision of the zoning board may appeal to the superior court for the county in which the municipality is situated by filing a complaint setting forth the reasons for the appeal within twenty (20) days after a decision has been filed in the office of the zoning board. The zoning board shall file the original documents acted upon by it

and constituting the record of the case appealed from, or certified copies thereof, together with other facts as may be pertinent, with the clerk of the court within ten (10) days after being served with a copy of the complaint. When the complaint is filed by someone other than the original applicant or appellant, the original applicant or appellant and the members of the zoning board shall be made parties to the proceedings. The appeal shall not stay proceedings upon the decision appealed from, but the court may, in its discretion, grant a stay on appropriate terms and make such other orders as it deems necessary for an equitable disposition of the appeal.

(b) If, before the date set for hearing in the superior court, application is made to the court for leave to present additional evidence before the zoning board, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for the failure to present it at the hearing before the zoning board, the court may order that the additional evidence be taken before the zoning board upon conditions determined by the court. The zoning board may modify its findings and decision by reason of additional evidence and shall file that evidence and any modifications, new findings, or decisions with the superior court.

(c) The review shall be conducted by the superior court without a jury. The court shall consider the record of the hearing before the zoning board, and if it shall appear to the court that additional evidence is necessary for the proper disposition of the matter, it may allow any party to the appeal to present evidence in open court, which evidence along with the record shall constitute the record upon which the determination of the court shall be made.

(d) The court shall not substitute its judgment for that of the zoning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

(1) In violation of constitutional, statutory, or ordinance provisions;

(2) In excess of the authority granted to the zoning board by statute or ordinance;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(e) The provisions of this section shall apply to appeals from all zoning boards of review of any city or town, whether or not the city or town has adopted the provisions of this chapter.

History of Section.

G.L. 1909, ch. 57, § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-20; P.L. 1969, ch. 239, § 48.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) assigned subsection designations; substituted "reasons for the appeal" for "reasons of appeal" near the middle of the first sentence of subsection (a); substituted "the complaint is filed" for "the complaint filed" near the beginning of the next-to-last sentence in subsection (a); and made several substitutions for the words "such" and "said" and several punctuation changes throughout the section.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) inserted a comma following "the zoning board" near the beginning of the first sentence in subsection (b) and near the beginning of the second sentence in subsection (c); divided the former single continuous provisions of subsection (d) into the present subdivisions of subsection (d), thereby making related capitalization and stylistic changes; and inserted a comma following the word "statutory" in subsection (d)(1).

Delayed Repealed Sections. This section (G.L. 1909, ch. 57. § 8; P.L. 1923, ch. 430, § 2; G.L. 1938, ch. 342, § 8; G.L. 1956, § 45-24-20; P.L. 1969, ch. 239, § 48), concerning appeals to superior court, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-281c1.

NOTES TO DECISIONS

ANALYSIS

1. Right to review.
2. Scope.
3. Parties to review - Aggrieved persons.
4. Time for filing.
5. Record considered.
6. Substantial evidence.
7. Relief granted.
8. Remand to board.
9. Reversal.

1. Right to Review.

Zoning board has no legal standing to ask supreme court to issue its prerogative writ of certiorari to review a superior court judgment reversing a decision of the board since the board is neither a partisan nor has it personal or official interest in the matter other than to decide the matter according to law and to prove fact. Hassell v. Zoning Bd. of Review, 108 R.I. 349, 275 A.2d 646 (1971); Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

The general certiorari standard of review is inapplicable in the superior court, which must follow the statutory criteria set forth in this section. Toohey v. Kilday, 415 A.2d 732 (R.I. 1980).

The superior court has jurisdiction to review the denial by a zoning board of an application for a variance, although such review is limited to a determination of whether the zoning board's decision was arbitrary or an abuse of discretion. Consolidated -Realty Corp. v. Town Council, 513 A.2d 1(R.I. 1986).

Superior court, in reviewing a refusal by a town zoning board to sanction a project, cannot consider an application for the project as seeking a variance from zoning requirements where the applicant failed to seek relief by way of variance before the board. Northeastern Corp. v. Zoning Bd. of Review, 534 A.2d 603 (R.I. 1987).

2. Scope.

An appeal in a zoning proceeding involving a public utility may not be taken under this section but must be taken under the provisions of § 39-1-30. Mercial v. New England Tel. & Tel. Co., 110 R.I. 149, 290 A.2d 907 (1972).

This section has altered the scope of review previously established by decisional law in that it requires not "some" or "any" evidence but "substantial" evidence on the whole record to support the board's findings. Apostolou v. Genovesi, 120 R.I. 501, 388 A.2d 821 (1978).

This section governs superior court's review of appeals from decisions made by various municipal zoning boards rather than legislative acts of town or city council. Kilduff Bros. Bldrs. v. Town Council, 120 R.I. 501, 447 A.2d 1142 (1982).

A reviewing court must affirm a zoning board decision if there is substantial evidence to support the board's findings. Mendonsa v. Corey, 495 A.2d 257 (R.I. 1985).

A reviewing court may not substitute its judgment for that of the zoning board. Mendonsa v. Corey,495 A.2d 257 (R.I. 1985).

In reviewing the superior court's review of a zoning board decision, the supreme court does not weigh the evidence but rather examines the record to determine whether competent evidence exists to support the superior court justice's decision. The justice's decision will not be reversed unless it is shown that the superior court justice misapplied the law, misconceived or overlooked material evidence, or made findings that were clearly wrong. R.J.E.P. Assocs. v. Hellewell, 560 A.2d 353 (R.I. 1989); Skelley v. Zoning Bd. of Review, 569 A.2d 1054 (R.I. 1990).

3. Parties to Review - Aggrieved Persons.

The 1969 amendment is applicable to per-

sons aggrieved by zoning board decisions which were filed after 12:01 p.m., September 15, 1969. Hester v. Timothy, 108 R.I. 376, 275 A.2d 637 (1971).

Under this section and §§ 45-24-6 and 45-24-7 a city solicitor is an aggrieved person under the statute and may properly appeal on behalf of the municipality from the decision of a zoning board. City of East Providence v. Shell Oil Co., 110 R.I. 138, 290 A.2d 915 (1972).

In a zoning dispute, the local government may apply for certiorari in the supreme court, even though it was not judicially involved at the superior court level. Town of East Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977).

4. Time for Filing.

The thirty-day period provided by this section within which to file a petition for writ of certiorari did not begin to run until the decision of the board of review was filed in the office of the board even though the petitioner had actual knowledge of the decision prior to that time. Lindberg's, Inc. v. Zoning Bd. of Review, 106 R.I. 667, 262 A.2d 628 (1970).

5. Record Considered.

In reviewing the "whole record," the reviewing court is not empowered to substitute its judgment for that of the zoning board if it can conscientiously find that the board's decision was supported by substantial evidence in the whole record. Apostolou v. Genovesi, 120 R.I. 501, 388 A.2d 821 (1978).

Zoning boards of review must record their proceedings in sufficient detail to allow a reviewing court to ascertain the grounds of decision. Holmes v. Dowling, 413 A.2d 95 (R.I. 1980).

In reviewing a decision of a zoning board of review, the trial justice must examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence. Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646 (R.I. 1981).

6. Substantial Evidence.

"Substantial evidence" is more than a scintilla or merely "some" or "any" evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; and it refers to the reasonableness of the action of the zoning board on the basis of the evidence before it. Apostolou v. Genovesi, 120 R.I. 501, 388 A.2d 821 (1978.

Substantial evidence means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means in amount more than a scintilla but less than a preponderance. Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646 (R.I. 1981).

7. Relief Granted.

Where there was no evidence indicating that full compliance with the boundary requirement of an ordinance would constitute more than *mere* inconvenience affecting the full enjoyment of the permitted use, an application for variance was properly denied. Apostolou v. Genovesi, 120 R.I. 501, 388 A.2d 821 (1978).

8. Remand to Board.

Superior court, on appeal from decision of zoning board granting relief from lot and side yard requirements of ordinance, has jurisdiction on its own initiative to remand cause to the board for taking evidence on issue of unnecessary hardship. Thibodeau v. Zoning Bd. of Review, 108 R.I. 410, 276 A.2d 283 (1971).

When the zoning board fails to state its findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances but will remand for further proceedings. Irish Partnership v. Rommel, 518 A.2d 356 (R.I. 1986).

Subsection (d) confers upon the trial justice the authority to remand a case to the zoning board of review for further proceedings. This authority, however, should not be exercised in such circumstances as to allow remonstrants another opportunity to present a case when the evidence presented initially is inadequate. Roger Williams College v. Gallison, 572 A.2d 61 (R.I. 1990).

A remand for further proceedings should be based upon a genuine defect in the proceedings in the first instance, which defect is not the fault of the parties seeking the remand, or upon the fact that there is not record of the proceedings upon which a reviewing court may act. Roger Williams College v. Gallison, 572 A.2d 61 (R.I. 1990).

9. Reversal.

Court misapplied the law, thus mandating reversal, where the court, in its decision, mentioned but did not fully consider the impact of an earlier proceeding upon the zoning board's power to remove restrictions accompanying a grant of a prior special exception absent a showing of changed circumstances. Audette v. Coletti, 539 A.2d 520 (R.I. 1988).

The superior court misapplies the law in affirming the zoning board's denial of an application for a deviation from compliance with minimum lot size and frontage requirements, where refusing the property owner permission to build a house amounts to an adverse impact amounting to more than a mere inconvenience. Felicio v. Fleury, 557 A.2d 480 (R.I. 1989).

DECISIONS UNDER PRIOR LAW

ANALYSIS

1. Right to review.
2. Parties to review - Aggrieved persons.
3. Issues considered.
4. Burden of proof.
5. Record considered.
6. Discretionary powers of board.
7. Taking of testimony.
8. Alternative remedies.
9. Remand to board.
10. Equitable considerations.
11. Relief granted.

1. Right to Review.

A party aggrieved by decision of zoning board granting variance is entitled as of right to review by supreme court on certiorari. Buckminster v. Zoning Bd. of Review, 68 R.I. 515, 30 A.2d 104 (1943).

2. Parties to Review - Aggrieved Persons.

Supreme court may permit attorneys representing remonstrants who appeared before zoning board and who might have appealed if aggrieved by decision, to file briefs and to argue in support of board's decision, but court will ascertain whether remonstrants have such an interest that in justice they should be permitted to be heard. M. & L. Die & Tool Co. v. Board of Review, 76 R.I. 417, 71 A.2d 511 (1950).

On petition for writ of certiorari to reverse decision of board of review granting the petition for an exception under the zoning ordinance of the city permitting certain real estate to be used for a funeral home, petitioner whose property was a short distance from the property in question was an "aggrieved person" under this section even though no reference was made to the type of district in which her property was located or the nature or character of her property. Bastedo v. Board of Review, 89 R.I. 420, 153 A.2d 531 (1959).

The petition is sufficient to show aggrievement where petitioner alleges that his property is in close proximity with real estate of applicant seeking variance. Dilorio v. Zoning Bd. of Review, 105 R.I. 357, 252 A.2d 350 (1969).

A property owner is aggrieved within the purview of this statute when the property of which he is the owner is devoted to a use that would be naturally affected adversely by a decision granting an exception or a variance applicable to the land of another. D'Almeida v. Sheldon Realty Co., 105 R.I. 317, 252 A.2d 23 (1969).

3. Issues Considered.

The supreme court will hear only the questions that were before the board, and a constitutional issue cannot he brought up for the first time on appeal. Heffernan v. Zoning Bd. of Review, 49 R.I. 283, 142 A. 479 (1928).

Where landowner applied directly to local board of zoning review for a proposed extension of a nonconforming use and after adverse decision brought certiorari, the sole question before the court was the propriety of the action of the board under its discretion, and petitioner will not be heard on constitutionality of the act under which the zoning ordinance was enacted. Drabble v. Zoning Bd. of Review, 52 R.I. 228, 159 A. 828 (1932).

Question of whether the ordinance conferred on the board powers beyond those the town council could bestow could not be considered upon appeal where not raised in a petition for certiorari but raised for the first time in brief and argument. Beggs v. Zoning Bd. of Review, 79 R.I. 211, 86 A.2d 658 (1952).

Validity of ordinance could not be attacked on petition for writ of certiorari where invalidity of ordinance was not asserted before the board. Hopkins v. Zoning Bd. of Review, 84 R.I. 274, 123 A.2d 253 (1956).

Where an applicant, without claim of right and solely in reliance upon a zoning ordinance, applies directly to a zoning board to authorize a special exception or a variance under the ordinance, and after an adverse decision bring certiorari to review such decision, the only question before the court is the propriety of the action of the board. Madden v. Zoning Bd. of Review, 89 R.I. 1.3), 151 A.2d 681 (1959).

The enabling act under the zoning act has not extended the scope of the writ of certiorari so as to authorize a review of a purely legislative act by the zoning board of review. Town & Country Mobile Homes, Inc. v. Zoning Bd. of Review, 91 R.I. 464, 165 A.2d 510 (1960).

4. Burden of Proof.

Petitioner who brings certiorari to review a decision of a zoning board has the burden of showing the board abused its discretion and that its decision is erroneous and invalid. Woodbury v. Zoning Bd. of Review, 78 R.I. 319, 82 A.2d 164 (1951).

5. Record Considered.

On certiorari the supreme court will consider only the record returned by the board in response to issuance of the writ. Allen v. Zoning Bd. of Review, 75 R.I. 321, 66 A.2d 369 (1949).

A decision of a board of review will be sustained on appeal if there is in the record any legal evidence supporting the decision.

Zimarino v. Zoning Bd. of Review, 95 R.I. 383, 187 A.2d 259 (19631.

The supreme court will not assume that the zoning board reached its decision upon the basis of knowledge it acquired from view or by reason of its presumed expertise unless the record discloses that its action is based thereon. Pettine v. Zoning Bd. of Review, 9 R.I. 404, 192 A.2d 433 (1963).

Where the action of a zoning board of review bases its decision on legal evidence as disclosed in the record, the supreme court will not weigh the evidence upon which the board bases its decision. Pettine v. Zoning Bd. of Review, 96 R.I. 404, 192 A.2d 433 (1963).

Where the court is able to ascertain from the record the reasons for the board's decision and it is supported by sufficient evidence, the decision will be sustained even though the board fails to state its reasons for its decision. Richards v. Zoning Bd. of Review, 100 R.I. 212, 213 A.2d 814 (1965).

A decision granting or denying relief which fails to give the reasons and the ground upon which it is predicated and to point out the evidence upon which the ultimate finding or findings are based will be returned to the board for clarification. Hopf v. Board of Review, 102 R.I. 275, 230 A.2d 420 (1967).

When considering an appeal from a zoning board's action pursuant to the provisions of this section, the supreme court does not weigh evidence, for such a function is solely the prerogative of the board of review. Reynolds v. Board of Review, 103 R.I. 535, 238 A.2d 764 (1968).

Where exception to permit the erection of an apartment house is denied because petitioner owns only an option to buy what would constitute sufficient land for the building, but exercises his option and buys the land prior to oral argument on appeal, the appellate tribunal may admit the deed as part of the record. Fryzel v. Zoning Bd. of Review, 105 R.I. 491, 252 A.2d 918 (1969).

When record does not set forth facts establishing aggrievement and such facts are not alleged in the petition other than to allege ownership of land within the municipality, the petition contains insufficient allegations to establish aggrievement. D'Almeida v. Sheldon Realty Co., 105 R.I. 317, 252 A.2d 23 (1969).

6. Discretionary Powers of Board.

Supreme court would not reverse discretionary action of zoning board unless there was an abuse of such discretion or unless it had exceeded its powers. Morgan v. Zoning Bd. of Review, 52 H.I. 338, 160 A. 922 (1932).

Decision of zoning board of review will not be set aside unless it is so arbitrary and unreasonable as to show a clear abuse of discretion. Jacques v. Zoning Bd. of Review, 64 R.I. 284, 12 A.2d 222 (1940); Woodbury v. Zoning Bd. of Review, 78 R.I. 319, 82 A.2d 164 (1951); Pistachio v. Zoning Bd. of Review, 88 R.I. 285,147 A.2d 461 (1959); Madden v. Zoning Bd. of Review, 89 R.I. 131, 151 A.2d 681 (1959).

On petition of certiorari to review decision of zoning board of review denying application for exception or variance to permit apartment construction in a residence district, if there is some evidence to support the board's findings, the supreme court will not disturb it. May-Day Realty Corp. v. Board of Appeals, 92 R.I. 442, 169 A.2d 607 (1961).

7. Taking of Testimony.

Where no sworn testimony was taken or other evidence offered showing statements made before the board, the supreme court ordered the taking of new testimony and inquiry broadened into whether the facts then before the court warranted the court in making a variance, and not the narrow question whether the board had properly exercised its discretion. Harrison v. Hopkins, 48 R.I. 42, 135 A. 154 (1926).

8. Alternative Remedies.

An injunction to prevent alterations in a building which were being made under a permit issued by the building inspector could not be issued when the petitioners had not exhausted their statutory remedies under this section by an appeal to the board of review and then to supreme court. Scott v. Hope-Olney Realty, 83 R.I. 331, 116 A.2d 461 (1955).

Where common law writ of certiorari was brought to review action of city council in denying application for permit to build rather than a proceeding in certiorari under this section the city council was ordered to act upon the application for a permit but further mandatory instructions which might have been made under the provisions of this section were denied. Regnier v. City Council, 91 R.I. 387, 162 A.2d 804 (1960).

9. Remand to Board.

On petition *for* certiorari from board of review which having a misconception of its power dismissed petition for review of denial by building inspector, case would be remanded to board where board should have treated petition as for variance since zoning ordinance deprived petitioner of a useful purpose of the land. Ajootian v. Zoning Bd. of Review, 85 R.I. 441, 132 A.2d 836 (1957).

Where the supreme court directed the board to reconsider an application for a special exception and variance it was the duty of the board to notify the objector (petitioner for certiorari) of their decision in granting the application after reconsideration; and, hav-

ing failed in such duty, the 30 day period for applying for certiorari did not begin until such notice was given. Cranston Jewish Center v. Zoning Bd. of Review, 95 R.I. 421, 187 A.2d 779 (1963).

A cause will be remanded to the board of review for reconsideration where the court is unable to determine from the record before it whether the board was circumscribing its authority to grant an exception in a manner not provided by the provisions of the enabling act or the terms of the ordinance. Kraemer v. Zoning Bd., 98 R.I. 328, 201 A.2d 643 (1964).

10. Equitable Considerations.

Action of the board in upholding the issuance of a permit for construction which, although permissible when the permit was issued, had been rendered improper by a subsequent amendment of the zoning ordinance was affirmed when the evidence in the record showed that the permittee had incurred substantial construction expense in reliance on a previous permit which was invalid through no fault of the permittee. Tantimonaco v. Zoning Bd. of Review, 102 R.I. 594, 232 A.2d 385 (1967).

11. Relief Granted.

When the portion of the decision of a local board granting an exception is sustained, substantial justice has been done end the spirit of the ordinance is best preserved by quashing that portion of the decision which, in addition to the relief afforded by way of special exception, purports to grant a variance as well. Titus v. Zoning Bd. of Review, 99 R.I. 211, 206 A.2d 630 (1965).

Collateral References. Right to intervene in court review of zoning proceeding. 46 A.L.R.2d 1059.

Standing of lot owner to challenge validity or regularity of zoning changes dealing with neighboring property. 37 A.L.R.2d 1143.

45-24-21. Special statutes controlling. [Repealed effective July 1, 1993.] - The provisions of this chapter are subject to the provisions of any special statutes respecting any particular town or city, none of which are hereby repealed, except as otherwise provided.

History of Section.

G.L. 1938, ch. 342, § 9; G.L. 1956, § 45-24-21.

Delayed Repealed Sections. This section (G.L. 1938, ch. 342, § 9; G.L. 1956, § 45-24-21), concerning special statutes controlling, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

1. In General.

Where a town was governed by a special law which provided authority to enact zoning ordinances, this chapter was not applicable and a complaint for violation of a zoning ordinance which charged that the ordinance was enacted pursuant to this chapter should have been dismissed without prejudice. Johnston v. Barrett, 100 R.I. 405, 216 A.2d 513 (1966).

45-24-22. Community residences. [Repealed effective July 1, 1993.] - Wherever six (6) or fewer retarded children or adults reside in any type of residence in the community, they shall be considered a family and all requirements pertaining to local zoning are waived.

History of Section.

P.L. 1977, ch. 257, § 1.

Delayed Repealed Sections. This section (P.L. 1977, ch. 257, § 1). concerning community residences, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

NOTES TO DECISIONS

ANALYSIS

1. Local ordinances.
2. Subdivision covenants.

1. Local Ordinances.

This section is a general statute of statewide application and thus, any local ordinance inconsistent herewith is invalid. Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981).

2. Subdivision Covenants.

Group home for six mentally retarded citizens was within the definitional scope of a "single-family dwelling" for "residential purposes only" and not commercial in nature for purposes of subdivisions' restrictive covenants. Gregory v. State Dep't of Mental Health, Retardation & Hosps., 495 A.2d 997 (R.I. 1985).

45-24-23. Group homes. [Repealed effective July 1, 1993.] - A group home licensed by the state, pursuant to chapter 24 of title 40.1, and providing care or supervision or both to not more than eight (8) mentally disabled or mentally retarded persons, shall be considered a family for purposes of zoning. Any group home purchased or built by the state of Rhode Island, which is no longer used to house these persons and is vacant for a period up to one year must be offered for sale on the private housing market forthwith, and shall thereafter remain under the jurisdiction of the zoning enforcement officer and zoning code of that municipality in which the home is located, and the zoning enforcement officer and zoning code shall govern the use of the home.

History of Section.

P.L. 1980, ch. 314, § 1; P.L. 1985, ch. 115, 1.

Reenactments. The 1988 Reenactment) P.L. 1988, ch. 84, S 1) deleted "of the Rhode Island General Laws" preceding "and providing" in the first sentence; and substituted "these persons" for "said persons" and "the zoning enforcement" for "such zoning enforcement" and made a minor stylistic change in the last sentence.

The 1991 Reenactment (P.L. 1991, ch. 354, § 1) substituted "chapter 24 of title 40.1, and" for "§ 40.1-24-1 and" in the first sentence, since that appears to be the intended reference; substituted "use of the home" for "use thereof' at the end of the second sentence; and made several punctuation changes throughout the section.

Delayed Repealed Sections. This section (P.L. 1980, ch. 314, § 1; P.L. 1985, ch. 115, § 1), concerning group homes, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-24. Cooperative housing. [Repealed effective July 1, 1993.] - With respect to a limited equity housing cooperative, incorporated and operated to serve the public purpose of providing housing for low and/or moderate income residents, a local zoning board of review may waive those zoning requirements as in the opinion of the board unduly limit the local community's ability to provide housing for low and/or moderate income residents.

History of Section.

P.L. 1986. ch. 256, § 4.

Reenactments. The 1988 Reenactment W.L. 1988, ch. 84, § 1i substituted "those zoning requirements" for "such zoning requirements" near the middle of the section.

Delayed Repealed Sections. This section (P.L. 1966, ch. 256, § 4), concerning cooperative housing, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-25. Special authority - City of Warwick - Creation. [Repealed effective July 1, 1993.1 - (a) The city of Warwick is hereby authorized to permit the Warwick building official to hear variance requests to the Warwick zoning ordinance for deviations to the dimensional requirements of the ordinance, provided, however, the following conditions are met:

(1) That no abutting property owner within the required radius objects to the requested variance.

(2) That the building official and zoning enforcement official of the city of Warwick approve of the requested variance in writing.

(3) That the requested variance is not inconsistent with the comprehensive plan of the city of Warwick.

(4) That the requested variance does not require a variance of a flood hazard requirement.

(5) That the requested variance does not vary a dimensional requirement by more than fifty percent (50%) of the requirement.

(b) The Warwick city council is hereby empowered to establish an appropriate and reasonable procedure for the hearing of variance requests in the Warwick zoning ordinance.

History of Section.
P.L. 1988, ch. 108, § 1.

Reenactments. The 1991 Reenactment (P.L. 1991, ch. 354, § 1) assigned the subsection designations; inserted a comma preceding "provided, however" near the end of the introductory language in subsection (a), which insertion was previously made in 1988 by the compiler; substituted a colon for a period at the end of the introductory language in subsection (a); substituted "the requirement" for "said requirement" at the end of subsection (a)(5); and substituted "for the hearing of variance requests" for "to effect same" near the end of subsection (b).

Delayed Repealed Sections. This section (P.L. 1988, ch. 108, § 1), concerning special authority in the city of Warwick, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(ci.

45-24-26. Group family homes. [Repealed effective July 1, 1993.1 - A home licensed by the state pursuant to the provisions of chapter 72.1 of title 42, which is staffed by a resident married couple, providing care and supervision to not more than six (6) children residing therein, exclusive of the children of the resident married couple, shall be considered a single family residence for all zoning purposes and shall be a use permitted in all municipal zoning districts.

History of Section.
P.L. 1990, ch. 202, § 2.

Delayed Repealed Sections. This section (P.L. 1990, ch. 202, § 2), concerning group family homes, was repealed by P.L. 1991, ch. 307, § 1, effective July 1, 1993. See § 45-24-28(c).

45-24-27. Title.- Sections 45-24-27 through 45-24-72 shall be known as the "Rhode Island Zoning Enabling Act of 1991".

History of Section.
P.L. 1991, ch. 307, § 1.

Compiler's Notes. As enacted by P.L. 1991, ch. 307, § 1, this section was designated as § 45-24-26. Inasmuch as there already exists a § 45-24-26, the section was re-