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# Town of Franklin

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April 24, 2024

Town of Bellingham Planning Board
c/o Bellingham Planning Office
10 Mechanic St
Bellingham, MA 02019

By USPS First Class Mail
and Electronic Transmission:
planningboard@bellinghamma.org

Re: Application of Wall Street Development Corp for Approval of 156 Unit Multi-Family:
Town of Franklin's Opposition

Dear Bellingham Planning Board Members,

The undersigned is Town Attorney for the Town of Franklin. Reference is made to the pending application of Wall Street Development for approval to construct 156 units of multi-family housing in Bellingham, with primary access to be provided over abutting land in Franklin. Bellingham's zoning apparently allows multi-family housing on the land which is proposed to be developed; however, Franklin's zoning does not allow multi-family housing in the zoning district where the land which the developer proposes to use for access is located. It is the Town of Franklin's legal position that, since land located in this zoning district cannot be used for multi-family housing, it cannot be used for access to multi-family housing in Bellingham. Town submits that its legal position is fully supported by established caselaw, Town of Brookline v. Co-Ray Realty Company, Inc. 326 Mass. 206 (1950); see also: Pinecroft Development, Inc. v. Zoning Board of Appeals of West Boylston 101 Mass App. Ct. 122 at 122-123 (2022); see also: M. Bobrowski Handbook of Massachusetts Land Use and Planning Law Fifth Ed. (2022) Chapter 12.07 [D] [I] and [3], copies attached. In the Town of Brookline case cited above, Boston's zoning permitted multi-family zoning but Brookline's did not, in the subject area. A developer obtained approval for a multi-family housing project to be constructed on land in Boston, but with access and other active use of abutting land in Brookline. The Supreme Judicial Court held that Brookline could enforce its zoning prohibition on multi-family housing to prevent use of the Brookline land for access and other active purposes. The Town of Franklin submits that the Town of Brookline case governs the Bellingham Planning Board's disposition of the pending application and requires that the application for approval to construct multi-family units in Bellingham with roadway access from Franklin be denied.

I have taken the liberty to provide a copy of this letter to Bellingham Town Counsel Attorney Amy E. Kwesell of KP Law; I strongly urge the Bellingham Planning Board to consult with her to confirm that the Town of Franklin's legal analysis contained herein is legally correct.

Very Truly Yours,

Mark G Cerel

Mark G. Cerel, Franklin Town Attorney

# HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW

## Zoning, Subdivision Control, and Nonzoning Alternatives

Fifth Edition

Mark Bobrowski

Wolters Kluwer

of authorizing by special permit the extension of permitted uses in one district into the other district for a distance of 100 feet or to the property line, whichever is less. Although this proposal was not included in the final draft of the Zoning Act, many cities and towns have adopted regulations pertaining to split lots.[211]

### [1] Lots Split by Zoning District Boundaries

A recurring problem in lots split by two or more zoning district boundaries[212] is the determination of a proper reference point for the measurement of required yards or setbacks.

The leading case on point is *Tofias v. Butler*.[213] The plaintiffs owned 34 acres of land in Waltham, located partially in a limited commercial district and partially in a residential district. Plaintiffs proposed to construct a large building located entirely on that portion of the property in the limited commercial district.[214] The defendants, abutters situated in the residential district, sought revocation of the building permit issued for construction because the footprint exceeded the lot coverage requirement of the Waltham zoning ordinance. The ordinance prescribed that the footprint not exceed 20 percent of the ground area of the lot. The board of appeals revoked the permit, using a computation based solely on the portion of the lot in the limited commercial district.

Plaintiffs argued that the entire lot should be available to compute the lot coverage ratio, and the Appeals Court agreed. The Court reasoned that where the land in the more restrictive district was used in an "abstract" fashion (i.e., merely to supply space for a yard requirement), its inclusion in the computation was not inconsistent with the requirements of the district.[215]

On the other hand, where use of the portion of the lot in the more restrictive district is for an active purpose, the regulations of that district may be invoked to preclude or condition the use. In *Town of Brookline v. Co-Ray Realty Co.*,[216] the Supreme Judicial Court examined the proposed use of a lot split by the boundary of Boston and Brookline. The owner intended to construct an apartment building on the Boston side and to use the Brookline portion, zoned for single residences, as the rear yard required by the Boston ordinance. However, the rear area was also proposed as a service entrance—a use not allowed in Brookline. The Court held that the Brookline portion of the lot could not be used in computing the required rear yard.

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[211] Indeed, the Appeals Court has expressly sanctioned this approach. *Tofias*, 26 Mass. App. Ct. at 96-97 n.14.

[212] Municipalities may properly draw district lines so as to split lots. Moss v. Town of Winchester, 365 Mass. 297, 299-300 (1974).

[213] 26 Mass. App. Ct. 89 (1988). The decision contains a collection of earlier cases.

[214] The footprint of the proposed structure amounted to 5.21 acres or 226,850 square feet.

[215] *Tofias*, 26 Mass. App. Ct. 89, 94-96. *See also* Tambone v. Bd. of Appeal of Stoneham, 348 Mass. 359 (1965).

[216] 326 Mass. 206 (1950).

Thus, as a general rule, a yard or setback should be measured from the boundary of the split lot and not the boundary of the zoning district, unless the local ordinance or bylaw clearly states a different standard[217] or unless the portion of the lot in the more restrictive district is used for an active and violative purpose.[218]

### [2] Access Within Lots Split by Zoning District Boundaries

In *Harrison* v. *Building Inspector of Braintree*,[219] the Supreme Judicial Court reviewed access within split lots. The lot in question was primarily zoned for industrial purposes, but a small portion extended into an adjacent residential district.[220] The owner constructed a factory on the industrially zoned portion of the lot. The only access to public ways from the factory was via the residentially zoned portion of the lot. When 400 employees and service vehicles began using the residential portion to enter the premises, neighbors complained that use of the residentially zoned portion to access the interior, industrially zoned portion was a violation of the more restrictive district's use limitations.

The Court held that "[t]he use of land in a residential district, in which all aspects of industry are barred, for access roadways for an adjacent industrial plant violates the residential requirement."[221] In essence, the Court ruled that the access strip assumed the character of its destination. Since "all aspects of industry" were prohibited in the residential district, industrial access was tantamount to a precluded industrial use.

The courts have applied the *Harrison* rule in a variety of contexts. Access across restricted residential districts to reach multifamily apartments,[222] industrial plants[223] in a neighboring community,[224] and commercial operations[225] have been barred or restricted. Similarly, an access road to a multi-family housing project across a business district[226] and an access road to a retail use across an industrial district[227] have been prohibited.

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[217] *See, e.g.*, Goldlust v. Bd. of Appeals of N. Andover, 27 Mass. App. Ct. 1183, 1184 (1989).

[218] *See Tambone*, 348 Mass. 359; Burlington Sand & Gravel v. Town of Harvard, 26 Mass. App. Ct. 436, 438 (1988).

[219] 350 Mass. 559 (1966).

[220] The lot contained 340 acres. The industrial portion was entirely surrounded by a residential strip zone 200 feet wide and adjacent to public streets.

[221] 350 Mass. at 561 (citing Town of Brookline v. Co-Ray Realty Co., 326 Mass. 206, 211-212 (1950)).

[222] *See, e.g.*, Richardson v. Zoning Bd. of Appeals of Framingham, 351 Mass. 375 (1966).

[223] *See, e.g.*, Shea v. Town of Danvers, 21 Mass. App. Ct. 996 (1986).

[224] *See, e.g.*, Town of Chelmsford v. Byrne, 6 Mass. App. Ct. 848 (1978).

[225] *See, e.g.*, Bldg. Inspector of Dennis v. Harney, 2 Mass. App. Ct. 584 (1974).

[226] DuPont v. Town of Dracut, 41 Mass. App. Ct. 293, 295-296 (1996).

[227] Beale v. Planning Bd. of Rockland, 423 Mass. 690, 693 (1996).

It is important to note the limitations of the *Harrison* rule. First, it only applies where the access way in question is privately held, not publicly provided.[228] Second, the doctrine bars access only where "all aspects" of the destination use are prohibited in the more restrictive district. In *McGinley* v. *Morehouse*,[229] the town of Harvard attempted to bar access to a golf clubhouse across a lot split by municipal boundaries. The clubhouse was in Ayer; the course was in Harvard. The Land Court held that access across the private Harvard ways could not be prohibited because a clubhouse was an accessory use to the golf course, a permitted use in the Harvard zoning district. Similarly, if the use is available by special permit in the more restrictive district, *Harrison* suggests that access should be available by special permit.[230] Finally, the Court has suggested that the rule should be more leniently applied where it would result in a deprivation of all practical use.[231]

### [3] Lots Split by Municipal Boundaries

A lot split by municipal boundaries is subject to the zoning requirements of both municipalities.[232] For example, in *Town of Brookline v. Co-Ray Realty Co.*,[233] the Supreme Judicial Court examined the proposed use of a lot split by the boundary of Boston and Brookline. The owner intended to construct an apartment building on the Boston side and to use the Brookline portion, zoned for single residences, as a service entrance to the apartment building. This use was not allowed in the Brookline residential district. The Court applied the relevant Brookline bylaw to bar the use.

In *Boulter Brothers Construction Co., Inc. v. Zoning Board of Appeals of Norfolk*,[234] the Appeals Court ruled that, absent a contrary local rule, passive use of land in another municipality may be used to meet the area requirements of a bylaw or ordinance.

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[228] *See* Harrison v. Textron, 367 Mass. 540 (1975) (dictum). It is unclear whether access via an approved subdivision roadway not yet dedicated to the municipality constitutes a public or a private access way.

[229] Misc. Case No. 141347 (Land Ct. 1990).

[230] On the other hand, the specificity requirement of Mass. Gen. L. ch. 40A, § 9 may be invoked to argue that such access must be specifically authorized by the local ordinance or bylaw. *See* **§ 9.03[B]**.

[231] *See, e.g.*, Town of Chelmsford v. Byrne, 6 Mass. App. Ct. 848 (1978). In such circumstances the lack of access may be a critical fact in challenging the zoning classification of the district. *See* Nahigian v. Town of Lexington, 32 Mass. App. Ct. 517, 524-526 (1992).

[232] *See, e.g.*, DuPont v. Town of Dracut, 41 Mass. App. Ct. 293, 295-296 (1996); Burlington Sand & Gravel v. Town of Harvard, 26 Mass. App. Ct. 436, 440 (1988); Town of Chelmsford v. Byrne, 6 Mass. App. Ct. 848 (1978).

[233] 326 Mass. 206 (1950). *See also* Lapenas v. Zoning Bd. of Appeals of Brockton, 352 Mass. 530 (1967).

[234] 45 Mass. App. Ct. 283, 285-286 (1998). *See also* Petrillo v. Zoning Bd. of Appeals of Cohasset, 65 Mass. App. Ct. 453, 460-461 (2006).