

Land Use Manager Series

Background

This document is a compiled version of the entire “Land Use Manager” series distributed by the Executive Office of Communities and Development between the years 1984 and 1999. The contents of these advisory reports address planning and land use law issues commonly dealt with by municipal planners throughout the Commonwealth of Massachusetts. They continue to be useful today, for both general reference and clarification of the complex statutes and case law related to land use. As expected, portions of the information contained in these reports has been modified by changes in statutes and regulations, or clarified by more recent case law. Users are encouraged to keep this in mind when consulting these reports.

Source & Acknowledgements

These advisory reports were developed by Donald J. Schmidt, formerly Principal Planner (and Attorney) in the Office of Local and Regional Planning under the Massachusetts Executive Office of Communities and Development (EOCD) [now the Massachusetts Department of Housing and Community Development (DHCD)]. Without the significant amount of time contributed by Mr. Schmidt this resource would not exist today.

The paper versions of these reports were scanned and compiled in 2012 by Andrew R. Port, Director of Planning for the City of Newburyport and Northeast Regional Representative for the Massachusetts Chapter of the American Planning Association (APA). APA-MA believes this resource should be made broadly available to its membership and has therefore taken the time to make it accessible using today’s technology.

Special Thanks

Special thanks to Elaine Wijnja, Principal Land Use Planner for the Department of Housing and Community Development (DHCD) for providing original and complete copies of the Land Use Manager series for scanning.

Finding Information

The electronic version of this document contains a compiled scan of the entire Land Use Manager series, converted to Adobe Portable Document Format (PDF), processed using Optical Character Recognition (OCR). Users may find information using embedded tabs (“bookmark” links or “table of contents” listing general subject matters) or by simple keyword search, using the built-in text search tool in Adobe Acrobat Reader.

Land Use Manager Series

Table of Contents

Volume	Edition	Title	Date
1	1	Separate Lot Protection	January, 1984
1	2	Condominiums: Ownership v. Use	February, 1984
1	3	Can You Regulate Religious or Educational Uses By Special Permit?	March, 1984
1	4	Conditioning the Grant of a Special Permit or Variance on Ownership	April, 1984
1	5	Large Lot Zoning	May, 1984
1	6	A Hazardous Approach to the Flood Insurance Program	June, 1984
1	7	The Immunity of State Government From Municipal Zoning Regulations	July, 1984
1	8	Legislation Authorizing Zoning Boards of Appeals to Extend the Life of a Variance	August, 1984
		Chapter 195. An Act Further Regulating the Authority of Boards of Appeals Concerning Certain Variances	
1	9	Creating Substandard Lots	September, 1984
1	10	Endorsing 81P Plans Showing Zoning Violations	October, 1984
1	11	To Vote or Not to Vote: That is the Question	November, 1984
1	12	Quorum Requirements	December, 1984
2	1	All Discretionary Special Permit Zone Held Invalid	January, 1985
2	2	Site Plan Review	March, 1985
2	3	Zoning Freeze for Subdivision Plans	April, 1985
2	4	Zoning Protection for Approval Not Required Plans is Limited to Use	June, 1985
2	5	The Death of a Variance	July, 1985
2	6	Filing the Written Word	August, 1985
2	7	Constructive Grant - Who's on First	September, 1985
2	8	How to Beat a Zoning Change	October, 1985
2	9	Access Roadways	November, 1985
2	10	Reducing Lot Frontage by Special Permit	December, 1985
3	1	Separate Lot Protection: A Second Look	January, 1986
3	2	Group Homes V. Single Family Zones	February, 1986
3	3	Open Meetings	May, 1986
3	4	The Merging of Substandard Lots (Part I)	June, 1986
3	5	The Merging of Substandard Lots (Part II)	July, 1986
3	6	The Merging of Substandard Lots (Part III)	August, 1986
3	7	Building Moratoriums	September, 1986
3	8	Contract Zoning	December, 1986

Table of Contents (cont.)

Volume	Edition	Title	Date
4	1	Legislation Extending the Time Period for Reviewing Subdivision Plans Chapter 699. An Act Relative to the Review of Certain Plans Submitted Pursuant to the Subdivision Control Law	January, 1987
4	2	The Process of Adopting a Zoning Proposal	February, 1987
4	3	Amending a Zoning Proposal	May, 1987
4	4	Effective Date	June, 1987
4	5	Inverse Condemnation	July, 1987
4	6	Regulatory Takings	August, 1987
4	7	Common Driveways	December, 1987
5	1	Recent Amendments to the Zoning Act and Subdivision Control Law	January, 1988
5	2	Chapter 685. An Act Further Regulating Zoning Laws	February, 1988
5	3	Impact Fee Bylaw Declared Invalid	April, 1988
5	4	Zoning Enforcement Officer	June, 1988
5	5	Requests for Zoning Enforcement	July, 1988
5	6	Conditioning Subdivision Plans	August, 1988
5	7	Planning Board Regulations Cannot Exceed Construction Standards "Commonly Applied" by the Community	September, 1988
5	8	Attorney General Approves 5 Acre Zoning	October, 1988
5	9	Split Lots	November, 1988
5	10	Selected Massachusetts General Laws Dealing with Land Use Issues	December, 1988
6	1	Open Space Zoning	January, 1989
6	2	"ANR" and the Vital Access Standard (Part I)	February, 1989
6	3	"ANR" and the Vital Access Standard (Part II)	April, 1989
6	4	"ANR" and the Vital Access Standard (Part III)	June, 1989
6	5	"ANR" and the Vital Access Standard (Part IV)	July, 1989
6	6	"ANR" and the Vital Access Standard (Part V)	August, 1989
6	7	Dimensional Special Permits	December, 1989
7	1	SJC Decision Has Limited Impact on "ANR" Review	January, 1990
7	2	Recent Legislation Regarding Farm Stands and Review Fees	February, 1990
7	3	81-L Exemption	April, 1990
7	4	Perimeter Plans	May, 1990
7	5	A Variance is a Variance	July, 1990
7	6	The 81-FF Exemption	August, 1990
7	7	Repetitive Petitions	September, 1990
7	8	Perimeter Plans: You Be the Judge	October, 1990
7	9	The Seven-Month Zoning Protection	November, 1990
7	10	Zoning Bylaws Attorney General's Approval	December, 1990
8	1	Zoning Enforcement Statute of Limitations	July, 1991
8	2	The Section 6 Finding An Act Relative to Rules and Regulations Impacting Agricultural Operations	August, 1991

Table of Contents (cont.)

Volume	Edition	Title	Date
8	3	The Section 6 Finding (Part II)	September, 1991
8	4	Regulating Non-Conforming Structures	November, 1991
8	5	The Single and Two-Family Protection (Part I)	December, 1991
8	6	The Single and Two-Family Protection (Part II)	January, 1992
8	7	The Single and Two-Family Protection (Part III)	February, 1992
8	8	Public Safety and Subsidized Housing	April, 1992
8	9	Footprint Theory Overturned	July, 1992
8	10	Process for Approving Building Lots Lacking Adequate Frontage	October, 1992
9	3	The ANR Puzzle: Adequacy of Public Ways	November, 1992
9	4	The ANR Puzzle: Practical Access to Building Lots	December, 1992
10	1	Changing Lot Lines on Approved Subdivision Plans	November, 1993
10	2	Approval of Zoning Frontage by a Planning Board	December, 1993
11	1	Subdivision Plans and Separate Lot Protection	April, 1995
1998 to 1999	Ed. # 1	Land Court Looks at Common Driveways Lapsed Variances Infectious Invalidity	Jan-Mar, 1998
1998 to 1999	Ed. # 2	Changing Nonconforming Uses & Structures The 81L Exemption Hiring Outside Consultants Looking at the Land Court	Apr-June, 1998
1998 to 1999	Ed. # 3	SJC Limits Zoning Appeals Separate Lot Protection Voting Without Attending Hearing Peer to Peer Looking at the Land Court	July-Sept, 1998
1998 to 1999	Ed. # 4	Split Lot Entitled to Separate Lot Protection Automatic Rescission Bylaw Interpretation Looking at the Land Court	Oct-Dec, 1998
1998 to 1999	Ed. # 5	Regulating Sexually Oriented Businesses Subdivision Plans and Zoning Delaying ANR Endorsement Looking at the Land Court	Jan-Mar, 1999

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

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January, 1984



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

SEPARATE LOT PROTECTION

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Zoning legislation in Massachusetts has historically provided an exemption for substandard lots. Presently, Chapter 40A, Section 6, M.G.L. provides in part as follows:

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

In Massachusetts, many lots have been created by plans which have been subsequently endorsed, recorded, or both. At the time of such endorsement or recording all of the lots shown on the plan were owned by the same person. Some local building officials and zoning boards of appeals have interpreted the separate lot protection provision found in Chapter 40A, Section 6 to mean that unless a lot is held in separate ownership from that of adjoining land at the time of the endorsement of a plan showing the lot, or the recording of a plan showing the lot, or recording of a deed describing the lot, whichever occurs first, the lot is not exempt from increased zoning requirements and thus is unbuildable unless the lot meets the new zoning requirements. Since almost all lots at the time of creation are held in common ownership, such an interpretation would, for all practical purposes, offer no legitimate protection to separately owned lots which have become substandard due to a zoning change.

The Massachusetts Appeals Court in upholding a Superior Court decision disagrees with such an interpretation and has found that Chapter 40A, Section 6, does indeed offer greater protection to separately owned lots.

SIEBER v. ZONING BOARD OF APPEALS, WELLFLEET
16 Mass. App. Ct. 901 (1983)

Excerpts:

The defendants...own a parcel of land (locus), with a frontage of eighty feet and an area of 5,600 square feet, in a section of Wellfleet zoned for residential use. The relevant zoning by-law prescribes a minimum frontage of 125 feet and an area of 20,000 square feet for construction on a lot in the residential zone. In 1979, the Sullivan's applied for and were granted a building permit authorizing construction of a single-family house on the locus. The plaintiffs, who own property adjoining the locus, sought review before the board, which subsequently upheld the grant of the permit. The instant action was thereafter filed in the Superior Court.

In granting summary judgement for the defendants, the judge ruled that the board had acted lawfully in approving the building permit because the locus had the benefit of the grandfather provisions in the first sentence of c. 40A, Section 6, paragraph 4, as inserted by St. 1975, c. 808, Section 3. ... Specifically, the judge ruled that although the locus was first recorded on a plan filed in 1889, when the locus was held in common ownership with adjoining land, the exemption was applicable to the locus because, as evidenced by recorded deeds, it had been held at all times since 1891 in separate ownership from all adjoining land. For the several reasons enumerated in the extensive memorandum filed with the judge's order, we concur.

The following are some excerpts from the memorandum of decision filed with the Superior Court judge's order. Sieber v. Gauthier, Civil Action No. 40548, Barnstable County (Mass. Sup. Ct. August 31, 1981.)

The legal issue squarely presented by the cross-motions for summary judgment in this case is an intriguing - and close - one, which appears not to have been directly addressed and decided by a Massachusetts appellate court, and the definitive answer to which will be of more than passing precedential interest to landowners, municipal officials and others.

The underlying issue addressed by both motions is whether the provisions of the first sentence of the fourth paragraph of G.L. c. 40A, s.6, exempt said parcel from the dimensional requirements of the current Wellfleet Zoning By-Law.

As is suggested by the defendants, the locus, if it is to have statutory protection, must find that protection in the first sentence of the fourth paragraph of G.L. c. 40A, s.6,...

The plaintiffs interpret the preceding language to provide protection only if "at the time of recording or endorsement" of a plan, the property "was not held in common ownership with any adjoining land." Under this interpretation the locus would not meet the requirements of the quoted language because the common ownership test is not met as of the 1889 recording of the only plan of locus.

On the contrary, the defendants interpret the language to require only that the common ownership test be met by an instrument of record prior to the effective date of the zoning change for which exemption is sought. Under this interpretation the property is exempt from all dimensional requirements except the five thousand square foot area and the fifty foot requirements of the quoted language because it has met the separate ownership test continuously since 1891, sixty-six years prior to the initial zoning effort of the town.

The court rules that the lots in question are entitled to the exemption afforded by G.L. c. 40A, s.6. The combined area of the lots is in excess of 5,000 square feet and the combined frontage is greater than the required fifty feet. In addition, the lots have been in single ownership for many years prior to zoning and were not subject to expansion by adjoining land.

Limitation of the words "recorded or endorsed" to plans only would render the language of Section 6 nugatory. A subdivision as it is defined by G.L. c. 41, s. 81L, is the "division of a tract of land into two or more lots." Before the Subdivision Control Law took effect, such a division could be accomplished without review by local planning boards simply by recording a survey plan showing the newly created lots. Regardless of whether a subdivision plan was made before or after the Subdivision Control Law became effective, implicit in all such plans is the understanding that potential new lines of ownership are created in a tract of land so divided. There is no point in creating a plan of lots already separately conveyed. To interpret Section 6 to require separate ownership at the time of recording or endorsement of a plan showing more than one lot is to render it meaningless because such a plan by its very nature implies that the lots created thereon are all initially in common ownership and then subsequently deeded to individual owners.

The net result of interpreting Section 6 to require separate ownership at the time of recording or endorsement of a subdivision plan is to attribute a "Catch-22" mentality to the Legislature's intent. One cannot have separate ownership before the plan because there must be a plan showing the tract of land so divided before lots may be separately deeded and owned. However, if there is such a plan, the separate ownership criteria of Section 6 would never be satisfied, even to subsequent individual lot owners, because initially all lots shown on the plan were commonly owned.

The language of Section 6, therefore, becomes a nullity. It is hard to place any reliance on an analysis which results in such a barrenness of result in legislative effort. ...

In applying the principles of statutory construction to the language of Section 6, the modifying phrase, "which at the time of recording or endorsement, "refers to the antecedent phrase, "a lot for single family residential use." ... Support for the contention that the status of the lot immediately prior to the zoning change should be controlling is found in the language of Section 6 which speaks of the "then existing requirements" and the "proposed requirements." This language reflects the legislative intent to provide a limited exemption for lots not held in common ownership with adjoining land from the "proposed" zoning change. ... It would appear reasonable then to look to the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought.

SUMMARY:

Local municipal officials must enforce their local zoning by-laws in a manner which is consistent with the Appeals Court decision. Therefore, if a lot: (1) has at least 5,000 square feet and fifty feet of frontage; (2) is in an area zoned for single or two-family use; (3) conformed to existing zoning when legally created, if any; and (4) is in separate ownership prior to the town meeting vote which made the lot nonconforming, such lot may be built upon for single or two-family use provided the lot has maintained its separate identity.

It should be noted that a local zoning by-law may give greater protection to nonconforming separate lots than the minimum state protection. Check your local by-law.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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February, 1984

CONDOMINIUMS: OWNERSHIP V. USE

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In 1983, the General Court enacted legislation which regulates condominium conversion. The new act also authorizes communities to enact bylaws or ordinances imposing requirements relative to condominium conversion that differ from the provisions of the new law.

Over the past few years, however, the Massachusetts Supreme Court has dealt with the issue of whether a local zoning bylaw may regulate condominium development. The general principle is that zoning can regulate the use of land but not its form of ownership.

In Goldman v. Town of Dennis, 375 Mass. 197 (1978), the court reviewed a local zoning bylaw which purported to bar the conversion of a cottage colony to single family use under condominium type ownership.

The town of Dennis amended its zoning bylaw so as to forbid the conversion of a nonconforming cottage colony to single family use under condominium type ownership unless the lot on which each building was to be located met certain minimum dimensional type requirements. The bylaw did not define "cottage colony" but since the issue was not argued on appeal the Supreme Court accepted the Land Court's conclusion that a "cottage colony" was a group of summer vacation homes. Since Chapter 40A, MGL, The Zoning Enabling Act, authorized communities to adopt zoning bylaws to regulate the use of buildings, structures and land, one of the issues considered in Goldman was whether the regulating or preventing of condominium conversion relates to the form of ownership and not to the use of land and thereby not authorized by The Zoning Enabling Act.

GOLDMAN V. TOWN OF DENNIS
375 Mass. 197 (1978)

Excerpts:

Braucher, J. ...

The legislative body of the town could reasonably believe that conversion of a cottage colony to single family use under condominium type ownership would encourage expansion of use beyond the short summer season. In McAleer v. Board of Appeals of Barnstable, 361 Mass. 317, 323 (1972), we recognized that a town could inhibit "expansion of a nonconforming use from seasonal to a year-round basis," although we found the by-law there in question to be broad enough to permit the increase. ... Here the by-law is explicit in its limitation of the expansion of a nonconforming use. Although the limitation is phrased in terms of the type of ownership, we think it is valid as a regulation of "change of use." ...

... We are not here concerned with discrimination between a rented apartment building and a like building converted to condominium type ownership ...

In CHR General v. City of Newton, 387 Mass. 351 (1982), the court found that the City did not have the authority pursuant to the Home Rule Amendment to enact an ordinance restricting the conversion of rental units to condominium or cooperative ownership as such an ordinance was a private or civil law governing the relationship between landlord and tenant and thus was invalid under the Home Rule Amendment. Although the City had not enacted the restrictions as part of its zoning ordinance, the issue was raised as to whether the City could enact a law dealing with condominium conversion under its zoning power.

CHR GENERAL V. CITY OF NEWTON
387 Mass. 351 (1982)

Excerpts:

Lynch, J. ...

... Since [the ordinance] is a law predominantly civil in nature and directly affecting a civil relationship, it may be found valid

only if enacted "as an incident to an exercise of an independent municipal power."

... The city asserts that the ordinance may be upheld as incident to the exercise of either its police or its zoning powers. We disagree.

... the [Home Rule Amendment] undoubtedly grants municipalities "broad powers to adopt bylaws for the protection of the public health, morals, safety, and general welfare, of a type often referred to as the 'police' power. We assume that these broad powers would permit adopting a by-law requiring landlords (so far as legislation does not control the matter) to take particular precautions to protect tenants against injury from fire, badly lighted common passageways, and similar hazards." ...

... That [the ordinance] may have been enacted in furtherance of the public welfare, therefore, does not end our inquiry. We must ascertain whether there exists some individual component of the city's police power which authorizes its enactment of [the ordinance], and to which that ordinance's effects on civil relationships may fairly be said to be incidental.

The city relies on its zoning power as the individual component of its police power which authorizes enactment of [the ordinance]. This court has held that "the zoning power is one of a city's ... independent municipal powers included in [the Home Rule Amendment's] broad grant of powers to adopt ordinances ... for the protection of the public health, safety, and general welfare." ... The question dispositive of this appeal, therefore, is whether [the ordinance] could be found valid as an exercise of the zoning power granted the city by [the Home Rule Amendment]. We conclude that it cannot.

A "fundamental principle of zoning [is that] it deals basically with the use, without regard to the ownership, of the property involved or who may be the operator of the use." ... The city concedes, as it must, that "a building composed [of] condominium units does not 'use' the land it sits upon any differently than an identical building containing rental units." ...

The city's citing of Goldman v. Dennis, 375 Mass. 197 (1978), as support for its assertion that its zoning powers extend to enacting ordinances regulating condominium conversion is inapposite. ... [In this case], the ... ordinance affects not the use [of the land], but only the ownership of the property in question. ...

We conclude that if the city wishes to regulate the conversion of rental units to condominium ownership, it must seek from the Legislature a grant of authority to do so.

SUMMARY:

1. Chapter 527 of the Acts of 1983 is entitled An Act Enabling Cities and Towns to Regulate the Conversion of Residential Property to the Condominium Forms of Ownership. This new law regulates the conversion of residential properties to condominium ownership. The legislation applies to all communities except those cities and towns which have adopted a bylaw or ordinance regulating condominium conversion pursuant to a special act of the Legislature. The new act authorizes a municipality to enact a bylaw or ordinance imposing requirements that differ from the State law. Therefore, if your community wishes to enact a bylaw or ordinance relative to condominium conversion, it must do so in accordance with the provisions of Chapter 527.

2. The Dennis zoning bylaw was explicit in its limitation of the expansion of a nonconforming use and although the limitation was phrased in terms of ownership, the court found such a requirement valid for the purposes of regulating a change of use of an existing nonconforming use. The change of ownership in effect transformed a cottage colony to a single family use which was determined to be a change of use. Other types of conversions could be considered a change of use for the purposes of zoning. For example, based upon the rationale found in Goldman, the conversion of a motel or hotel to condominium ownership could represent a change of use for zoning purposes.

3. In upholding the Dennis zoning bylaw, the court noted in Goldman that the issue in the case was not concerned with the discriminating between a rented apartment building and a like building converted to condominium type ownership. In CHR General, the court cited studies that indicated that the differences between apartment buildings and condominiums are not significant and do not affect land use and found that a building composed of condominium units does not use the land it sits upon any differently than an identical building containing rental units. Therefore, a local zoning bylaw or ordinance cannot regulate condominium development differently than rental apartment development or other similar residential development.

4. Some communities are experiencing "time-sharing" developments. A "time-sharing" development is a development where a person or persons occupy, by legal instrument, a single-family home or other type dwelling unit for a specified time period during the course of a calendar year. Without a special act of the Legislature, it is doubtful whether a community has the authority to regulate "time-sharing" or to differentiate under its zoning authority "time-sharing" units from other similar dwellings or dwelling units.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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CAN YOU REGULATE RELIGIOUS OR EDUCATIONAL USES BY SPECIAL PERMIT?

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In 1950, the General Court enacted the so-called "Dover Amendment" which provided that "no ordinance or by-law which prohibits the use of land for any church or religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid." This provision was first tested in Attorney General v. Town of Dover, 327 Mass. 601 (1951). The Town of Dover had amended its zoning by-law forbidding the use of land in a residence district except for certain enumerated purposes including "Educational use; if non-sectarian." The Supreme Judicial Court found the by-law invalid as it prevented the use of certain land for a Catholic educational facility.

Since the opinion in Attorney General v. Dover, the Court has considered the scope of the "Dover Amendment" and the extent of zoning regulations to property used for educational and religious purposes. In Sisters of the Holy Cross v. Town of Brookline, 347 Mass. 486 (1964), the court considered the issue of whether or not the plaintiff was exempt from the application of the floor area and side yard requirements of the Brookline zoning by-law. The court found that the imposition of single-family residence dimensional requirements would have the effect of virtually nullifying the effect of the "Dover Amendment" and that the by-law as applied to Holy Cross was invalid as it limited the use of its land. In Radcliffe College v. City of Cambridge, 350 Mass. 613 (1966), the court refused to construe the "Dover Amendment" as precluding the application of off-street parking requirements of the Cambridge zoning ordinance to the plaintiff. The court reasoned that parking was a secondary educational purpose and thus the ordinance "did not impede the reasonable use of the college's land for educational purposes."

Communities were legitimately unsure as to the scope of the "Dover Amendment" and the validity of regulations which imposed controls on religious and educational uses. When the General Court enacted the Zoning Act (See St. 1975, c. 808, s.3), they attempted to clarify the "Dover Amendment" by defining the scope of permissible regulations. Chapter 40A, Section 3, MGL now provides as follows:

No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a non-profit education corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

The town of Lenox, under the authority of the Zoning Act, amended its by-law so that educational and religious uses required a special permit from the zoning board of appeals. The by-law also required that an informational statement and a site plan be filed with the petition for a special permit. The information statement had to specify the probable impact of the proposed use on such factors, as changes in the number of legal residents, increase in municipal service costs, changes in tax revenue, land erosion or loss of tree cover, character of surrounding neighborhood and master plan of the town or any pertinent regional plans. The site plan called for the delineation of existing buildings, parking areas, sewer and water lines, trees over twelve inches in diameter and any other significant existing man-made or natural features. The by-law also required that educational and religious uses meet specific regulations concerning building height, building coverage, setbacks, access roads and parking. When the authority of the town of Lenox to enact such requirements was reviewed, the principle issue addressed by the court was whether the Zoning Act allows a community to require a special permit for all new religious and educational uses or changes in such uses.

BIBLE SPEAKS V. BOARD OF APPEALS OF LENOX
8 Mass. App. Ct. 19 (1979)

Excerpts:

Greaney, J. ...

... there is nothing in the language of G.L. c. 40A, s. 3, which contemplates the requirement of site plans and informational statements as monitoring

devices for educational uses, ... [The by-law] in its entirety goes beyond a collation of all of the reasonable bulk and dimensional requirements which a by-law can legitimately impose on educational buildings and districts.

In our opinion, the provisions of the by-law taken together invest the board with a considerable measure of discretionary authority over an educational institution's use of its facilities and create a scheme of land use regulation for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by G.L. C. 40A, s. 3. The Legislature did not intend to impose special permit requirements, designed under C. 40A, s. 9, to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.

We conclude, therefore, that the provisions of the Lenox by-law go well beyond the scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses by G.L. c. 40A, s. 3, and place the board in a position to act, as it did in this case, impermissibly to 'impede the reasonable use of the [institution's] land for its educational purposes.'

... new judgments are to be entered declaring ... those portions of ... the Lenox zoning by-law which impose the requirement of a site plan, informational statement, and special permit before religious and educational institutions expand their uses are invalid; that the provisions ... imposing bulk, dimensional, and parking requirements are valid; ...

SUMMARY

1. If your by-law or ordinance is comprehensive in nature in that it lists uses that are permitted by right and by special permit, an inadvertent omission to mention religious and educational uses operates automatically as a prohibition. We would suggest that you check your ordinance or by-law to ensure that such religious and educational use that are protected by Chapter 40A, Section 3, MGL are permitted and are not required to obtain a special permit from a special permit granting authority.

2. Whether a community can require the submission of a non-discretionary site plan outside the scope of the special permit process is unclear. The court's language that there is nothing in the Zoning Act which contemplates the requirement of site plans and informational statements as monitoring devices for educational uses appears to severely, if not completely, limit such a process.

3. Ideally, a community should adopt specific regulations that apply to religious and educational uses. The following are the bulk, dimensional and parking provisions adopted by the town of Lenox which were held by the court as valid requirements. The regulations should be considered only as an example of the types of requirements a community may wish to impose on such uses. The extent of reasonable regulations will depend on local conditions.

Any non-municipal educational use or any religious use is subject to the following regulations:

1. Maximum building height -- 2 stories or 35 feet.
2. Maximum building coverage -- 4%.
3. Setback -- two hundred (200) feet buffer surrounding the property to be kept undeveloped except for entrance and exit roadways.
4. Major access roads and major parking areas subject to frequent use day or night shall be paved. Major roads are to be eighteen (18) feet wide and shall not exceed a $7\frac{1}{2}\%$ grade.
5. Parking areas shall be screened as provided in Section 2 -- definitions -- screening -- (a) and (c).
6. Parking areas shall be within three hundred (300) feet of the building to be served.
7. Parking requirements:
 - A. Places of assembly -- 1 space for every three (3) seats.
 - B. Classrooms and/or dormitories --
Grades 1-10 -- 1 space for each staff member;
Grades 10-12 -- 1 space for each staff member plus 1 space for every two (2) students.
College -- 1 space for each staff member plus two (2) spaces for every three (3) students.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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L

CONDITIONING THE GRANT OF A SPECIAL PERMIT OR VARIANCE ON OWNERSHIP

A

The Zoning Act authorizes a special permit granting authority to impose conditions and safeguards when granting a special permit, and also authorizes a zoning board of appeals to impose conditions and safeguards when granting a variance. It has been the practice of some boards to condition the grant of a special permit or variance on the continued ownership of the property by a particular person.

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The Massachusetts Appeals Court had the opportunity to review the past and present statutory authority of a zoning board of appeals to condition a variance on ownership. In 1973, the board of appeals of the town of Hadley granted a variance but restricted the variance to the applicant's lifetime and prohibited the variance from being transferred to anyone else. In 1976, upon the petition of the applicant, the zoning board removed the ownership condition. The decision of the zoning board was then challenged by an abutter who alleged that the board exceeded its authority in removing the condition because the requirements for a new variance had not been met. In upholding the board's decision, the court found it unnecessary to consider whether the removal of the condition required the same showing necessary for the grant of a new variance. Instead, the board's authority to remove the condition was analyzed by the court in terms of the nature and effect of the condition itself and the statutory concerns relevant to the grant of a variance. The following case emphasizes the fact that the grant of a variance is concerned with a unique condition relating to the land and not the applicant.

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HUNTINGTON V. BOARD OF APPEALS OF HADLEY
Mass. App. Ct. Adv. Sh. 1975 (1981)

Excerpts:

Greaney, J. ...

We look first to the statute. Under the former s. 15 [Ch. 40A as in effect prior to St. 1975, c. 808, s.3] the critical factual showing required for a variance was that of unique hardship, i.e., "substantial hardship" which was created by "conditions especially affecting such parcel or such building but not affecting generally the zoning district in which it is located". The exception made available by this statute was a narrow one. At its root is a concern that the grant of a variance be based only upon circumstances which directly affect real estate and not upon circumstances which cause personal hardship to the owner. ... "The criteria in the act ... relate to the land, not [to] the applicant." ... The present s.10 continues this emphasis on the land itself and makes the concept even more restrictive by specifying that the special circumstances justifying the grant of a variance must relate to "the soil conditions, shape, or topography" of such land or structures.

In contrast, the condition in issue here bears no relation to any circumstances which affects the underlying real estate. Nor is it aimed at the nature, character, or extent of the use permitted of the estate. Rather, it serves only to limit the duration of the variance itself by tying it to the lifetime and ownership of a particular individual. We view this as inconsistent with the explicit statutory emphasis on the real estate and its use as the basis of the board's inquiry. In effect, such a condition "injects criteria not found in the enabling act." ... We further view it as inconsistent with the generally accepted principle that "a variance applies to the land rather than to its current owner, and ... runs with the land when it is conveyed to [another] person."

...

Personal conditions of the sort presented here are held in disfavor in other jurisdictions. ... As aptly expressed by Chief Justice Kenison in Vlahos Realty Co. v. Little Boar's Head Dist., 101 N.H. 460, 463-464 (1958), such restrictions are inappropriate because they "place the emphasis on the regulation

of the person rather than the land, and tend to make [a variance] an ad hominem privilege rather than a decision regulating the use of property." ...

The Legislature has recently made a clear policy judgment rejecting the attachment of such a condition to the grant of a variance. The present s.10 ... contains new language which specifically prohibits the imposition of "any condition, safeguards or limitation based upon the continued ownership of the land or structures to which the variance pertains by the applicant, petitioner or any owner." While this section also includes general language retained from the former s.15, which allowed the board to impose "limitations both of time and of use," it is not clear to us that this language was ever intended to sanction a condition of the sort presented here, and the available evidence tends to indicate that it was not. The legislative history of the present G.L. c. 40A, for example, states that the quoted prohibition was inserted in s.10 for the purpose of eliminating "the practice of some local boards of appeals to condition the grant of a variance on the continued ownership of property by a particular person," which practice was deemed "improper, considering that hardship must be unique to the land or building and not merely to an individual." ...

The court has looked more favorably on conditioning the grant of a special permit on ownership of the property by a specific individual. In Todd v. Board of Appeals of Yarmouth, 377 Mass. 162 (1958), the court upheld a condition which provided that the special permit runs only to the applicant. Ownership conditions with respect to special permits were also upheld in Maki v. Yarmouth, 340 Mass. 207 (1960) and Shuman v. Board of Alderman of Newton, 361 Mass. 758 (1972). However, in the Shuman case, the court noted that though the grant of a special permit may be limited to a particular applicant, the considerations on which the grant is based still relates to the land rather than the applicant.

More recently, the board of appeals of Lincoln granted a special permit to erect a non-commercial radio tower. The zoning board, acting upon the recommendations of the town's planning board, imposed certain conditions on the special permit. Condition No. 7 stated that the special permit would "terminate automatically on the date that petitioner alienates the title he now holds to his property ..." Condition No. 8 required that the special permit be reviewed every three years by the zoning board. The zoning bylaw authorized the board of

appeals to grant a special permit for a non-commercial radio tower and further provided that a special permit to erect and maintain such a tower in connection with the operation of an amateur radio station could not be denied unless the safety of the public would be endangered by such erection or maintenance. The petitioner questioned the board's authority to impose such conditions.

HOPENGARTEN V. BOARD OF APPEALS OF LINCOLN
17 Mass. App. Ct. 1006 (1984)

Excerpts:

The judge correctly ruled that condition No. 7, making the permit "personal to the" petitioner, was valid and appropriate. ... the petitioner objected that, if he were by deed to convert his individual title to a tenancy by the entirety with his wife ... or otherwise to provide for her to share in it, as e.g., by revocable trust, ... it would result in a termination of the special permit under condition No. 7. We concur with the concession by the town's counsel that condition No. 7, although somewhat confusing in its imprecise terms, ... was intended to cause the permit to lapse only if the petitioner ceased to have a substantial ownership and use interest, direct or beneficial, in his present land.

Condition No. 8 was ruled correctly, on the basis of the evidence before the judge, to be an appropriate method of preserving an opportunity to the board (and to others with standing) to obtain, at least every three years, board review of the continuing safety (in actual use) of the metal tower, a structure which obviously may be subject to deterioration if not properly maintained and repaired. As to maintenance, a witness called by the petitioner recommended inspections of the tower, its bolts, connecting sections, and guy wires, twice a year for rust and to be sure "everything is safe." The board reasonably could have provided that the permit should expire at the end of the three year period, so that complete reapplication would have been necessary. Condition no. 8 is much less drastic. "The safety of the public," of course, under the present by-law, is the only consideration which the board may take into account in the circumstances of this permit in the event of an objection to its renewal. Such an objection may be based only on public safety grounds.

SUMMARY

1. A variance applies to the land rather than to its current owner and it runs with the land when it is conveyed to a person other than the applicant. The Zoning Act specifically prohibits a zoning board of appeals from imposing a condition on a variance based upon the ownership of the land or structure by a particular person.

2. In other jurisdictions, the courts have looked unfavorably upon the conditioning of a special permit so that it terminates when the title of the land is conveyed to someone other than the applicant. For example, see Olvenson v. Zoning Board of Review, 44 A2d 720 (1945); Cohn v. County Board of Supervisors, 286 P2d 836 (1955); Weinrib v. Weisler, 261 NE2d 406 (1970); Beckish v. Planning & Zoning Com., 291 A2d 208 (1971). Though the Massachusetts courts have upheld ownership conditions, such conditions must still relate to the use of the land. Such a condition must also bear a reasonable relationship to the standards set forth in the local bylaw or ordinance.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 1, Edition No. 5
May, 1984

LARGE LOT ZONING

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The Massachusetts Supreme Court and Appeals Court have decided cases involving a challenge to allegedly excessive minimum lot size requirements. This issue of the Land Use Manager reviews those cases which have dealt with the question of so-called "large lot zoning."

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In Simon v. Town of Needham, 311 Mass. 560 (1942), the Supreme Court upheld a minimum one acre lot requirement for a single-family dwelling. In reviewing the provisions of the Needham bylaw, the Court noted the amenities which the town could reasonably believe would occur from the one acre requirement, and the advancement of such amenities was, in this case, sufficient justification for the one acre restriction.

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SIMON V. NEEDHAM
311 Mass. 560 (1942)

Excerpts:

Ronan, J. ...

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The establishment of a neighborhood of homes in such a way as to avoid congestion in the streets, to secure safety from fire and other dangers, to prevent over-crowding of land, to obtain adequate light, air and sunshine, and to enable it to be furnished with transportation, water, light, sewer and other public necessities, which when established would tend to improve and beautify the town and would harmonize with the natural characteristics of the locality, could be materially facilitated by a regulation that prescribed a reasonable minimum area for house lots. The area was to be determined not only in the light of present needs of the public but also with a view to the probable requirements of the public that would arise in

M A N A G E R

the immediate future from the normal development of the land. The advantages enjoyed by those living in one family dwellings located upon an acre lot might be thought to exceed those possessed by persons living upon a lot of ten thousand square feet. More freedom from noise and traffic might result. The danger of fire from outside sources might be reduced. A better opportunity for rest and relaxation might be afforded. Greater facilities for children to play on the premises and not in the streets would be available. There may perhaps be more inducement for one to attempt something in the way of the cultivation of flowers, shrubs and vegetables. ...

The Simon court noted that the strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large. In such cases, the interest of the municipality would not be allowed to stand in the way. The court concluded its decision with the following warning:

We cannot quite pronounce the instant by-law invalid when applied to the petitioner's land in all the circumstances disclosed by this record. We make no intimation that, if the lots were required to be larger than an acre or if the circumstances were even slightly different, the same result would be reached. It will be time enough to determine that question when it is presented.

In the case of Aronson v. Town of Sharon, 346 Mass. 598 (1964), the Massachusetts Supreme Court made good on its earlier warning by striking down a bylaw which required a minimum lot area of 100,000 square feet. The only justification the town put forth for enacting such a large lot requirement was that the community wished to encourage that the land be left in its natural or more rural state so as to provide living and recreational amenities for its inhabitants and visitors. The court found that such a large lot requirement bore no rational relation to the objectives of zoning even if such a restriction would further the preservation of land in its natural state for recreational and conservation purposes.

ARONSON V. SHARON
346 Mass. 598 (1964)

Excerpts:
Wilkins, C.J. ...

Whether a by-law is, on the one hand, a reasonable interference with a landowner's rights undertaken in the exercise of the police power for the public benefit or

is, on the other hand, a deprivation of private property without compensation often depends upon the facts of the particular case. ... If, after making every presumption in favor of the by-law, its imposition upon a given parcel of land 'has no real or substantial relation to the public safety, public health or public welfare,' it cannot be so applied. ...

... We cannot resist the conclusion that, however worthy the objectives, the by-law attempts to achieve a result which properly should be the subject of eminent domain. As Mr. Justice Holmes said in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-416, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking ... A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change ... This is a question of degree -- and therefore cannot be disposed of by general propositions.'

In Simon v. Needham, 371 Mass. 560, 563, quoted supra, are enumerated certain possible advantages of living upon an acre lot as compared with one of 10,000 square feet. While initially an increase in lot size might have the effects there noted, the law of diminishing returns will set in at some point. As applied to the petitioners' property, the attainment of such advantages does not reasonably require lots of 100,000 square feet. Nor would they be attained by keeping the rural district undeveloped, even though this might contribute to the welfare of each inhabitant. Granting the value of recreational areas to the community as a whole, the burden of providing them should not be borne by the individual property owner unless he is compensated.

In Wilson v. Sherborn, 3 Mass. App. Ct. 237 (1975), the court took a close look at the zoning bylaw of the town of Sherborn which required a two acre (87,120 sq. ft.) minimum lot size. When the Massachusetts Appeals Court decided Sherborn, it acknowledged that Needham and Sharon were the parameters for its decision. The town did not have a public water supply or town sewerage which necessitated wells and on-site septic systems. The Appeals Court upheld the validity of the bylaw as the town was able to show a reasonable relationship between the two acre requirement and the sewage and water conditions of the town.

WILSON V. SHERBORN
3 Mass. App. Ct. 237 (1975)

Excerpts:

Goodman, J, ...

It is, of course, true that a zoning by-law enjoys a presumption that it is not in 'conflict with some constitutional provision or the enabling statute' and will be upheld if its 'reasonableness ... is fairly debateable' ... However, debatability in terms of generalities is not enough to justify two-acre zoning. For such justification, the town must be 'able to bring forward' some 'advantages' which are 'tangible' and not 'nebulous.' ... It must appear from the record that there is a 'reasonable basis for the judgment of the town meeting' that there are special needs that are met by two-acre zoning. ...

The town, in this case, recognized this analysis and produced evidence to justify the two-acre provision as an appropriate health protection measure. ... This justification was accepted in the decision of the Land Court, which found that the town did not have a public water supply or a town sewage system and that wells and on-site septic systems were, therefore, necessary for residential construction. This, the Land Court found, created a need for 'a sufficient land area to physically accommodate the septic system structural elements and the well ... a sufficient land area with a soil type that allows the septic system and the well to operate without the possibility of any eventual pollution of the well water ... some provision for additional land area in the event that the system requires repair, relocation or expansion ... [and some attention to] the possible deleterious effect to the environment, in time, because of the numerous, though safely functioning sewerage and water supply systems.'

The petitioner points to no specific finding that can be said to be inconsistent with the general findings that two acre zoning bears a reasonable relationship to what (as the decision indicates) was characterized by expert witnesses to be 'a rather acute sewerage problem confronting the town, as yet unsolved but resulting in the denial of permits for residential septic tanks in an effort to curb pollution.'

SUMMARY

1. In Sherborn, the court made reference to the Department of Community Affairs 1972 Legislative Report which summarized the effect of the large lot zoning cases. The Department noted that "Local communities ... in establishing minimum lot size requirements of larger than one acre ... are especially subject to question where such regulations are not directly related to police power objectives (health or safety) occasioned by local topographic or soil conditions." The court adopted this standard which created some shift in the burden of proof. A community cannot rely on the presumption that its by-law is valid when there is a large lot zoning challenge.
2. The factors which distinguished the situation in Sherborn from Sharon were the findings of the Land Court that the town of Sherborn did not have a public water supply or a town sewage systems, and that the wells and on-site septic systems were necessary for residential construction. The town of Sherborn introduced evidence, and the Land Court apparently found, that the two acre minimum was necessary to ensure that the septic systems would not pollute the well systems, especially in consideration of the possibility that over time a septic system may need to be expanded or relocated when it becomes no longer safely operable. The submission of such evidence was important because based on these facts the Appeals Court held that the two acre minimum was reasonably related to the police power.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 1, Edition No. 6
June, 1984

A HAZARDOUS APPROACH TO THE FLOOD INSURANCE PROGRAM

L

It has come to our attention that the Federal Emergency Management Agency has advised Massachusetts communities that it is not necessary to adopt flood plain districts as delineated on Flood Insurance Rate Maps by amending the local zoning bylaw pursuant to Chapter 40A, Section 5, MGL, and that a community may adopt a general bylaw for such flood plan designations.

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This may not be such a good idea.

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Recently, the town of Barre, after consulting with the Federal Emergency Management Agency, adopted Flood Insurance Rate Maps as part of the general bylaws of the Town, rather than by amending its local zoning bylaw. The purpose of the bylaw and the delineation of the flood plain districts were stated in the general bylaw as follows:

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SECTION I. Districts

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A. Flood Plain District

1. Purpose

The purposes of the Flood Plain District are to protect the public health, safety, and general welfare, and to protect human life and property from the hazards of periodic flooding.

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2. District Delineation

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The Flood Plain District is delineated on Flood Insurance Rate Map (FIRM), as Zones A, A 1-30 to indicate the 100-year flood plain. The precise boundaries of the District are defined by the 100-year flood elevations shown on the FIRM and further

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defined by the Flood Profiles contained in the Flood Insurance Study.

The floodway boundaries are delineated on the Flood Boundary Floodway Map (FBFM), and further defined by the Floodway Data Tables contained in the Flood Insurance Study.

The Town and property owners may appeal the flood levels to the Federal Emergency Management Agency by submitting evidence to FEMA for review.

The general bylaw was submitted to the Attorney General for his approval as required by Chapter 40, Section 32, MGL. The Attorney General disapproved the bylaw for the following reasons:

I regret that I must enclose the amendments to general by-laws adopted under Article 3 of the warrant for the Barre Special Town Meeting held February 27, 1984, with the disapproval of the Attorney General endorsed thereon.

The proposed by-law is a flood plain district management program. As such, it is a regulation of the uses of land authorized by the Zoning Act, General Laws, Chapter 40A. It is not a wetlands by-law adopted under G.L. c. 131, §40, pertaining to the removing, filling or dredging on banks, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other telecommunication services.

Historically, by-laws enacted in this state to implement the Federal Flood Insurance Program have been zoning enactments.

Article 3 should have followed the Zoning Act procedures.

SUMMARY:

Under the terms of the Home Rule Amendment, a community may adopt a bylaw which is not inconsistent with any general law enacted by the General Court. In Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1977), the Supreme Judicial Court upheld a wetlands by-law as not inconsistent with Chapter 131, Section 40, MGL, and further found that such a bylaw had neither the purpose nor effect of a zoning regulation.

In Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221 (1972), the Supreme Judicial Court held that flood plain regulations are authorized by the Zoning Act and may be adopted as part of a zoning bylaw. Whether a community may adopt floodplain regulations by general bylaw has not been decided by the courts. However, the court has indicated that regulations which prohibit or permit construction of buildings or location of buildings in a comprehensive fashion can be classified as zoning measures. It would appear that the National Flood Insurance Program suggests zoning enactments as the federal requirements discuss regulating uses of land and structures in order to be eligible for Flood Insurance.

In conclusion, we would suggest that a community seek the advice of their legal counsel in those cases where the community has adopted the Flood Insurance Rate Maps by general bylaw rather than as an amendment to its zoning bylaw. We would recommend that communities adopt the Flood Insurance Rate Maps pursuant to their zoning authority.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 1, Edition No. 7
July, 1984

THE IMMUNITY OF STATE GOVERNMENT FROM MUNICIPAL ZONING REGULATIONS

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Chapter 40A, Section 3, MGL, specifically authorizes municipalities to impose reasonable dimensional requirements on the use of land for educational purposes on land owned or leased by the Commonwealth of Massachusetts. Except for allowing communities to impose such dimensional requirements on state schools, the Zoning Act remains silent as to the applicability of local zoning regulations to other State government uses.

Through the years, we have received many inquiries from local officials as to whether local zoning regulations apply to the use of land for state purposes on land owned or leased by the Commonwealth. The general rule is that the state is immune from local zoning regulations in the absence of specific statutory provisions to the contrary. The underlying rationale for this rule is that when a state agency has been delegated the responsibility of performing a governmental function, it cannot be subject to the general police powers of a municipality. This rationale was developed in 1906 when the court decided Teasdale v. Newell and Spaulding Construction Co., 192 Mass. 440 (1906). In that case, the metropolitan park commissioners contracted with the construction company to do grading and other work on land which had been taken by the commissioners for park purposes. It was necessary for the construction company to find adequate stable room in the immediate vicinity of the work area for its horses. The park commissioners authorized the contractor to build a temporary stable upon part of the land which had been taken for park purposes. The General Laws, at that time, required a license from the local board of health. The question before the court was whether that section of the General Laws was applicable to the contractor's stable since it had not been licensed by the board of health. In deciding the case, the court noted that the statutes under which the park commissioners acted contained elaborate provisions for the establishment of parks and authorized the commissioners to take any actions necessary for the proper execution of their powers. The court found that the licensing law did not apply to the stable stating that:

... these parks are placed under the control of these commissioners acting as the agents of the State in exercising the authority of the sovereign over its own property. As such agents, performing the duty of making available for park purposes the land in question, it is found reasonably necessary for them to erect upon it and use this stable. Such an act must be regarded as needful in the proper execution of the powers which the State may exercise over its own property; and the general law made for the regulation of citizens must be held subordinate to this special statute regulating the use of the property of the State unless there is express provision to the contrary. It is not to be presumed that the Legislature intended to give to the local licensing board the authority to thwart the reasonably necessary efforts of the park commissioners to perform their duty as agents of the State.

As to the applicability of local zoning regulations relative to activities of the Commonwealth or its agents, the leading case is Medford v. Marinucci Brother and Co. Inc., 344 Mass. 50 (1962). In deciding this case, the court cited many cases from other jurisdictions which held that a state is immune from municipal zoning regulations absent statutory provisions to the contrary.

In Marinucci, the contractor received permission from the Department of Public Works to construct a railroad loading area at a particular location in the city of Medford which was zoned for single family residences. The loading area was located on a portion of the land taken for Interstate Highway 93. The City sued to enjoin the use of the land under the authority of its zoning ordinance. Based upon the rationale developed in Teasdale, the Massachusetts Supreme Court held that the absence of a specific exemption in the Zoning Enabling Act did not indicate that the Legislature intended that the Commonwealth in its activities should be subject to municipal zoning regulations.

MEDFORD V. MARINUCCI
344 Mass. 50 (1962)

Excerpts:

Wilkins, D. J. ...

... Marinucci in the performance of his contract on Commonwealth land with the Commonwealth must likewise be exempt from the Medford zoning ordinance. The Commonwealth, as matter of common knowledge, does not have the employees or the equipment to construct all the roads and bridges which a modern highway system requires. It must act through others, and a contract with Marinucci was the method chosen to construct that portion of Interstate Highway 93 which now concerns us. We cannot conclude that by enacting the Zoning Enabling Act the Legislature

intended to authorize a municipality to thwart the Commonwealth in carrying out the functions of government. When the Legislature has intended to confer a municipal veto upon action by the Department of Public Works, it has done so in unmistakable terms.

County government also has exemptive status from local zoning regulations. The most recent case concerned with governmental immunity dealt with the proposed construction of a county jail. The county commissioners of Bristol County devised a plan to build a county jail in the town of Dartmouth in an area of the Town zoned for limited industrial use. Pursuant to Chapter 131, Section 40, MGL, the county commissioners filed a notice of intent with the local conservation commission relative to the proposed construction activity on the land. The conservation commission notified the county commissioners that they would not accept their notice until an application for a variance had been made to the zoning board of appeals. On appeal, the court found that the land in Dartmouth on which the county commissioners sought to construct a new jail was not subject to the zoning bylaw of the town of Dartmouth.

COUNTY COMMISSIONERS OF BRISTOL V.
CONSERVATION COMMISSION OF DARTMOUTH
380 Mass. 706 (1980)

Excerpts:
Hennessey, C. J. ...

... an entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations (absent statutory provision to the contrary) at least in so far as that entity or agency is performing an essential governmental function. It is clear that a county stands in the same position as the other legislatively created entities discussed above for purposes of applying this rule. Like the Massachusetts Turnpike Authority, which we described in Massachusetts Turnpike Auth. v. Commonwealth, 347 Mass. 524, 525 (1964), as a body politic and corporate ... and ... a public instrumentality performing an essential governmental function," counties also are "organized by the General Court for the convenient administration of some parts of government. They are bodies politic and corporate. They exist solely for the public welfare. ... They may be changed at the will of the Legislature, and the character and extent of the sovereign powers to be exercised through them are subject to modification in like manner, according to legislative judgment of the requirement of the interests of the public. ...

What the plaintiff county commissioners seek to accomplish here is clearly the execution of an essential governmental function. General Laws c. 34, §3, as amended through St. 1978, c. 478, §17, provides in part specifically that "[e]ach county shall provide suitable jails, houses of correction, fireproof offices and other public buildings necessary for its use." Therefore, our reading of Massachusetts case law leads to the conclusion that the Dartmouth zoning by-law is inapplicable in this circumstance.

SUMMARY:

1. The State is immune from municipal zoning laws unless the Legislature has enacted statutory provisions requiring the State to conform to local zoning regulations. For example, the Zoning Act presently provides that land or structures owned or leased by the State for educational purposes may be subject to reasonable dimensional requirements.
2. Absent statutory provisions requiring compliance with local zoning regulations, an entity or agency created by the Legislature (i.e., county government) is exempt when that entity or agency is performing an essential governmental function.
3. The federal government is immune from zoning requirements in that the United States is supreme when operating under any power it possesses under the Constitution. The use of land by the federal government is also immune from zoning regulations when the land is leased to the government by a private landowner.
4. The status of the immunity of municipal government from local zoning regulations is unclear. In other jurisdictions, the issue is resolved by the court determining whether the function in question is governmental or proprietary. However, in Massachusetts, case law has assumed that a municipality must conform to its own zoning regulations and absent case law to the contrary, we feel that municipal uses are not immune from local zoning regulations. Many communities address this issue in their local zoning bylaws by specifically providing that municipal uses are permitted as of right in all zoning districts. This is a worthwhile approach to consider if your bylaw does not presently authorize municipal uses.

NOTICE OF PUBLIC HEARING ON
PROPOSED ZONING AMENDMENTS:

As you are aware, Chapter 40A, Section 5, MGL, requires that the Department of Community Affairs must be notified as to any public hearing scheduled by the planning board relative to a proposed amendment to the local zoning bylaw or ordinance. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the scheduled hearing by the planning board.

In order to be assured that our records will reflect proper notice, please mail such public hearing notices to the following address:

Donald J. Schmidt
Executive Office of Community Affairs
100 Cambridge Street - Room 904
Boston, Massachusetts 02202

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 1, Edition No. 8
August, 1984

LEGISLATION AUTHORIZING ZONING BOARDS OF APPEALS TO EXTEND THE LIFE OF A VARIANCE

CHAPTER 195. AN ACT FURTHER REGULATING THE AUTHORITY OF BOARDS OF APPEALS CONCERNING CERTAIN VARIANCES

L

Presently, the Zoning Act provides that if the rights authorized by a variance are not exercised within one year from the granting date, such variance becomes void. The Legislature has amended the Zoning Act so that the Zoning Board of Appeals will have the authority to extend the life of a variance beyond the one year time period.

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Chapter 195 of the Act of 1984 amends Chapter 40A, Section 10, MGL by striking out the last paragraph as amended by Chapter 829, Section 4B of the Acts of 1977 and inserting in its place the following paragraph:

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If the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse; provided, however, that the permit granting authority in its discretion and upon written application by the grantees of such rights may extend the time for exercise of such rights for a period not to exceed six months; and provided, further, that the application for such extension is filed with such permit granting authority prior to the expiration of such one year period. If the permit granting authority does not grant such extension within thirty days of the date of application therefor, and upon the expiration of the original one year period, such rights may be reestablished only after notice and a new hearing pursuant to the provisions of this section.

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E MANAGER

This amendment to the Zoning Act was approved by the Governor on July 12, 1984, and will take effect on October 10, 1984.

ANALYSIS:

The general scope of the legislation is to statutorily grant to the local Zoning Board of Appeals the discretionary authority to extend the life of a variance for a limited period of time. In this regard, the new law provides that if the rights authorized by a variance are not exercised within one year from the date the variance was granted, then the variance expires unless an application for an extension has been filed prior to the expiration date of the variance. If an application for extension has been timely filed, the Board of Appeals has the discretionary authority to extend the life of the variance provided such extension does not exceed six months.

Though the new law expressly allows a Board of Appeals to extend the time for exercising the rights authorized by a previously granted variance, the legislation remains silent as to the procedure a Board of Appeals should follow when considering such extension. In reviewing the amendment in context with the remaining provisions of the Zoning Act, we would recommend the following procedure:

1. SUBMISSION

The new law provides that a written application for an extension must be filed with the permit granting authority by the "grantee" of such rights prior to the expiration date of the variance. Though the "grantee" is the one to whom the grant was made, we assume that a succeeding owner of the property could apply for an extension. Nevertheless, Chapter 40A, Section 15, MGL is clear as to the submission process as it provides that "All ... petitions for variance over which the board of appeals ... exercise original jurisdiction shall be filed by the petitioner with the city or town clerk who shall forthwith transmit a copy thereof to the board of appeals"

The date of submission to the town or city clerk is important as such submission initiates the 30 day time period in which the Board of Appeals must act on the application.

2. NOTICE AND PUBLIC HEARING:

Though the new law does not expressly direct the Board of Appeals to conduct a public hearing for the purpose

of extending the life of a variance, Chapter 40A, Section 11, MGL provides that "no variance ... or any extension ... thereof shall take effect until a copy of the decision bearing the certification of the town or city clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk, and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds"

Since any extension of a variance requires a recorded decision in the registry of deeds and a certification by the city or town clerk that no appeal has been filed, or if an appeal has been filed, it has been dismissed or denied, the Board of Appeals must give notice, hold a public hearing and file its decision in the same manner as if the Board was entertaining the original petition or appeal for the variance.

3. CRITERIA FOR MAKING DECISION

The Legislature has authorized the Board of Appeals to extend the life of a variance at its own discretion. However, the legislation does not express any standards for the Board to consider when exercising such discretion.

A hearing before the Board of Appeals must be fair in all respects and not a mere formality preceding a predetermined result. The purpose of a hearing is to decide an issue and to ascertain facts bearing upon that issue. It is important that the Board of Appeals, when granting or denying an extension to a variance, does not act in an arbitrary or capricious manner. There must be some criteria on which the Board can base its decision.

The Legislature could not have intended that the holder of the variance must show anew that all the criteria necessary to grant a variance, as set out in Chapter 40A, Section 10, MGL, are satisfied before the holder of the variance is entitled to an extension. If this were the case, there would appear to be no practical need for the legislation since an applicant presently has the ability to reestablish the rights authorized by a variance and if so reestablished, the applicant would have a one year period in which to exercise such rights.

Since the Zoning Act gives no criteria for the Board to consider, we have reviewed other reference materials relative to this matter and feel that Arden and Daren Rathkopf, noted zoning authorities, offer the best solution to the problem.

Where an application is made for an extension of the time within which to exercise the variance, the only matters for the board to consider would be whether there had been changes in the conditions affecting the property which would support a finding that hardship no longer existed or that neighborhood conditions had so changed that to exercise the variance would affect its basic character. Nor would it appear necessary for the applicant to negative these matters, the burden of proving them resting on opponents of the extension.

See 3 Rathkopf, The Law of Zoning and Planning 38.06 (4th ed. 1984)

SUMMARY:

1. The Board of Appeals must give notice, hold a public hearing, and make a decision within 30 days of the date the application was filed with the city or town clerk. The voting requirements for granting an extension are the same as if the Board was considering the original petition or appeal for a variance as Chapter 40A, Section 15, MGL provides that "The concurring vote of all the members of the board of appeals consisting of three members, and a vote of four members of a board consisting of five members, shall be necessary ... to effect any variance"

2. In considering whether to grant an extension, it is important that the Board of Appeals base its decision on some criteria. Since the Zoning Act remains silent in this area, we feel that the criteria stated in Rathkopf appear to be reasonable standards for consideration by a Board of Appeals. Rather than having the petitioner show that all the criteria necessary to grant a variance are still present, it places the onus on anyone opposed to the extension to show that there has been a change which would effect the findings which were made by the Board when originally granting the variance. Such a process would appear

to be consistent with the intent of the legislation as it will be easier for the petitioner to obtain an extension rather than either reestablishing the rights authorized by the original variance or applying for a new variance.

3. When granting an extension, the Board of Appeals should specify in its decision the increased period authorized by such extension. The Board has the discretionary authority to determine the length of the extension for a period of time up to but not exceeding six months.
4. Any extension granted by the Board of Appeals will not take effect until a copy of the decision bearing the certification by the city or town clerk that no appeal has been taken or if an appeal has been taken that it has been dismissed or denied is recorded in the registry of deeds. A Building Inspector should not issue a building permit for any activity authorized by variance until he is assured that the variance or any extension thereto has been so recorded.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 1, Edition No. 9
September, 1984

CREATING SUBSTANDARD LOTS

L

Either as a Building Inspector, or as a member of a Planning Board or Zoning Board of Appeals, you have probably been asked by a local property owner as to what he or she must do to create a building lot which will not meet the minimum frontage requirement of the local zoning bylaw. Relative to this issue, we have received many inquiries from local officials such as:

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1. Can a Zoning Board of Appeals grant a dimensional variance creating a substandard lot?
2. Should a Planning Board approve a plan of land showing a proposed lot with insufficient frontage?
3. In creating a substandard lot, should the applicant first obtain approval from the Planning Board or Zoning Board of Appeals?

N

Fortunately, the Massachusetts Appeals Court has answered all of these questions and more when it decided Arrigo v. Planning Board of Franklin, Mass. App. Ct. Adv. Sh. 2101 (1981). In Arrigo, the Court dealt with the creation of a building lot which did not meet the minimum lot frontage requirement of a local zoning bylaw.

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ARRIGO V. PLANNING BOARD OF FRANKLIN Mass. App. Ct. Adv. Sh. 2101 (1981)

U

Raymond Mercer and his wife (the Mercers) wished to create a substandard building lot. They owned a parcel of land in the town of Franklin which was located in a rural-residential zone. The minimum lot frontage requirement for that zone was 200 feet, and the minimum lot area was 40,000 square feet.

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In September of 1976, the Mercers petitioned the Zoning Board of Appeals for a variance. They presented the Board with a plan showing two lots, one with 5.3 acres and 200 feet of frontage, and the other lot with a 4.7 acres and 186.71 feet of frontage. The Board of Appeals granted a dimensional variance for the lot which had the deficient

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MANAGER

frontage. The Arrigo's, neighboring property owners, appealed the decision of the Board to the Superior Court.

In February of 1977, the Mercers applied to the Planning Board for approval of a plan showing the two lot subdivision. The Planning Board approved the subdivision plan even though one of the lots shown on the plan did not have the sufficient frontage as required by the Zoning By-law. The Arrigos also appealed the Planning Board's decision to the Superior Court.

The judge in Superior Court reversed the decisions of the Planning Board and Zoning Board of Appeals, and the Mercers appealed both reversals to the Massachusetts Appeals Court.

1. THE BOARD OF APPEALS CASE

In granting the dimensional variance for the substandard lot, the Board of Appeals failed to make the necessary finding that the substantial hardship be based upon the soil, shape or topography of the land. The Massachusetts Appeals Court found that the Superior Court judge was correct in overturning the decision of the Board of Appeals in that the granting of the variance by the Board was in excess of its authority.

There is no basis for the Mercers' contention that the judge erred when he reversed the decision of the board of appeals granting a variance. The judge found that there were no conditions especially affecting the land in question. ... and that any hardship was purely financial and was the Mercers' own making. The applicable principles are illustrated by Warren v. Board of Appeals of Amherst, Mass. Adv. Sh. (1981) 522, 530-534. The Mercers urge that the deviation from the required frontage, 6.68 percent, was deminimis, but the frontage deviation in the Warren case was only two percent and the variance granted by the board was nevertheless annulled. As all the conditions for a variance set out in G.L. C. 40A, § 10, were not met, the judge correctly annulled the decision of the board of appeals. ...

2. THE PLANNING BOARD CASE

The Planning Board approved the two lot subdivision plan and waived the 200 foot frontage requirement for the substandard lot pursuant to the Subdivision Control Law.

Chapter 41, Section 81R, MGL authorizes a Planning Board to waive the minimum frontage requirement of the Subdivision Control Law provided the Planning Board determines that such waiver is in the public interest and not inconsistent with the intent and purpose of the Subdivision Control Law. The minimum frontage requirement of the Subdivision Control Law is found in Chapter 41, Section 81L, MGL which states that the lot frontage is the same as is specified in the local zoning bylaw, or 20 feet in those cases where the local zoning bylaw does not specify a minimum lot frontage.

The Superior Court judge annulled the decision of the Planning Board waiving the frontage requirement as he concluded that the Planning Board waiver was not in the public interest and was contrary to the intent and purpose of the Subdivision Control Law. The Massachusetts Appeals Court reviewed the purposes of the Subdivision Control Law, and held that the Planning Board waiver was consistent with the purposes of the Subdivision Control Law, and that its decision to approve the two lot subdivision plan was not in excess of its authority.

... the primary significance of frontage for purposes of the Subdivision Control Law is to ensure access to vehicular traffic and the availability of utilities and municipal services to lots in the subdivision ... Concern under the Subdivision Control Law arises from frontages too narrow to permit easy access or from frontage connected to the lots they serve by necks too narrow or winding to permit easy access. ...

The two lots shown on the Mercers' subdivision plan have long frontages on an established public way. Both lots are roughly rectangular, and no potential problems concerning access or the provision of municipal services or utilities have been suggested. In these circumstances we do not think it can be said that the planning board exceeded its authority in concluding that the fourteen foot frontage deviation would not be inconsistent with the intent and purpose of the Subdivision Control Law.

3. ZONING V. SUBDIVISION CONTROL

In deciding this case, the Massachusetts Appeals Court had the opportunity to comment on the fact that the Planning Board and Zoning Board of Appeals are faced with different statutory responsibilities when considering the question of creating a substandard lot. Although Chapter 41, Section 81R gives the Planning Board the authority to waive the frontage requirement for the purposes of the Subdivision Control Law, the court

stressed that the authority of the Planning Board to waive frontage requirements pursuant to Section 81R should not be construed as authorizing the Planning Board to grant zoning variances. The court noted that there is indeed a significance between the granting of a variance for the purposes of the Zoning Act an approval of a subdivision plan pursuant to the Subdivision Control Law. On this point, the court summarized the necessary approvals in order to create a building lot lacking adequate frontage.

In short, then, persons in the position of the Mercers, seeking to make two building lots from a parcel lacking adequate frontage, are required to obtain two independent approvals: one from the planning board, which may in its discretion waive the frontage requirement under the criteria for waiver set out in G.L. c. 41, § 81R, and one from the board of appeals, which may vary the frontage requirement only under the highly restrictive criteria of G.L. c. 40A, § 10. The approvals serve different purposes, one to give marketability to the lots through recordation, the other to enable the lots to be built upon. The action of neither board should, in our view, bind the other, particularly as their actions are based on different statutory criteria.

SUMMARY:

1. An owner of land wishing to create a substandard building lot which will have less than the required lot of frontage needs to obtain approval from both the Zoning Board of Appeals and the Planning Board. A zoning variance from the Board of Appeals varying the lot frontage requirement is necessary in order that the lot may be built upon for zoning purposes. It is also necessary that the lot owner obtain a frontage waiver from the Planning Board pursuant to Chapter 41, Sections 81L, 81R, and 81Y, MGL so that the lot is buildable for the purposes of the Subdivision Control Law.
2. The variance by the Zoning Board of Appeals and the waiver by the Planning Board are two separate and distinct approvals with different purposes, but both are necessary before a building permit can be issued by the building official. Both approvals require a public hearing as prescribed by the applicable statutes.

3. This case points out the fact that it is extremely difficult for the Board of Appeals to grant a variance for the creation of a substandard building lot. The Board must find that a substantial hardship exists solely as a result of the soil, shape or topography of the land. It is the applicant's choice as to which board to petition first when seeking to create a substandard lot. However, since it is difficult to show that all the necessary criteria exists before a variance can be granted by the Board of Appeals, we would suggest that an applicant attempt to obtain a variance before seeking a waiver from the Planning Board.
4. The court noted that the Mercers' plan was not entitled to approval by the Planning Board as a matter of law because the plan did not comply with the frontage requirement of the Subdivision Control Law. Since the proposed division of land constituted a subdivision, a definitive plan was submitted in order for the Planning Board to waive frontage requirements for the purposes of the Subdivision Control Law. The Planning Board must determine whether a frontage waiver is in the public interest and not inconsistent with the Subdivision Control Law. The endorsement of such waiver must either be shown on the plan or on a separate instrument attached to the plan with reference to such instrument shown on the plan. A waiver should not be accomplished by an applicant submitting an approval not required plan (81P plan) as the proposed division constitutes a subdivision which requires a public hearing.
5. It is important to note that the Arrigo case dealt solely with the creation of a substandard lot which did not meet the minimum frontage requirement of the local zoning bylaw. As for minimum lot area, the lot in question complied with the provisions of the zoning bylaw.

In next month's issue of the Land Use Manager, we will look at the issue of zoning compliance as it relates to the Planning Board's review of an approval not required plan.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 1, Edition No. 10
October, 1984

ENDORsing 81P PLANS SHOWING ZONING VIOLATIONS

L

Last month's edition of the Land Use Manager dealt with the creation of a building lot which did not meet the minimum frontage requirement of the local zoning bylaw. However, frequently Planning Boards are presented with a plan to be endorsed "approval under the Subdivision Control Law not required" where the plan shows a division of land into proposed lots in which:

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- a. all the proposed lots have the required zoning frontage either on public ways, previously approved ways or existing ways that are adequate in the board's opinion but;
- b. one or more of the proposed lots lack the required minimum lot area or the plan indicates other zoning deficiencies.

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Since the plan shows zoning violations, can the Planning Board refuse to endorse the plan "approval not required" as requested by the applicant?

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What can a Planning Board do to prevent future misunderstandings as to the buildability of the proposed substandard lots if they are required to endorse the plan?

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As to the Planning Board's endorsement, the answer is clear. The only pertinent zoning dimension for determining whether a plan depicts a subdivision is frontage. In Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the Harwich Planning Board was presented with a plan showing a division of a tract of land into two lots, both of which had frontage on a public way greater than the minimum frontage required by the zoning bylaw. The Planning Board refused endorsement since the plan indicated certain violations as to the minimum lot area and sideline requirements of the zoning bylaw. However, the Massachusetts Appeals Court decided that the plan was entitled to the Planning Board's endorsement.

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MANAGER

SMALLEY V. PLANNING BOARD OF HARWICH
10 Mass. App. Ct. 599 (1980)

Anne Smalley submitted a plan to the Planning Board for endorsement that "approval under the Subdivision Control Law was not required." The plan showed a division of a tract of land into two lots on which there were two existing buildings, a residence and a barn. The barn and the residence were standing when the Subdivision Control Law went into effect in Harwich. One lot had an area of 14,897 square feet and included the existing residence. The other lot had an area of 20,028 square feet and included the existing barn. Both lots shown on the plan met the minimum 100 foot frontage requirement of the zoning bylaw.

The zoning bylaw required a minimum lot area of 20,000 square feet so that the smaller lot containing the residence did not conform to the minimum lot area requirement. The plan also indicated violations as to the minimum sideline requirements of the zoning bylaw. The Planning Board refused to endorse the plan and Smalley appealed to the Superior Court. The judge in Superior Court annulled the Planning Board's decision to refuse endorsement and the Planning Board appealed to the Massachusetts Appeals Court.

The Planning Board contended that the zoning violations shown on the plan justified its decision not to endorse the plan "approval not required." The Planning Board argued that Chapter 41, Section 81M, MGL (which states the general purposes of the Subdivision Control Law) requires that the powers of the Planning Board under the Subdivision Control Law "shall be exercised with due regard ... for insuring compliance with the applicable zoning ordinances or by-laws" After reviewing the legislative history of the "approval not required plan," the court decided against the Planning Board.

In view of the legislative history and judicial interpretation of § 81P, we do not read that section to place the same duties and responsibilities on the board as it has when it is called upon to approve a subdivision. Provision for an endorsement that approval was not required first appeared in 1953, when § 81P was enacted. Theretofore plans not requiring approval by a planning board could be lawfully recorded without reference to the planning board. The purpose of § 81P, as explained by Mr. Philip Nichols on behalf of the sponsors of the 1953 legislation, was to alleviate the "difficulty ... encountered by registers of deeds in deciding whether a plan showing ways and lots could lawfully be recorded." ... This purpose is manifested in the insertion by St. 1953, c. 674, § 7, of G.L. c. 41, § 81X, which provided -- as it now provides -- that; "No register of deeds shall record any plan showing a division of a tract of land into two or more lots, and ways, ... unless (1) such plan bears an endorsement of the planning board of such city or town that such plan has been approved by such planning board, ...

or (2) such plan bears an endorsement ... as provided in [§ 81P]."

Thus, § 81P was not intended to enlarge the substantive powers of the board but rather to provide a simple method to inform the register that the board was not concerned with the plan -- to "relieve certain divisions of land of regulation and approval by a planning board ('approval ... not required') ... because the vital access is reasonably guaranteed" Further, were we to accept the defendant's contention that a planning board has a responsibility with reference to zoning when making a § 81P endorsement, it would imply a similar responsibility with reference to other considerations in § 81M ..., not only "for insuring compliance with the applicable zoning [laws]" but "for securing adequate provision for water, sewerage, drainage, underground utility services," etc. A § 81P endorsement is obviously not a declaration that these matters are in any way satisfactory to the planning board. In acting under § 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision.

Nor can we say that the recording of a plan showing a zoning violation, as this one does, can serve no legitimate purpose. The recording of a plan such as the plaintiff's may be preliminary to an attempt to obtain a variance, or to buy abutting land which would bring the lot into compliance, or even to sell the non-conforming lot to an abutter and in that way bring it into compliance. In any event, nothing that we say here in any way precludes the enforcement of the zoning by-law should the recording of her plan eventuate in a violation.

....

We therefore affirm the judgment. In this connection we note that the lower court has retained jurisdiction though so far as appears nothing remains to be done but to place a § 81P endorsement on the plan in accordance with the judgment. ...

SUMMARY:

The court has interpreted the Subdivision Control Law to impose two standards that must be met in order for lots shown on a plan to be entitled to an endorsement by the Planning Board that "approval under the Subdivision Control Law is not required."

1. The lots shown on such plan must front on one of the three types of ways specified in Chapter 41, Section 81L, MGL, and;
2. A Planning Board's determination that adequate access to such lots as contemplated by Chapter 41, Section 81M, MGL, otherwise exists.

Therefore, a plan showing proposed lots with sufficient frontage and access, but showing some other zoning violation, is entitled to an endorsement that "approval under the Subdivision Control Law is not required." If the necessary variances have not been granted by the Board of Appeals, what can a planning board do to make it clear that some of the proposed lots may not be available as building lots? A prospective purchaser of a lot may assume that the planning board's endorsement is an approval on zoning matters even though such endorsement gives the lots shown on the plan no standing under the applicable zoning bylaw.

Chapter 41, Section 81P, MGL, provides that "The endorsement under this section may include a statement of the reason approval is not required." If an applicant is unwilling to note on the plan those lots which are in noncompliance with the zoning bylaw, or are otherwise not available as building lots, we would suggest that the Planning Board may properly add on the plan under its endorsement an explanation to the effect that the Planning Board has made no determination as to zoning compliance. Since a Planning Board has no jurisdiction to pass on zoning matters, we would suggest that planning Boards consider the following type of statement:

1. "The above endorsement is not a determination as to conformance with zoning regulations."
2. No determination as to compliance with zoning requirements has been made or intended.
3. "Planning Board endorsement under the Subdivision Control Law should not be construed as either an endorsement or an approval of Zoning Lot Area Requirements."

Hopefully, one of the above statements would have the effect of leading a purchaser to seek further advice. Of course, the building inspector should also be alerted.

AUTHOR'S NOTE:

We have received a few inquiries relative to our Land Use Manager dealing with the immunity of State Government from municipal zoning regulations. (See Vol. 1, Edition No. 7). Some of our readers have asked whether a local Housing Authority must comply with zoning requirements. The answer is Yes.

As noted in our Land Use Manager, an entity or agency created by the Legislature is exempt when that entity or agency is performing an essential governmental function unless there are statutory provisions requiring compliance with local zoning regulations. Chapter 121B, Section 28, MGL provides that "every project of a housing authority shall be subject to all laws and all ... by-laws and regulations of the town in which it lies, relating to ... zoning" If you are interested in a court case concerning this issue, see Russell v. Zoning Board of Appeals of Brookline, 349 Mass. 532 (1965).

Donald J. Schmidt

NOTICE TO ALL BOARDS OF APPEALS AND SPECIAL PERMIT GRANTING AUTHORITIES:

Boards of Appeals and Special Permit Granting Authorities must follow the requirements as set forth in Chapter 40A, Section 11, MGL, when holding a public hearing. Section 11 specifically states that "no such hearing shall be held on any day on which a state or municipal election, caucus or primary is held in such city or town."

Hopefully, your board did not conduct a public hearing during last month's primary. Remember that the 6th of November is election day and not to schedule a public hearing on that date.

AN ACT RELATIVE TO THE UNEXPIRED TERMS OF CERTAIN ELECTED MUNICIPAL PLANNING BOARD MEMBERS:

Chapter 57 of the Acts of 1984 amends Chapter 41, Section 81A, MGL relative to the procedure to be followed when filling a vacancy on a Planning Board which occurs otherwise than by the expiration of the term.

The law provides that if members of a Planning Board are elected, any unexpired term shall be filled by appointment by the Board of Selectmen and the remainder of the members of the Planning Board until the next annual election, at which time, such office shall be filled, by election, for the remainder of the unexpired term. All such appointments shall be made in the manner as provided in Chapter 41, Section 11, MGL.

This law was approved on June 12, 1984 and took effect on September 10, 1984.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 1, Edition No. 11

November, 1984

TO VOTE OR NOT TO VOTE: THAT IS THE QUESTION

L

It should be obvious that an applicant is entitled to a fair public hearing before a Zoning Board of Appeals or Special Permit Granting Authority. What happens if a member of a board who failed to attend the public hearing casts a vote which is essential to the decision?

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Courts have expressed diverse views on this matter, but of the courts that have ruled on the issue, most have tolerated the practice of permitting a member to vote although he was not present at the hearing. For example, a case in support of the majority view is Family Consultation Service v. Howard, 176 N.Y.S. 2d 707 (1958) where the court found that an absent member of a Board of Appeals who had access to and actual knowledge of the facts and issues in the case, and who had a transcript of the public hearing available would be qualified to vote although not present at the public hearing.

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How about Massachusetts? Is a member of a Zoning Board of Appeals or Special Permit Granting Authority qualified to vote if such member was not present at the public hearing? The Massachusetts Appeals Court says "NO".

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S

In Brewster, the Planning Board consisted of seven members and was designated in the Zoning Bylaw as a Special Permit Granting Authority. The Planning Board held a public hearing in July of 1981 on a special permit application for a planned unit development at which only four of the seven board members were present. The Planning Board took the application under advisement and held a meeting in August, and at this meeting six members of the board were present including the four members who had been at the public hearing. The Planning Board met again in September and the six members who had been present at the August meeting were again present. It should be noted that the Brewster Zoning Bylaw only required a concurring vote of four or more members in order for the Planning Board to grant a special permit. Upon the advice of Town Counsel, the two members of the board who had not been present at the public hearing abstained from voting on the special permit. The four remaining members then voted to grant the special permit.

E M A N A G E R

The plaintiffs filed a complaint in Superior Court in which they alleged, among other things, that because the Planning Board failed to comply with the voting requirements of the Zoning Act, it lacked authority to grant the special permit. The Superior Court judge subsequently ruled that the board's vote was in violation of the mandatory two-third voting requirement of the Zoning Act. The case was remanded to the board for further proceedings.

After complying with the Open Meeting Law, the Planning Board met again to vote on the issuance of the special permit. Present at this meeting were the board members who had previously voted for the special permit and the two members who had abstained from that vote. The six board members voted unanimously to grant the special permit.

The Planning Board renewed its motion for summary judgment which was granted by the Superior Court judge. The plaintiffs appealed.

MULLIN V. PLANNING BOARD OF BREWSTER
17 Mass. App. Ct. 139 (1983)

Excerpts:

Rose, J. ...

1. The plaintiffs have set forth a persuasive argument that the second vote conducted by the board was invalid. They contend that because two of the voting members failed to attend the board's public hearing on the permit, they could not participate in the decision of the board. The plaintiffs conclude that as this would leave only four members validly voting on the permit, the board cannot comply with the voting requirements established by G.L. c. 40A, s. 9.
2. When a municipal administrative board is acting in a judicial or quasi judicial capacity, "all [members of the board] who are to join in the decision must have attended the hearing." ... The question presented by the parties is whether the board was acting in an adjudicatory capacity so as to require all voting board members to have attended the ... public hearing.

While a "planning board ... is a local body and is not an 'agency' for the purposes of the state Administrative Procedure Act, G.L. c. 30A", ... we may refer by analogy to the provisions of that act for the limited purpose of defining "an adjudicatory proceeding". ...

General Laws c. 30A, s. 1 (1), ... defines an adjudicatory proceeding as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." ...

The board would have this court rule that it was functioning as a quasi legislative, rather than a quasi judicial body. The board suggests that it is not subject to the requirement that all of its members who vote must have been in attendance at the hearing prior to voting on an application for a special permit. ...

This court has previously examined the quasi legislative - quasi judicial dichotomy. ... We indicated that an adjudicatory proceeding is one involving "particular persons, their business or property, and their relation to a particular transaction [rather than a question involving] ... governmental policy." ...

Because the application for a special permit directly affected the rights of Bay Colony, and given the quantum of procedural requirements involved in the issuance of a special permit ... we conclude that the proceedings before the board were adjudicatory in nature. For these reasons, only those members of the board who attended the ... public hearing could properly vote on Bay Colony's application for a special permit.

2. The plaintiffs have argued that the provisions of G.L. c. 40A, s. 9, unequivocally require a two-thirds vote of an authority having five or more members. This would indicate that the board may grant a special permit only upon a favorable vote of at least five of its seven members. The board has nevertheless argued that the special permit was validly granted under the provisions of ... the Brewster Zoning by-law ... which only requires a "concurring vote of four or more members."

The validity of a by-law will not be upheld if "it is shown ... that it conflicts with the enabling act." ... General Laws c. 40A, s. 9, requires a two-third vote of an authority of more than five members. Because ... the Brewster zoning by-law is inconsistent with that requirement, that provision of the by-law is invalid.

The defendants' argument that it could properly transform itself into an authority of four members for this specific application is equally without merit ... We held that a zoning board may not transform itself into a board of a lesser membership unless there is a specific authority in the applicable governing statute for such a "metamorphosis." Having found no such language in G.L. c. 40A, s. 9, we conclude that the board may grant a special permit only upon a favorable vote of at least five of its seven members. ...

SUMMARY

1. When a Special Permit Granting Authority is considering a special permit application, or when a Board of Appeals is considering either a variance or an appeal in accordance with the provisions of Chapter 40A, MGL, such proceedings are adjudicatory in nature. Therefore, only those members of the Special Permit Granting Authority or Zoning Board of Appeals who attend the public hearing are entitled to vote on the application, petition or appeal which was the subject matter of such public hearing.

2. The provisions of the Brewster zoning bylaw relative to the voting requirement for a Special Permit Granting Authority were inconsistent with the provisions of Chapter 40A, Section 9, MGL. This case should act as a reminder to communities that it is important to review local bylaws and ordinances on a periodic basis to insure consistency with State statutes. Check your local regulations to see that any voting requirement is consistent with the provisions of the Zoning Act.

3. In Mullin, the court looked at the definition of planned unit development. The plaintiffs argued that a PUD must contain all the uses listed in Chapter 40A, Section 9, MGL. The court found that the plain language of Section 9 authorizes a development of any combination and any number of the stated possible uses.

We tend to forget the stated purposes of the General Court for enactment of the Zoning Act as they are not found within the zoning legislation. Two such stated purposes were to encourage the modernization of zoning bylaws and ordinances by local government in accordance with the Home Rule Amendment, and to achieve greater implementation of the powers granted to municipalities by the Home Rule Amendment. In this regard, it seems clear that Section 9 should not be read as limiting local government's authority to define uses which are to be regulated by special permit.

4. In Mullin, the defendants also argued that the special permit was constructively granted because the Planning Board failed to take final action on the application within the 90-day period prescribed in Chapter 40A, Section 9, MGL. The court found that the Planning Board did take final action by filing its initial decision with the town clerk within the statutory time period, and that the subsequent invalidation of the board's vote had no effect on the finality of the board's action.

The Massachusetts Appeals Court's decision has appeared to raise an interesting problem as to what effect a lack of a quorum has on zoning decisions. In Sesnovich v. Board of Appeals of Boston, 313 Mass. 393 (1943), the Massachusetts Supreme Court made clear that the lack of a quorum was not merely procedural, but was jurisdictional. If it is jurisdictional, how can a Special Permit Granting Authority which lacks a quorum vote or take final action? In the Mullin case, the Planning Board voted to grant the special permit. Would the same result have been reached in the case of a denial by a Special Permit Granting Authority? BE CAREFUL.

We would strongly recommend that all public hearings be held by the necessary quorum of the board so as to eliminate any future questions or appeals as to whether there was a legally constituted board. In next month's issue of the Land Use Manager, we will look at quorum requirements.

NOTE:

Carol A. Rolf has left the Executive Office of Communities and Development to begin work with a private law firm in the State of New Hampshire. Carol's work in the area of zoning and land use has been of great assistance to local officials. She has given an invaluable service to both the private and public sectors, and her expertise will be missed by those she has worked with during the past 7½ years. We all wish her well in her new endeavor.

Inquiries relative to zoning and land use are still welcomed, and correspondence concerning such inquiries should be addressed to Donald Schmidt at this office. Also, questions will be answered by telephone at 617/727-3197, or on our toll-free line at 1/800/392-6445.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 1, Edition No. 12
December, 1984

QUORUM REQUIREMENTS

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A public hearing which will satisfy the statutory requirement that a board act after notice and hearing is a hearing which is held by a quorum of the board. A Zoning Board of Appeals and a Planning Board are required to hold a public hearing on a variety of matters. What will constitute the quorum requirement for a board on a particular matter will vary depending upon the applicable statutory requirement.

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The general rule as to the existence of a quorum is that in the absence of a statutory restriction, a majority of a board is a quorum, and a majority of the quorum can act.

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However, where a statute requires a unanimous decision in a matter before a board, there exists a statutory restriction so that a quorum requirement in such matter now consists of all the members of the board. An example of such a statutory restriction can be found in Chapter 40A, Section 15, MGL which requires the concurring vote of all the members of a Zoning Board of Appeals consisting of three members in order for such board to grant a variance. An easy rule to remember relative to an extraordinary quorum requirement for conducting a public hearing is that the same number of members necessary to make a favorable decision on a matter must also be present at the public hearing.

D

As either a member of a Zoning Board of Appeals or a Planning Board, it is important to know that your board should not open or conduct a public hearing when lacking the necessary quorum. As is noted in the following case, if a member is ill and unable to attend (and no alternate is available), the lack of a quorum cannot be waived by interested parties as the quorum requirement for conducting a public hearing is jurisdictional, and not merely procedural.

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The zoning law of the city of Boston authorized the Board of Appeals, which consisted of five members, to grant variances. No variance could be authorized by the Board of Appeals except by the unanimous decision of the entire membership of the board. A public hearing was held on an application for a variance by four of the five members. At the public

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hearing, it was explained that one member was absent due to an illness but that the absent member would review the testimony presented at the public hearing and notify the board when he was ready to act on the application. Everyone present at the public hearing agreed to the procedure. Later, the board held a meeting at which all the members, including the absent member, unanimously voted to grant the variance. The plaintiff appealed.

SESNOVICH V. BOARD OF APPEALS OF BOSTON
313 Mass. 393 (1943)

Excerpts:

Field, C. J. ...

Important features of the statute are the provisions that no variance "shall be authorized except by the unanimous decision of the entire membership of the board" rendered "after public hearing" The meaning of "entire membership of the board" was considered in Real Properties, Inc. v. Board of Appeal of Boston, 311 Mass. 430, and it was held "that the 'board of appeal' ... may be a board of appeal constituted for the particular case consisting of appointed members and a substitute or substitutes duly designated as such According to the provisions of the statute, however, a variance can be allowed only by a "unanimous decision of the entire membership" of a board so constituted, that is, a board of five persons-members or duly designated substitutes for members. And the express requirement of the statute that the "unanimous decision of the entire membership of the board" shall be rendered "after public hearing" necessarily imports that the "public hearing" shall be conducted by the "entire membership of the board" that is to render the decision, a board of five members or duly designated substitutes. All the members of the board that is constituted for the purpose of making a decision on the question of allowing a variance in a particular case must be present at the "public hearing."

... A quorum for a decision upon a petition to vary the application of the zoning bylaw necessarily consists of the "entire membership of the board" that is to make the decision. A "public hearing" at which less than the "entire membership of the board," a quorum thereof, was in attendance would not be a "public hearing" such as is required by the statute to be held before a variance can be allowed. The board, without a quorum present, would not be legally competent to hold the "public hearing" that by the terms of the statute is a condition precedent to a decision authorizing a variance. ... The requirement of the presence of a quorum of the board is not merely procedural. It relates to the jurisdiction of the board. Consequently, the absence of a quorum cannot be waived by the interested parties. ...

It follows that as matter of law the decision of the board of appeal should be quashed. Judgment is to be entered to that effect.

SUMMARY

A public hearing must be held by a quorum of a board. That is, the same number of members necessary to make a favorable decision on a question must be present at the public hearing. If a statute requires a concurring vote of a larger number than a majority of the membership of a board, such larger number represents the quorum requirement. For example, under zoning, a concurring vote of four members of a five member Board of Appeals is required in order to grant a special permit or variance. Therefore, the public hearing quorum requirement for such board is four members.

Quorum requirements for the following public hearings which are held by either planning boards or zoning boards of appeals would be:

<u>SUBJECT OF HEARING</u>	<u>BOARD</u>	<u>QUORUM REQUIREMENT FOR PUBLIC HEARING</u>
Zoning ordinance of bylaw proposal	Planning Board	Majority of entire board membership
Variances or appeals	Zoning Board	3 of a 3-member board 4 of a 5-member board
Special Permit	Zoning Board	3 of a 3-member board 4 of a 5-member board
Special Permit	Planning Board	4 of a 5-member board 2/3's of a board with more than 5 members
Definitive Sub-division Plan	Planning Board	Majority of entire board membership

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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ALL DISCRETIONARY SPECIAL PERMIT ZONE HELD INVALID

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As building activity has increased, many communities have amended their zoning bylaws so that certain types of developmental proposals are reviewed by a local board before an applicant can obtain a building permit and commence construction. Over the past few years, some communities have adopted a regulatory scheme whereby a review by a local board is required for all building activity within a specified zoning district. The requiring of a mandatory review by a local board for a certain class of use has mainly been directed at commercial and industrial development within a community.

In some bylaws, this review is designated as a "site plan review" process, and in other bylaws, the review is part of the special permit process. The review, as part of the special permit process, is accomplished by either designating all types of development as special permit uses, or by designating all types of development as special permit uses requiring the mandatory submission of a site plan.

Where all development within a specified zoning district will require a review by a local board, the key element as to the validity of such a process appears to hinge on whether the community has delegated to the local review board a discretionary function versus a regulatory function. The review process is in trouble if it is determined to be a purely discretionary function.

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In the past, the court has looked unfavorably on a zoning scheme which gives unbridled discretionary authority to a Zoning Board of Appeals (See Smith v. Board of Appeals of Fall River, 319 Mass. 345 (1946)) but it was not until 1976 when the court first commented on the concept of an all special permit zone. In McCaffrey v. Board of Appeals of Ipswich, 4 Mass. App. Ct. 109 (1976), the court stated that a "by-law which provided only for special permits would be extraordinary to say the least." However, the Massachusetts Appeals Court has now held invalid a provision in the town of Braintree's zoning bylaw which conditioned all uses in a business district on the grant of a discretionary special permit by the Planning Board.

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The Braintree zoning bylaw divided the Town into seven use districts, ranging in restrictiveness from residential to business and industrial. The bylaw spelled out uses which were permitted as of right in each district, and provided in some districts for special permit uses which were subject to approval by the Planning Board. Section 135-605 of the bylaw specified numerous uses, including offices, which were permitted as a matter of right in business districts. However, Section 135-604 of the bylaw provided that all proposed development in business districts required an approved special permit from the Planning Board. Section 135-604 stated that:

All proposed development in Business Districts shall be by special permit submitted to the special permit granting authority for approval. Such development proposal shall be submitted on plan and profile drawings by a qualified engineer as required by Planning Board Rules and Regulations. Such proposals shall include but not be limited to access-egress, lot lines, utilities, topography, wetlands, building sites and building sizes and proposed uses, parking facilities, accessory structures and signs. The authority shall evaluate and act upon said plans as provided in Article V. Copies of decisions shall be submitted to the Building Inspector, the Board of Appeals, the Conservation Commissioner, the Board of Health, the Board of Selectmen, the Sewer Commissioner and the Water Commissioner.

The effect of Section 135-604 was to make every use in a business district subject to the grant of a special permit by the Planning Board. The only standards to guide the Planning Board in its decision to grant or to deny a special permit pursuant to Section 135-604 were those found in the purpose clause of the bylaw which stated:

This chapter is hereby established for the following purposes: to promote the health, safety, convenience and welfare of the town's inhabitants, to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, sewerage system, schools, parks, open space and other public requirements; to conserve the value of lands and buildings; to encourage the most appropriate use of land throughout the town; to conserve natural resources prevent blight and pollution of the environment; and to preserve and increase its amenities.

SCIT applied to the Planning Board for a special permit to construct an office building. The Planning Board denied the special permit and based its decision on the fact that the project had failed to obtain a positive recommendation from the Police Department.

The police chief's opposition to the project was based upon his opinion that traffic capacity of the roadways adjoining the locus had been reached. SCIT appealed the Planning Board's decision to Superior Court. The Superior Court judge annulled the Planning Board's decision and ordered the issuance of the special permit. The judge found that the Planning Board had acted arbitrarily in denying the special permit solely on the grounds that the Police Department recommended against the application because of its concern about traffic. The Planning Board appealed.

SCIT, INC. V. PLANNING BOARD OF BRAINTREE
19 Mass. App. Ct. 101 (1984)

Excerpts:

Greaney, C. J. ...

Although many issues have been argued, we need only decide one question in this case: whether the Braintree zoning by-law may make ... all uses in a business district conditional on the issuance of a discretionary special permit.

...

... There is no doubt that the effect of § 135-604 is to make every use in a business district subject to the grant of a special permit by the planning board The board and town concede that this is indeed the effect of § 135-604, and admit that the provision was purposely adopted to authorize the considerable discretion conferred by established Massachusetts case law on special permit granting authorities to grant or deny special permits. The board and town further concede, as we think they must, that § 135-604 cannot be construed as calling simply for site plan approval.

... Braintree has attempted to use the power delegated by the Zoning Act in a fashion which creates a logical inconsistency between §§ 135-605 and 135-604 of the by-law. The former provision identifies and authorizes specific uses as of right in a business district. ... while the latter provision purports to make all uses in the same district dependent on the grant of a special permit. We see no reasonable way to reconcile the two provisions. Therefore, we ask: which should prevail? We conclude that the regulation of uses within a business district contemplated by § 135-604 is unlawful because the provision conflicts with the uniformity and special permit provisions of the Zoning Act.

Section 4 of c. 40A provides that "[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." The basic assumption underlying the division of a municipality into zoning districts is that, in general, each land use will have a

predictable character and that the uses of land can be sorted out into compatible groupings. Based upon this assumption, certain uses are permitted as of right within each district, without the need for a landowner or developer first to seek permission which depends upon the discretion of local zoning authorities. The uniformity requirement is based upon principles of equal treatment; all land in similar circumstances should be treated alike, so that "if anyone can go ahead with a certain development [in a district], then so can everybody else.

... § 4 does not contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated. Section 135-604 attempts to do precisely that in direct contravention of § 4 of the Zoning Act. ...

An equally serious problem for the validity of § 135-604 is posed by § 9 of c. 40A. ... The role of the special permit in land use planning is not something new. Special permit procedures have long been used to bring flexibility to the fairly rigid use classifications of Euclidean zoning schemes by providing for special uses which are deemed necessary or desirable but which are not allowed as of right because of their potential for incompatibility with the characteristics of the district. ... Uses most commonly subjected to special permit requirements are those regarded as troublesome (but often needed somewhere in the municipality, for example, gasoline service stations, parking lots, and automobile repair garages), ... and uses often considered desirable but which would be incompatible in a particular district unless conditioned in a manner which makes them suitable to a given location (for example, an apartment house in a single family residential district). ...

Section 9 is unambiguous, however, in authorizing special permits only for "specific types of uses", and it is clear that this language was intended to mean exactly what it says, ... We see no escape from the conclusion that § 135-604's purported conditioning of all uses in a business district on a special permit exceeds the scope of the delegation fixed by the unambiguous language of § 9. ...

The judgment is vacated. A new judgment is to enter (a) declaring that § 135-604 of the Braintree zoning by-law, insofar as it applies to uses in a business district, is void; and (b) annulling the decision of the planning board as in excess of its authority.

SCIT may apply to the building inspector pursuant to relevant provisions of the by-law for the issuance of a building permit. Any appeal from the inspector's decision is to be taken, in accordance with the by-law, to the zoning board of appeals. The Superior Court is to retain jurisdiction of the case for any further proceedings that may be necessary.

SUMMARY

Aside from the concept of an all special permit zone, it is interesting to note the court's reference to Smith v. Zoning Board of Appeal of Fall River, 319 Mass. 341 (1946). In Smith, the zoning ordinance authorized the Zoning Board of Appeals to permit alteration and use of buildings for not more than six families. However, the ordinance provided no criteria for the board to base its decision when considering whether to authorize such alterations. Though a Special Permit Granting Authority may have broad discretionary powers when making decisions on special permit applications, it is important that the local legislative body establish criteria by which the Special Permit Granting Authority must base its decision. Communities should review their zoning regulations to be sure that a Special Permit Granting Authority does not have unlimited powers to discriminate as to the use of land between similarly situated landowners.

A zoning bylaw which specifies that all uses within a zoning district are subject to the issuance of a discretionary special permit is inconsistent with the Zoning Act. However, the court has looked favorably on a limited discretionary special permit review such as the special permit review process which was upheld in Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25 (1970). Also, a non-discretionary site plan review would appear to be consistent with the Zoning Act. If your bylaw requires a review by a local board for all uses within a specified zoning district, the validity of such process may depend on whether the nature of the review is purely discretionary versus a review process which regulates without the discretionary authority to deny a proposed development. If your community has established a special permit process or site plan review process for all uses within a specified zoning district, we would suggest that you consult your town counsel or city solicitor for an opinion as to the validity of such process in light of the Braintree decision.

In next month's issue, we will look at the Dugout case and site plan approval.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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SITE PLAN REVIEW

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As was discussed in the last issue of the Land Use Manager (See Vol. 2, Ed. No. 1), a zoning scheme which establishes a special permit process or site plan review process for all uses within a specified zoning district may be inconsistent with the Zoning Act. In SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984), the court held invalid a zoning bylaw provision which required a special permit review for all uses in a business zoning district. The decision was based on the theory that such a review conferred on the Planning Board an unlimited power to discriminate as to allowable uses between landowners similarly situated within the zoning district. However, there have been instances where the court has looked favorably on a zoning process which requires a review by a local board for all proposed uses within a specified zoning district. The key element as to the validity of such a process appears to hinge on whether or not the community has delegated uncontrolled discretionary authority to the local review board.

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In recent years, the process of site plan review has become a familiar feature of many local zoning bylaws. In some instances, site plan review is required for all uses within a zoning district. In light of the Braintree decision, it would be helpful to review some past court decision which have looked at the concept of site plan approval. The theory behind site plan review is to provide an administrative process whereby proposed developments are reviewed by a local board before the issuance of a building permit. Properly drafted site plan review regulations are primarily concerned with the siting of buildings, open space, parking areas and the providing of adequate access to and from the proposed development. Whether or not site plan review is included as part of the special permit process, it appears the court will look to see whether such an administrative review is not overly broad so that such a process goes beyond its appropriate function.

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One of the earlier cases that dealt with the concept of site plan review was Helen Coolidge v. Planning Board of North Andover, 337 Mass. 648 (1958), where the court found invalid a site plan approval process. The zoning bylaw authorized the Planning Board to determine whether a particular use could operate on a particular lot. The court found that

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the bylaw gave the Planning Board more than mere administrative supervision and was, therefore, in conflict with the Zoning Enabling Act. The bylaw permitted motels in any district, but only upon obtaining an approved site plan from the Planning Board. The bylaw also authorized the Planning Board to approve the site plan with or without conditions. The court found that the bylaw gave the Planning Board authority to exercise its discretion as to whether a motel could be built within the community. The court noted that the discretionary power delegated to the Planning Board was emphasized by the fact the the Board could impose conditions when approving the site plan. Since the discretionary authority delegated to the Planning Board was in essence the power to grant special permits, the court held the bylaw invalid as at that time the Zoning Enabling Act did not authorize a Planning Board to be designated as a Special Permit Granting Authority. Later, in Auburn v. Planning Board of Dover, 12 Mass. App. Ct. 998 (1981), the court would took favorably on such a process when the Planning Board was authorized by State statute to grant special permits.

In Richardson v. Zoning Board of Appeals of Framingham, 351 Mass. 372 (1966), the court did uphold a mandatory site plan approval process by the Planning Board under the provisions of the old Zoning Enabling Act. In contrast to the North Andover bylaw reviewed in Coolidge, the authority which was delegated to the Planning Board was to determine the classification of proposed parking facilities from 13 use classifications which were specified in the bylaw. The court determined the site plan process to be administrative in nature so as to assist in determining compliance with specific provisions of the bylaw and was not the exercise of a discretionary zoning power that was found to exist in Coolidge.

One of the more important cases dealing with the concept of site plan review was Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25 (1970). In Dugout, the court upheld a bylaw provision which required a mandatory site plan approval by the Zoning Board of Appeals as part of a special permit process. Even though the review was considered as only permitting a use upon the issuance of a special permit , the court determined that the bylaw limited the Zoning Board of Appeals' discretionary authority to such an extent that the purpose of the review was to regulate the use by imposing conditions and safeguards rather than a prohibition of the use. In reviewing the bylaw provisions, the court looked at the concept of the traditional type of special permit which is highly discretionary versus the Dugout type of special permit which limited the discretionary authority of the board.

Y.D. DUGOUT V. BOARD OF APPEALS OF CANTON
357 Mass. 25 (1970)

Dugout proposed to erect a building for a restaurant. The locus was in an area zoned for business use, and Dugout applied to the Zoning Board of Appeals for site plan approval. The Canton zoning bylaw established classes of districts which included business districts, limited industrial districts, and industrial districts. The term "Non-Residential Districts," as defined in another section of the bylaw, referred to any one of these types of zoning districts. The bylaw prescribed use regulations for each zoning district and Section III D of the bylaw which governed "Business District Uses" provided in part:

1. . . . In a business District, the following uses are permitted as of right: . . . (j) Restaurant or similar place for the serving of food or beverages only to persons inside a completely enclosed building, subject to the condition that no mechanical or live entertainment is regularly furnished except as hereinafter authorized . . .

Another section of the bylaw contained special provisions which were applicable to all "Non-Residential Districts." Specifically, Section IV D of the bylaw provided:

Site Plan Approval. 1. Requirement for Site Plan. In all Non-Residential Districts, no commercial building shall be constructed or externally enlarged, and no commercial use shall be expanded in ground area . . . except in conformity with a site plan bearing an endorsement of approval by the Board of Appeals.

Section IV D 4 of the bylaw further provided that:

... in considering a site plan . . . the Board of Appeals shall assure, to a degree consistent with a reasonable use of the site for the purposes permitted or permissible by the regulations of the district in which located: (a) Protection of adjoining premises against detrimental or offensive uses on the site. (b) Convenience and safety of vehicular and pedestrian movement within the site, and in relation to adjacent streets, property or improvements. (c) Adequacy of the methods of disposal for sewage, refuse and other wastes resulting from the uses permitted or permissible on the site, and the methods of drainage for surface water. (d) Adequacy of space for the off-street loading and unloading of vehicles, goods, products, materials and equipment incidental to the normal operation of the establishment.

The bylaw required that an application for site plan approval be submitted directly to the Zoning Board of Appeals. Then, the Zoning Board of Appeals was required to refer the application to the Planning Board. After receipt of a Planning Board report or a lapse of 35 days without a report, the Zoning Board of Appeals could then act on the site plan. In considering a site plan, the bylaw further required that the Zoning Board of Appeals conform to all requirements of procedure applicable to the Zoning Board of Appeals when deciding requests for special permits. After meeting all procedural requirements, the Zoning Board of Appeals denied site plan approval. The Board's reasons for denying the site plan were as follows:

1. Royall Street is primarily used for residential purposes.
2. The parking problems ... on Royall Street are of long standing.
3. ... Dugout ... does not now provide any parking ...
4. The proposed plan would provide some parking facilities but the entrance area would be on Royall Street, a narrow

street. 5. The entrance area would be an inducement to further parking on Royall Street and aggravate a present poor situation. 6. The adjoining premises cannot be adequately protected against ... noise, loud music, drunkards, parking illegally, blocking of safe passage along Royall Street ... 8. The entrance way on Royall Street is detrimental to the area residents and lessens the convenience and safety of vehicular and pedestrian movement in relation to adjacent streets, property, and improvements.

The Supreme Court found that the Zoning Board of Appeals exceeded its authority in disapproving the site plan for Dugout's restaurant and annulled the Board's decision. However, the court found that the bylaw provisions relative to site plan approval were valid.

The purpose of § IV D 4 is obviously to ensure, not only that the use of land in Non-Residential Districts complies with the principal general use regulations of the by-law, but also that each particular proposed commercial building avoids injury to aspects of the public interest reasonably specified in § IV D 4. The town, we assume, in its by-law (1) might have defined geographically the business zone in which Dugout seeks to put up its cafe and then (2) might have provided in terms that the area could be used only for residential purposes and, upon special permit, also for the commercial purposes [as specified in the bylaw] provided that the standards set out [in the bylaw] and § IV D 4 were met. All nonresidential use of the defined area then would clearly have been a matter of special permit granted in accordance with standards stated in the by-law. If these were sufficient to guide the action of the board of appeals, this would have been a valid traditional type of exception. ...

We think that, in substance, the Canton by-law may be viewed (a) as prescribing valid general rules for application to commercial buildings and uses in Non-residential Districts which include satisfaction of the standards stated in § IV D 4, and (b) is equivalent to permitting any commercial building construction in such districts only upon special permit if the board determines there is compliance with [the bylaw] and also with the standards set out in § IV, especially subsec. D 4. The authorities already cited indicate that towns may adopt reasonably flexible methods, consistent with the substantive and procedural provisions of c. 40A, § 4, of allowing boards of appeals to adjust zoning regulation to the public interest in accordance with sufficiently stated standards. We look at the substance as well as the form of the attempted regulation and conclude that the method of regulation adopted by § IV D is permitted under c. 40A, §§ 2 and 4.

The board's authority to enforce compliance with § IV D 4 is only to "assure" protection of the public interest "to a degree consistent with a reasonable use of the site for the purposes permitted or permissible by the regulations of the district" in which the regulated land lies.

This language implies regulation of a use rather than its prohibition. It guides us in interpreting the later portions of § IV D 4 as contemplating primarily the imposition, for the public protection, of reasonable terms and conditions upon the commercial use of land zoned for business.

On the facts of the present case, in any event, § IV D 4 warrants no more than the imposition of reasonable conditions in connection with the approval of a site plan. We assume (a) that, to prevent traffic congestion where a lot in a business zone has frontage only on a narrow street or where particularly heavy use of commercial premises is likely, the board of appeals could specify parking spaces in addition to the minimum number called for in ... the bylaw if special conditions affecting particular land and adjacent ways made that appropriate, or (b) that some form of screening (to reduce noise, light, dust, or other injury) might be required for particular commercial uses, or (c) that the board might make other appropriate provisions to protect the neighborhood and the public from unreasonable harm. The evidence shows no such detriment from Dugout's proposed use for a restaurant or cafe as would justify prohibition of the project completely under a regulatory provision no more explicit than that in § IV D 4.

In Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971), the court upheld a zoning bylaw which required site plan approval by the Planning Board for proposed apartment construction. In approving the site plan, the Planning Board was required to hold a public hearing in order to determine whether specific standards of the bylaw had been met such as lot size, lot coverage, setback, height and sewerage requirements. In citing Richardson, the court determined that such a process was valid as the purpose of the site plan approval was merely to ascertain whether the applicant complied with specific requirements of the bylaw and was not an improper delegation of a legislative power to the Planning Board which was found to exist in Coolidge.

McDonald's Corporation v. Town of Seekonk, 12 Mass. App. Ct. 351 (1981), dealt with the question of the appropriate appeal process and the exhaustion of administrative remedies when there exists a mandatory site plan review which is not within the scope of a special permit process. The zoning bylaw required that a plan for parking areas had to be submitted to the Planning Board for its approval before a building permit could be obtained from the Building Inspector. McDonald's submitted a parking plan for a proposed restaurant which was to be located in a business zone. The restaurant was a permissible use

under the zoning bylaw, but the Planning Board rejected the parking plan because it believed that the restaurant was a prohibited use in a business zone. The Building Inspector refused to issue a building permit citing as his reason that the parking plan had not been approved by the Planning Board. McDonald's appealed the decision of the Planning Board to the Board of Appeals, but did not pursue that route, and subsequently brought action in the Superior Court under the provision of Chapter 40A, Section 17, MGL. A judgement in favor of McDonald's was entered in Superior Court. The town of Seekonk appealed, and the Appeals Court dismissed the action holding that the Superior Court lacked jurisdiction to hear the matter in the absence of its having previously been considered by the Board of Appeals.

By statute, "[t]he responsibility for enforcing zoning ordinances or by-laws lies with the municipality and is assigned by statute to the building inspector or other specified municipal officers." ... Under Seekonk's zoning by-law, the building inspector is the enforcement officer. Therefore, under the statute and by-law, the planning board has no role in enforcing the zoning regulations. Once the building inspector denied the building permit for the parking areas, McDonald's sole recourse was an appeal to the board of appeals. ... We are required to note the lack of jurisdiction, even though it was not raised at the trial level or on appeal. . . .

The present judgment is vacated, and a new judgment is to be entered dismissing the action for lack of jurisdiction.

In Auburn v. Planning Board of Dover, 12 Mass. App. Ct. 998 (1981), the court upheld a site plan review process similar to the Dugout case. However, in Auburn, the bylaw appeared to allow a greater degree of discretionary authority than existed in Dugout. The Dover zoning bylaw required site plan approval through the issuance of a special permit by the Planning Board for all buildings to be erected in a business district "in order to ensure the most advantageous use of all properties within the ... district and for the reasonable protection of the legitimate interests of adjoining property owners." Section 6.3 of the bylaw also provided:

The application for a special permit shall be accompanied by a site plan, prepared by a registered architect. The site plan should provide for:

- a. compliance with the requirements for parking and loading spaces, for lot size, frontage, yards, and heights and lot coverage of buildings, and all other provisions of this By-Law;
- b. convenience and safety of vehicular and pedestrian movement on the site, and for the location of driveway openings in relation to street traffic;

- c. adequacy of arrangement and the number of parking and loading spaces in relation to the proposed uses of the premises;
- d. arrangement and appearance of proposed buildings, structures, free-standing signs, screening and landscaping;
- e. adequacy of methods for waste disposal, surface and subsurface drainage and lighting.

Site plans shall indicate existing proposed boundaries and all existing and proposed structures, parking and loading spaces, access, driveways and driveway openings, service areas and other open areas, and all facilities for lighting, for water supply, for sewage, refuse and other waste disposal, for drainage, for screening, and for other landscape features.

The Planning Board denied site plan approval for a two-story office building. A Superior Court judge found that the plans submitted by Auburn were lacking in adequate information pertaining to loading spaces, surface and subsurface drainage. The plans showed fewer parking spaces than the number required by the bylaw, and were also found to be inadequate with respect to screening, building sign requirements, and regulations providing for safe vehicular and pedestrian movement. Evidence also indicated that the plan failed to meet the sewage disposal requirements of the State Environmental Code. The judge concluded that the Planning Board's denial was based on "several problems of apparent deficiencies in the plans presented, any of which would in and of itself have called for rejection as presented" and that the Planning Board's action was not arbitrary and was based on legally tenable grounds. The Massachusetts Appeals Court agreed and upheld the validity of the bylaw, as well as the Planning Board's decision.

The plaintiffs contend that the town could not require a special permit for a use already permitted of right, and that if such a permit could be properly required, the standards expressed in the by-law were too vague to guide the board's action. Neither contention is applicable here ... the requirement that a site plan be approved before the issuance of a special permit does not impose impermissible restrictions on the allowed use. We are satisfied that the site plan requirements under review are consistent with the substantive and procedural provisions of G.L. c. 40A, § 9, and with the right of a town to "adopt reasonable flexible methods ... of allowing boards of appeals to adjust zoning regulation to the public interest in accordance with sufficiently stated standards." ... We are also satisfied that §§ 6.3 and 6.4 give the owner sufficient notice of what is expected of his development plans, and that while "[t]he by-law confers a measure of discretionary power to the board ... it does not confer unrestrained power to grant

or withhold special permits by the arbitrary exercise of that discretion." ... We conclude that greater particularity is not required and that the standards for the guidance of the board are adequate. ...

SUMMARY

It is interesting to follow the judicial acceptance of the site plan process as a form of administrative, as well as limited discretionary review. The theory that was noted in Dugout that zoning bylaws can authorize a type of special permit other than what in the past had been considered the "traditional type" of special permit has given communities a degree of flexibility in establishing administrative zoning controls.

In establishing an all review zone as part of the special permit process, it is important to note the distinction between the unlimited discretionary authority which was found to be invalid in the SCIT (Braintree) case versus the limited type of discretionary authority which was upheld in Dugout and Auburn. In SCIT, the Braintree zoning bylaw did not establish any criteria for the Special Permit Granting Authority to follow when considering its decision. The only standards to guide the Special Permit Granting Authority were found in the general purpose clause of the bylaw which, in effect, granted unbridled discretionary authority.

Dugout and Auburn are good cases to review for determining the extent of discretionary authority of a site plan review board when such review is part of the special permit process. The key element in the Auburn case which upheld the denial of a site plan was the fact that evidence showed that the site plan was lacking sufficient information, and showed obvious inconsistencies with the provisions of the zoning bylaw. In Dugout, which overturned the denial of a site plan, the court found that the board could have imposed reasonable conditions when reviewing the site plan which would have satisfied the purposes of the bylaw which was to regulate rather than prohibit the use.

An appeal from the denial of a site plan which is part of the special permit process is to a court of competent jurisdiction. However, this is not the case when site plan approval is not part of the special permit process and is administrative in nature. As was noted in McDonald's, an appeal from the inability of an applicant to obtain a building permit because of the denial of a site plan is to the Zoning Board of Appeals.

INVERSE CONDEMNATION

The United States Supreme Court will look at the question as to when a land use regulation constitutes a taking without just compensation. The issue to be argued is whether a landowner whose use of land is thwarted by changes in zoning regulations may sue a city or town for damages for the "taking" of the property.

Developers contend that a 1979 zoning change by the county planning board in Nashville made it impossible to complete their project. The dispute involves the Fifth Amendment, which says governments can't seize private property for public use "without just compensation". A Federal Appeals Court ordered the commission to apply the original regulations and upheld a jury verdict of \$350,000 against the commission.

If the United States Supreme Court permits such law suits, it will expose local governments to substantial financial liability for enacting excessive zoning regulations. Hamilton Bank v. Williamson County Regional Planning Commission, 729 F. 2d 402 (6th Cir. 1984), rev. granted, 53 U.S.L.W. 3191 (10/1/84).

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 2, Edition No. 3
April, 1985

ZONING FREEZE FOR SUBDIVISION PLANS

L

A Town Meeting has just voted in new zoning provisions which are more stringent than the previous ones.

A

Before the Town Meeting vote, but after the date the Planning Board gave public hearing notice relative to the proposed zoning changes, a developer submits a subdivision plan to the Planning Board for approval under the Subdivision Control Law.

N

The plan meets the old zoning requirements, but does not meet the new zoning requirements adopted by Town Meeting.

The developer claims that the plan is protected by the zoning "freeze" as provided in Chapter 40A, Section 6, MGL.

D

Question: Can the Planning Board disapprove the plan on the ground that it does not conform to the new zoning requirements?

Answer: No. The developer's plan will still be governed by the old zoning requirements.

U

Except for the change from seven to eight years of protection afforded land shown on subdivision plans, the protection accorded to subdivision plans remains essentially unchanged from the provisions of the Zoning Enabling Act in effect prior to the enactment of Chapter 808 of the Acts of 1975.

The Zoning Enabling Act in effect prior to Chapter 808 provided that:

S

The land shown on a definitive plan ... shall be governed by applicable provisions of the zoning ... in effect at the time of submission of the plan ... for a period of seven years from the date of endorsement of ... approval

E M A N A G E R

Presently, Chapter 40A, Section 6, MGL, provides that:

The land shown on [a definitive plan] ... shall be governed by the applicable provisions of the zoning ... in effect at the time of ... submission ... for eight years from the date of the endorsement of.... approval ...

However, the date a town zoning bylaw takes effect has been changed from the date the bylaw is duly published and posted after Attorney General approval to the date of Town Meeting vote provided the bylaw receives Attorney General approval and is duly published and posted. Chapter 40A, Section 5, MGL, presently provides that:

The effective date of the adoption or amendment of any zoning ... by-law shall be the date on which such adoption or amendment was voted upon by ... town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty.

...

Through the years, the State zoning statute has provided that once a zoning proposal has been published in a newspaper, such proposal affects permits issued thereafter provided such zoning proposal is duly adopted by Town Meeting. Presently, Chapter 40A, Section 6, MGL, provides that:

... a zoning ... by-law shall not apply ... to a building or special permit issued before the first publication of notice of the public hearing ... required by section five, but shall apply ... to a building or special permit issued after the first notice of said public hearing

...

A commonly asked question is what zoning will apply to a subdivision plan after the Planning Board has given public hearing notice on a proposed zoning amendment? Assuming that Town Meeting duly adopts the zoning amendment, is it the Planning Board's notice or the Town Meeting vote which will determine what zoning applies relative to the submission of subdivision plan?

The court has found that the date the zoning bylaw takes effect is the controlling event when considering what zoning will apply when a subdivision plan is submitted pursuant to the Subdivision Control Law, and not the date of the public hearing notice by the Planning Board

In Ward & Johnson v. Planning Board of Whitman, 343 Mass. 466 (1962), the court found that a proposed bylaw was not in effect when the applicant's preliminary plan was submitted to the Planning Board since the bylaw had not been adopted by Town Meeting. The Planning Board disapproved a definitive plan which had evolved from a previously submitted preliminary plan, because the plan did not conform to the zoning bylaw adopted by the town. The court found that the Planning Board was in error to disapprove the plan as the applicant's plan was governed by the zoning bylaw in effect prior to the Town Meeting vote. The relevant sequence of events were as follows:

February 4 - Notice of Public Hearing
February 8 - Submission of Preliminary Plan
February 19 - Submission of Definitive Plan
February 25 - Public Hearing
March 4 - Town Meeting Vote
March 24 - Attorney General Approval
April 18 - Disapproval of Plan

See also Lavoie v. Building Inspector of Ludlow, 346 Mass. 274 (1963); Livoli v. Planning Board of Marlborough, 347 Mass. 330 (1964); Chira v. Planning Board of Tisbury, 3 Mass. App. Ct. 433 (1975) which also conclude that the date the zoning bylaw takes effect and not the date of the Planning Board notice on the proposed zoning change, is the key event when determining what zoning will apply to subdivision plans.

In Doliner v. Planning Board of Millis, 349 Mass. 687 (1965), the court noted that there exists in the Zoning Enabling Act a direct and specific legislative statement that a subdivision plan is to be governed by the bylaw in effect when the plan is filed and being processed under the Subdivision Control Law. At the time of the Doliner decision, the Zoning Enabling Act provided that a town zoning bylaw did not take effect until after Attorney General approval. Therefore, under Doliner, a subdivider could submit his plan after Town Meeting vote and before Attorney General approval, and still be governed by the provisions of the old zoning bylaw. (Note: Under the present Zoning Act, after Attorney General approval and subsequent publication and posting as required by Chapter 40, Section 32, MGL, a zoning bylaw becomes retroactively effective back to Town Meeting vote.)

Finally, in Nyquist v. Board of Appeals of Acton, 359 Mass. 462 (1971), the argument was made that the issuance of a building permit is "a more meaningful event" than the filing of a subdivision plan and that the zoning in effect at the time of the issuance of a building permit should apply to land shown on a subdivision plan. The court noted that such an argument ignores the clear and unequivocal language of the Zoning Enabling Act which extends a broad protection to subdivision plans. The court found that properly submitted plans are not governed by the provisions of the Zoning Enabling Act which affect building permits issued after the publication of the public hearing notice by the Planning Board.

The statute gives a period ... within which the owner of the land shown on the approved plan may proceed under the provisions of the zoning by-law as in force prior to [the zoning] amendment.

SUMMARY

Chapter 40A, Section 6, MGL, net effect is to impose a moratorium on the application of new and more stringent zoning requirements imposed by an amendment to the zoning ordinance or bylaw which occurs subsequent to the submission of a plan under the Subdivision Control Law provided the plan is duly approved by the Planning Board. In the case of definitive plans, the moratorium is for a period of eight years (increased from five years by St. 1982 c. 185) from the date of endorsement.

For the purposes of Chapter 40A, Section 6, MGL, the "zoning in effect" is the zoning regulations which have been adopted by Town Meeting. By filing a subdivision plan, even if after public hearing notice has been published in a newspaper, a landowner can protect his land from future zoning changes provided the subdivision plan is subsequently endorsed by the Planning Board.

A preliminary plan submitted prior to Town Meeting vote will also protect the land from future zoning changes provided a definitive plan is submitted within seven months from the date of submission of the preliminary plan.

A subdivision plan protects the land shown on such plan from all future zoning changes whereas the submission of an approval not required plan and subsequent endorsement by the Planning Board that approval under the Subdivision Control Law is not required will only protect the land shown on such plan from future zoning changes relative to use and not zoning changes relative to dimensional or density requirements. In the case of approval not required plans, the moratorium is for a period of three years from the date of endorsement.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
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ZONING PROTECTION FOR APPROVAL NOT REQUIRED PLANS IS LIMITED TO USE

L

As was discussed in last month's issue of the Land Use Manager, the submission of a definitive plan or approval not required plan protects the land shown on such plans from future zoning changes for a specified period of time. A definitive plan is afforded an eight year zoning freeze, while an approval not required plan obtains a three year zoning protection period. A definitive plan protects the land shown on such plan from all changes to the zoning bylaw. An approval not required plan protects the land shown on such plan from future zoning changes related to use.

A
N
D

Presently, Chapter 40A, Section 6, MGL, provides that:

... the land shown on a [a definitive plan] ... shall be governed by the applicable provisions of the zoning ... in effect at the time of ... submission ... for eight years from the date of the endorsement of ... approval

... the use of land shown on [a approval not required plan] ... shall be governed by the applicable provisions of the zoning ... in effect at the time of submission of such plan ... for a period of three years from the date of endorsement ... that approval ... is not required

U
S

Whether a plan requires approval or not is, in the first instance, determined by Chapter 41, Section 81L, MGL, which defines "subdivision". If Planning Board approval is not required, the plan may be entitled to a use freeze. The questionable phrase contained in the statute relative to the zoning protection afforded approval not required plans is "the use of the land shown on such plan shall be governed"

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Does this mean that the use of the land shall be governed by all applicable provisions of the zoning bylaw in effect when the plan was submitted to the Planning Board? Or does it mean, as to use, that the land shown on the plan is only protected from any bylaw amendment which would prohibit the use?

In Bellows Farms v. Building Inspector of Acton, 364 Mass. 253 (1973), the Massachusetts Supreme Court determined that the language found in the zoning statute merely protected the land shown on such plans as to the kind of uses which were permitted by the zoning bylaw at the time of the submission of the plan. This decision established the court's view that the land shown on approval not required plans would not be immune to changes in the zoning bylaw which did not prohibit the protected uses.

On March 5, 1970, Bellows Farms submitted a plan to the Planning Board requesting the Board's endorsement that "approval under the Subdivision Control Law is not required." Since the plan did not show a subdivision, the Planning Board made the requested endorsement. Under the zoning bylaw in effect when Bellows Farms submitted the plans, apartments were permitted as a matter of right. Also, based upon the "Intensity Regulation Schedule" in effect at the time of submission, a maximum of 435 apartment units could be constructed on the land shown on such plan.

In 1970, after the submission of the approval not required plan, the town amended the "Intensity Regulation Schedule" and off-street parking and loading requirements of the zoning bylaw. In 1971, the town adopted another amendment to its zoning bylaw which required site plan approval by the Board of Selectmen. If these amendments applied to the land shown on the approval not required plan, Bellows Farms would only be able to construct a maximum of 203 apartment units.

Bellows Farms argued that the endorsement by the Planning Board that "approval under the Subdivision Control is not required" protected the land shown on the plan from the increased zoning controls relative to density, parking and site plan approval for three years from the date of the Planning Board endorsement. However, the town of Acton argued that the protection afforded by the state statute only extended to the "use of the land" and, even though the zoning amendments would substantially reduce the number of apartment units which could be constructed on the parcel, Bellows Farm could still use its land for apartments.

The court agreed with the town of Acton and found that the 1970 and 1971 amendments to the zoning bylaw applied to Bellows Farms' land. In deciding that an approval not required plan does not protect the land shown on such plan from increased dimensional or bulk requirements, the court reviewed the legislative history relative to the type of zoning protection which have been afforded approval not required plans.

In 1960, the Legislature first provided for a zoning protection for approval not required plans. The Zoning Enabling Act at that time specified that:

No amendment to any zoning ordinance or by-law shall apply to or affect any lot shown on a plan previously endorsed with the words 'approval under the subdivision control law not required' or words of similar import, pursuant to... [G.L. C. 41, S 81P], until a period of three years from the date of such endorsement has elapsed...

In 1961, the Legislature eliminated the above noted provision. However, in 1963, the Legislature again provided a zoning protection. The 1963 amendment contained the same language which presently exists in Chapter 40A, Section 6, MGL, which is:

The use of land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan ... for a period of three years

The court found that the difference between the 1960 and 1963 protection provisions for approval not required plans was "obvious and significant."

This is not a case of using different language to convey the same meaning. The use of the different language in the current statute indicates a legislative intent to grant a more limited survival of pre-amendment rights under amended zoning ordinances and by-laws. We cannot ignore the fact that although the earlier statute protected without restriction "any lot" shown on a plan from being affected by a zoning amendment, the later statute purports to protect only "the use of the land" shown on a plan from the effect of such an amendment.

In deciding the Bellows Farms case, the court also contrasted the broad zoning protection from all zoning changes afforded subdivision plans versus the more limited protection afforded approval not required plans.

BELLOWS FARMS V. BUILDING INSPECTOR OF ACTON
364 Mass. 253 (1973)

... when a plan requiring planning board approval under the subdivision control law is submitted to the board for such approval, "the land shown ... [on such a plan] shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of submission of the plan first submitted while such plan or plans are being processed ... [and] said provisions ... shall govern the land shown on such approved definitive plan, for a period of seven [now eight] years from the date of endorsement of such approval" This language giving the land shown on a plan involving a subdivision protection against all subsequent zoning amendments for a seven [now eight] year period is obviously much more broad than the language of ... [the Zoning Act] covering land shown on a plan not involving a subdivision. We have already noted that the ... [Zoning Act] gives protection for a period of three years against zoning amendments relating to "the use of the land," and that this means protection only against the elimination of, or reduction in, the kinds of uses which were permitted when the plan was submitted to the planning board. ...

The 1970 amendment to the zoning by-law did not eliminate the erection of apartment units from the list of permitted uses in a general business district, nor did it change the classification of the locus from that type of district to any other. It changed the off street parking and loading requirements and the "Intensity Regulation Schedule" applicable to all new multiple dwelling units in a manner which, when applied to the locus, had the effect of reducing the maximum number of units which could be built on the locus from the previous 435 to 203, but that did not constitute or otherwise amount to a total or virtual prohibition of the use of the locus for apartment units. ...

The 1971 amendment to the zoning by-law making the 1970 site plan approval provision applicable to the erection of multiple dwelling units makes no change in the kind of uses which the plaintiffs are permitted to make of the locus. It does not delegate to the board of selectmen any authority to withhold approval of those plans showing a proposed use of the locus for a purpose permitted by the by-law and other applicable legal provisions. Furthermore, the plaintiffs have submitted no site plan to the board of selectmen and we cannot be required to assume that the board will unreasonably or unlawfully withhold approval of such a plan when submitted. ...

SUMMARY

The Bellows Farms case established the principle that the protection afforded approval not required plans extends only to the types of uses permitted by the zoning bylaw at the time of the submission of the plan and not to the other applicable provisions of the bylaw. However, the court noted in Bellows Farms that the use protection would extend to certain changes in the zoning bylaw not directly relating to permissible uses, if the impact of such changes, as a practical matter, were to nullify the protection afforded to approval not required plans as authorized by the Zoning Act.

The court further stressed this "practical prohibition" theory in Cape Ann Land Development Corp. v. City of Gloucester, 371 Mass. 19 (1976), where the city amended its zoning ordinance so that no shopping center could be constructed unless a special permit was obtained from the City Council. When Cape Ann had submitted its approval not required plan, a shopping center was permitted as a matter of right. The issue before the court was whether Cape Ann was required to obtain a special permit and if so required whether the City Council had the discretionary right to deny the special permit. The court held that Cape Ann was required to obtain a special permit and that the City Council could deny the special permit if Cape Ann failed to comply with the zoning ordinance except for those provisions of the ordinance that practically prohibited the shopping center use. The court warned the City Council that they may not decline to grant a special permit on the basis that the land will be used for a shopping center. However, the City Council could impose reasonable conditions which would not amount to a practical prohibition of the use.

In a rather muddled decision, the Massachusetts Appeals Court held in Perry v. Building Inspector of Nantucket, 4 Mass. App. Ct. 467 (1976), that a proposed single family condominium development was not entitled to a three year grandfather protection from increased dimensional and intensity requirements. However, the court found that in applying the principle of the Bellows Farms case, as to the protection afforded by an approval not required plan for a use of land which is no longer authorized in the zoning district, a reasonable accommodation must be made by either applying the intensity regulation applicable to a related use within the zone or, alternatively, applying the intensity regulations which would apply to the protected use in a zoning district where that use is permitted. The court further noted that no hard and fast rule can be laid down and the reasonableness of the accommodation will depend on the facts of each case.

Finally, in Miller v. Board of Appeals of Canton, 8 Mass. App. Ct. 923 (1979), the Massachusetts Appeals court held that uses authorized by special permit are also entitled to a three year protection period and that the use protection provisions of the Zoning Act are not confined to those uses which were permitted as a matter of right at the time of the submission of the approval not required plan.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



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July, 1985

THE DEATH OF A VARIANCE

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A
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D
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E

In 1970, the Department of Community Affairs (DCA) was designated by the Legislature to investigate the need for a comprehensive revision to the Zoning Enabling Act. The DCA succeeded an advisory committee which had been appointed by the Legislature in 1967 to study and report on the Zoning Law. In its initial report to the Legislature in 1972, the DCA made numerous recommendations which sought to eliminate problems which had arisen under the old zoning statute by providing standardized procedures for the administration of municipal zoning laws. The report also noted the serious problems presented by the widespread improper exercise of the variance granting power by local Zoning Board of Appeals in Massachusetts.

In a 1973 report to the Legislature, the DCA concluded that in order to alleviate to some degree the current confusion regarding the status of land within municipalities, the Zoning Act should specify conditions under which a variance may lapse. The DCA report recommended a three-year lapse provision. The Legislature ultimately enacted a lapse provision except that the period triggering a lapse was reduced from three years to one year.

The last paragraph of Chapter 40A, Section 10, MGL, presently provides that if the rights authorized by a variance are not exercised within one year of the date of grant of such variance, they shall lapse and may be reestablished only after notice and a new hearing. (Note: The Zoning Act also authorizes a Zoning Board of Appeals to extend the life of a variance which has not lapsed beyond the one year time frame. See Land Use Manager, Vol. 1, Edition No. 8, August, 1984.)

Over the past few years, the court has had occasion to respond to certain questions that have arisen relative to the variance lapse provision.

1. Must the holder of a lapsed variance show anew that he satisfies the necessary criteria for the grant of a variance in order to reestablish it?

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2. What constitutes a sufficient exercise of the rights authorized by a variance?
3. Can the new lapse provision of the Zoning Act apply retroactively to variances granted under the provisions of the old Zoning Enabling Act?

In Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 78 (1982), a Superior Court judge held that the reestablishment of a lapsed variance only required a showing by the petitioner that the conditions relating to the grant of the variance had not changed materially since the date the variance was originally approved by the Zoning Board of Appeals. However, the Massachusetts Appeals Court reversed the decision of the Superior Court and held that the holder of a lapsed variance who seeks to reestablish his rights must not only petition for a new public hearing, but must also show anew that all the requirements set out in Chapter 40A, Section 10, MGL, which are necessary for the granting of a variance, have been satisfied.

Generally, as to what rights must be exercised by the holder of the variance within the one year period will depend on what is stated in the Zoning Board of Appeals' decision granting the variance. A petition or appeal which is frequently considered by Zoning Boards of Appeals in Massachusetts is a request for a dimensional variance in order to create a substandard building lot. Recently, in Frank Hogan v. Robert Hayes, 19 Mass. App. Ct. 399 (1985), the Massachusetts Appeals Court had the opportunity to review a zoning variance which had authorized the creation of two substandard lots.

In 1949, Margaret Stanton and her husband owned two lots with a combined lot area of 10,000 square feet, and a combined lot frontage of 100 feet. The Stantons bought one of the lots in 1948, and the other in 1949. In April, 1974, after the death of her husband, Mrs. Stanton petitioned the Zoning Board of Appeals for dimensional variances which would allow the division of her parcel into two lots so she could sell one lot which had an existing house and garage, and build a small residence on the other vacant lot. The Zoning Board of Appeals granted a variance "to subdivide the premises ... and erect a single-family dwelling on the vacant lot created."

In 1975, Mrs. Stanton sold the lot with the house and garage, and at a later date, Frank and Katherine Hogan acquired title to the property. In 1982, Robert and Mary Hayes purchased the vacant lot from Mrs. Stanton, and on December 14, 1982, they applied for a building permit. The Building Inspector issued a building permit to the Hayeses for the erection of a one-story single family dwelling.

The Hogans wanted to prevent the Hayeses from building on their lot and attacked the issuance of the building permit in a number of ways. One of their complaints was that the rights authorized by the variance were not exercised as the single family dwelling had not been constructed on the vacant lot as was specified in the variance that had been granted. However, the court found that the 1975 conveyance by

Mrs. Stanton to the Hogan's predecessor in title sufficiently exercised the rights authorized by the variance.

... We are prepared to say that, so far as [Chapter 40A, Section 10, MGL] may conceivably bear on the past variance at bar, there was a sufficient exercise of it not later than the time when Mrs. Stanton sold the lot and buildings to the plaintiffs' predecessor in 1975. ... the predecessor at that point (and, indeed, the plaintiffs today) would be in multiple violation of the zoning ordinance were it not for the variance. So, also, after disposing of the plaintiff's lot in reliance on the variance, Mrs. Stanton retained a lot which, except for the variance, could not have been developed and would have lost value. Even though the variance had not been fully carried out by actually building, we think it was sufficiently (and irrevocably) exercised.

Whether the existing lapse provision of the Zoning Act can reach back and affect variances that were granted under the provisions of the old Zoning Enabling Act has, at this time, avoided judicial determination. In reviewing an old variance which was granted in 1960, the court first hinted at the issue when it noted in Knott v. Zoning Board of Appeals of Natick, 12 Mass. App. Ct. 1002 (1981), that the "plaintiffs do not appear to argue that the present proceedings are controlled by the new Chapter 40A, Section 10 (which for new variances restricts to one year the time in which the rights granted may be exercised)."

When deciding in the Hogan case that the rights authorized by the variance had been sufficiently exercised, the court did not have to rule on the broad issue of retroactivity that had been raised by the plaintiff. However, the court issued a rather strong statement relative to the retroactivity of the lapse provision.

FRANK HOGAN V. ROBERT HAYES
19 Mass. App. Ct. 399 (1985)

Excerpts:

Kaplan, J. ...

On the main question of the claimed lapse of the rights granted by the variance, the plaintiffs would have to concede that under the Zoning Enabling Act which antedated the present Zoning Act, G.L. C. 40A, (effective in Quincy on June 30, 1978), a variance once validly allowed could continue in force without limit of time although not exercised. Nor was a time limit set on the instant variance, either by the ordinance or by the actual text of the variance as allowed. The plaintiffs

contend, however, that the new statute, G.L. C. 40A, Section 10, ... does establish a limit of one year, and that this (or possibly the policy expressed by it) applies not only to variances granted after the effective date of the statute, but retroactively to variances granted theretofore. ...

The notion that variances more than one year old, and remaining unexercised by the effective date of the new statute, are destroyed wholesale by a retroactive application of Section 10, would appear quite drastic, and hardly matches the text of that provision. A milder contention might take the form that Section 10 should extend to cancel variances, granted well before the effective date of the new statute, which have not been exercised within a year after that date. Even that proposition might put a great and insupportable strain on the statutory language. ...

In holding that the variance at bar did not lapse but on the contrary has been sufficiently availed of, we do not mean to reflect in any way upon a possibility that an old variance, long unexercised, may lose its force by reason of radically changed conditions at the locus, including changes brought about by revisions of a zoning ordinance or by-law. ...

SUMMARY

Hunters Brook Realty established the rule that the rights authorized by a Lapsed variance can only be reestablished by satisfying the criteria for the grant of a variance as set forth in Chapter 40A, Section 10, MGL. The holder of a lapsed variance must petition for a public hearing and show anew that all the statutory conditions exist before the Zoning Board of Appeals can grant a variance.

Zoning Boards of Appeals have been known to conduct their proceedings on an informal basis. Usually, this casual process is reflected in their written decision. If the decision of a Zoning Board of Appeals is sketchy and incomplete, it is difficult for the zoning enforcement officer to determine what event or events must occur within the one year period to avoid having a variance lapse. Since the Zoning Act contains lapse provisions for both variances and special permits, it is important that the decision of the granting authority be complete and articulate.

Since the enactment of the lapse provision, there has existed the question as to what rights must be exercised when the Zoning Board of Appeals grants a variance to create a substandard building lot. As was the situation in Hogan, a Zoning Board of Appeals' decision dealing

with the creation of a substandard lot often states that the variance is granted so that a single-family dwelling can be erected on the substandard lot. In such an instance, the court has found that the transfer of title giving the substandard lot a separate identify is a meaningful event and the exercise of the rights authorized by the variance does not necessarily hinge on the issuance of the building permit.

The Massachusetts Appeals Court has strongly indicated that the lapse provision most likely does not apply to variances granted under the provisions of the old Zoning Enabling Act. In light of the Hogan decision, it is important to also note the following general rule of interpretation relative to the retroactivity of statutes.

All statutes are prospective in their operation unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. Doubtless, all litigation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions, or causes of action. Cranberry Realty & Mortgage Co. v. Ackerly Communications, Inc. 17 Mass. App. Ct. 255 (1984).

If substantive rights are affected by an amendment to a statute, the court looks to see whether the Legislature intended a retroactive effect in "unequivocal terms" or "by necessary implication." Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1 (1914).

In the absence of very clear statutory language, the court will not apply legislation retroactively so as to affect substantive rights. Building Inspector of Acton v. Board of Appeals of Acton, 348 Mass. 453 (1965).

Reviewing the general rule of interpretation as to the retroactivity of a statute when effecting a substantive right, as well as the observations made by the court in the Hogan decision, strongly suggests that the lapse provision does not apply to variances that were granted under the provisions of the old Zoning Enabling Act.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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August, 1985

FILING THE WRITTEN WORD

L

It is important that a Zoning Board of Appeals or a Special Permit Granting Authority make its decision within the statutory time periods as specified in the Zoning Act. A failure to act within the prescribed time periods constitutes a constructive grant of the applicable petition, application or appeal. It is equally important that a copy of the written decision be filed within the required time periods. Failure to timely file the written decision with the city or town clerk will also result in a constructive approval.

A

Chapter 40A, Section 9, MGL, requires that special permits can only be issued following a public hearing which must be held within 65 days after the filing of an application for a special permit, and that the Special Permit Granting Authority must act within 90 days following the public hearing. Section 9 of the Zoning Act further states that:

N

Failure by a special permit granting authority to take final action upon an application for a special permit within said ninety days following the date of public hearing shall be deemed to be a grant of the permit applied for.

D

What constitutes final action? Must a Special Permit Granting Authority file a copy of its decision with the city or town clerk within the 90 day time period?

U

In Building Inspector of Attleboro v. Attleboro Landfill, Inc., 384 Mass. 109 (1981), the court held that the failure of the Planning Board, which was acting as a Special Permit Granting Authority, to file a copy of its written decision denying a special permit with the city clerk within 90 days of the public hearing resulted in the constructive grant of the special permit. The Planning Board had held a public hearing within 65 days after Attleboro Landfill had filed its application for a special permit. Thereafter, the Planning Board had voted to deny the special permit within 90 days, but failed to file its written decision with the city clerk until after the 90 day time period.

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BUILDING INSPECTOR, ATTLEBORO V, ATTLEBORO LANDFILL, INC.
384 Mass. 109 (1981)

Excerpts:

Lynch, J. ...

... There is no question that the action of the planning board denying the defendant's request for a special permit occurred within the ninety days prescribed by the statute, and that the filing with the city clerk occurred after the ninety-day period had expired. We, therefore, must decide which of these events constitutes final action in regard to an application for a special permit within the meaning of the statute.

At the outset, it is appropriate to observe that the word "final" clearly connotes the last or ultimate. Final action must be, therefore, the last or ultimate act of the planning board in relation to the application for a special permit. ... Even though Section 9 makes no mention of filing the decision of the permit granting authority with a city clerk, such filing is necessary to limit the period which appeals may be taken. Even though there is no clear exhortium to the permit granting authority to file its decision with the city clerk, such a duty is strongly implied when the statute is read in its entirety and when its requirements are compared with similar statutes. Elsewhere within Chapter 40A, we find the requirement that the permit granting authority must certify to the successful applicant that its decision has been filed with the city clerk, Chapter 40A, Section 11. Furthermore, unless the board's decision is filed with the clerk, there would be no commencement of the statutory time within which appeals may be taken. Such an unlimited appeal period is contrary to our appellate practice To conclude, therefore, that no filing by the permit granting authority with the clerk is mandated flies in the face of reason and logic. Once it is concluded that the permit granting authority must file its decision with the city clerk, it is difficult to conclude that such filing is not the last act required of the board upon the permit application, and thus final action within the meaning of the statute.

In Elder Care Services, Inc. v. Zoning Board of Appeals of Hingham, 17 Mass. App. Ct. 480 (1984), Elder Care had applied to the Zoning Board of Appeals for a special permit to construct a 120 bed nursing home, and 300 self-care units. The Zoning Board of Appeals held a public hearing and voted to deny the special permit, but failed to file its decision with the town clerk until 137 days after the public hearing.

In determining that the special permit had been constructively granted, the court reemphasized the point made in Attleboro Landfill, Inc. as to the necessity to interpret the Zoning Act as requiring the decision and filing to occur within 90 days following the public hearing so as to limit the period during which an appeal may be taken by an aggrieved party. See also Shea v. Board of Aldermen, Chicopee, 13 Mass. App. Ct. 1046 (1982).

What about a decision concerning an appeal or variance? When must the Zoning Board of Appeals file its written decision with the city or town clerk? Chapter 40A, Section 15, MGL, provides:

All hearings of the board of appeals shall be open to the public. The decision of the board shall be made within seventy-five days after the date of the filing of an appeal, application or petition except in regards to special permits, Failure by the board to act within said seventy-five days shall be deemed to be the grant of the relief, application or petition sought, subject to an applicable judicial appeal The board shall cause to be made a detailed record of its proceedings, ... setting forth clearly the reason or reasons for its decision ... copies of which shall be filed within fourteen days in the office of the city or town clerk ...

Though the Zoning Act clearly states that a Zoning Board of Appeals is required to make a decision on an appeal or variance within 75 days, it is not explicit as to whether the filing of the written decision must also occur within the 75 day time period. The question as to when a Zoning Board of Appeals must file its decision with the city or town clerk has been open to dispute and for some time it appeared that the court would never make a final determination relative to the issue.

In Brennan v. Board of Appeals of Bourne, 13 Mass. App. Ct. 1082 (1982), the plaintiff was appealing a decision of the building inspector relative to the use of her property as a seasonal condominium colony. Eighty-three days after the appeal was filed, the Board of Appeals voted to uphold the decision of the building inspector. Nine days later, the Board of Appeals filed its written decision with the Town Clerk. The court concluded that the appeal was constructively approved by virtue of the Board's failure to act within the 75 day time period. In deciding in favor of the plaintiff, the court made note of the following issue:

We have no occasion to decide whether seventy-five days plus the fourteen-day period for filing the decision rather than the seventy-five days is the applicable judicial appeal period because, in any event, both periods have expired in this case.

In Capone v. Zoning Board of Appeals of Fitchburg, 389 Mass. 617 (1983), the court had to determine if constructive approval occurs when a Zoning Board of Appeals makes a decision within 75 days, but fails to

timely file its decision. The Board of Appeals voted to deny the plaintiffs' appeal 57 days after the Capones filed their petition. However, the Board did not file its decision with the city clerk until 110 days after the petition had been filed.

The court recognized that the Zoning Act is ambiguous as to whether failure to file the decision will result in constructive approval, but concluded that the Board of Appeals must perform all statutorily required actions. After reviewing the provisions of the Zoning Act, the court found that the purpose of requiring the Board to file its decision, together with the requirement that the Board make its decision within 75 days is to induce the Board to act promptly. The court held that the appeal was constructively approved as the filing of the decision 110 days after the petition had been filed was in clear contravention of the statutory requirement of the Zoning Act. However, in deciding Capone, the court made the following notation:

Since the question is not before us, we do not decide whether a constructive grant occurs if the board fails to file within fourteen days of its decision or only if it fails to file within fourteen days of the last day of the period during which board action is permitted (seventy-five days).

In Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663 (1985), the court had to partially face the question which was left unanswered in Capone in a case where a Zoning Board of Appeals made and filed its decision within 75 days, but failed to file its decision within the 14 day time period.

On September 20, 1982, the petitioner filed an appeal. On November 18, 1982, 59 days after the appeal was filed, the Board made its decision. On December 3, 1982, 15 days later, but within the 75 day time period, the Board filed its written decision with the Town Clerk. In this case, the court found that the requirement that a decision must be filed within 14 days after it is made is merely directory, rather than mandatory, in circumstances where a Board of Appeals makes and files its decision within the 75 day time period.

ZUCKERMAN V. ZONING BOARD OF APPEALS OF GREENFIELD
394 Mass. 663 (1985)

Excerpts:

Hennessey, C. J. ...

... We conclude that, at least in those circumstances where the board has filed its decision within seventy-five days after the applicant appeals, any additional requirement, to the effect that the board file its decision within fourteen days after the decision is made, would be directory only.
... Because the board filed its decision on the applicant's

playground seventy-four days after the appeal was filed, there was no constructive grant of the relief sought.

General Laws c. 40A, s. 15, expressly provides a remedy for the failure of a board to act "within seventy-five days" after an appeal is filed. ... In contrast, no remedy is specified for failure to file a decision "within fourteen days." The omission is significant. Even if the Legislature did intend to require that a decision be filed within fourteen days after it is made, we conclude that it did not intend to remedy the type of violation committed by the board in the case before us. ... In Capone, we held that the applicant was entitled to a constructive grant where the board had acted within seventy-five days, but had neglected to file its decision until 110 days after the applicant had appealed. In that case, the board's failure to file its decision within fourteen days after the expiration of the seventy-five day period within which board action was permitted, created the prospect of a perpetual "cloud [on] the rights of a landowner to use his land." ... There is no such prospect here, where the board filed its decision within seventy-five days after the applicant appealed.

Again, in Zuckerman, as they did in Capone, the court avoided the key issue when they noted:

We express no view on the situation where the board makes its decision within seventy-five days, but files its decision within fourteen days after the seventy-five day period has elapsed.

Finally, in O'Kane v. Board of Appeals of Hingham, 20 Mass. App. Ct. 162 (1985), the court was confronted with the issue, concerning the filing of an appeal or variance decision, which for so long had avoided judicial determination. In O'Kane, the Zoning Board of Appeals voted to deny a variance 41 days after the application had been filed with the Town Clerk. The board filed its written decision with the Town Clerk 35 days after they had made their decision. Therefore, the Board of Appeals had filed its written decision within 14 days following the expiration of the 75 day period, but the filing occurred more than 14 days after they had voted to deny the variance.

O'KANE V. BOARD OF APPEALS OF HINGHAM
20 Mass. App. Ct. 162 (1985)

Excerpts:

Kaplan, J. The notoriously confused text of G.L. c. 40A, s. 15 ... presents yet another difficulty, and we seek to find the more satisfactory solution.

The present case is a variant on Zuckerman. Here the writing was filed more than fourteen days after the decision, and seventy-six days after the application. And so we have the question, posed but not answered in Zuckerman, whether filing must at all events occur within seventy-five days, or may be effectively made within a fourteen-day interval following the expiration of the seventy-five days. As indicated in Zuckerman, ... these appear to be the only commonsensical alternatives, and we think the latter position accommodates better to the text and scheme of S. 15, such as they are. In the second sentence, the [f]ailure by the board to act within said seventy-five days" refers to "the decision of the board" mentioned in the preceding sentence; and the "within fourteen days" of the third sentence, being directory, allows not less than that period after the decision is made for memorializing and filing it. Suppose a decision on the seventy-fifth day; it would be hard to deny that the board had a further fourteen days in which to file it.⁴ That terminus we think, should apply even where the decision was made at an earlier point in the period of seventy-five days.

⁴ In that precise situation, where decision is on the seventy-fifth day, no more than fourteen days would be allowed for filing. Otherwise the process could be protracted indefinitely, as was possible under the predecessor statute. It was a clear purpose of the enactment of s.15 to avoid any such perpetual "cloud".

SUMMARY

A Special Permit Granting Authority must take "final action" on an application for a special permit within 90 days following the date of the public hearing. "Final action" must include the last or ultimate act of a Special Permit Granting Authority in relation to an application for a special permit. Therefore, a Special Permit Granting Authority must also file a copy of its decision with the city or town clerk within the 90 day time period. Failure to timely file the written decision will result in constructive approval of the special permit.

Chapter 40A, Section 11, MGL, requires a Special Permit Granting Authority, when granting a special permit, to issue a certified copy of its decision to the owner and applicant. Chapter 40A, Section 15, MGL, requires that notice of all decisions by a Zoning Board of Appeals be mailed to parties in interest. In Attleboro Landfill, Inc., the court noted that there may be a different notice requirement when a decision denying a special permit is made by a Board of Appeals or some other Special Permit Granting Authority. Because of an apparent inconsistency within the Zoning Act, the court concluded that the Legislature could not have intended that "final action" by a Permit Granting Authority include the requirement for certification or notice after the decision on an application for a special permit has been filed with the city or town clerk.

A Zoning Board of Appeals must file its written decision on a variance or appeal with the city or town clerk within 14 days following the expiration of the 75 day time period. As long as the written decision is filed within that time period, then the requirement in the Zoning Act that the decision must be filed within 14 days after it is made is merely directory and not mandatory. However, failure to file the written decision within 14 days following the expiration of the 75 day time period will result in constructive approval of a variance or appeal.

In Zuckerman, the plaintiff also argued that his failure to receive a notice of the decision which had been mailed by the Zoning Board of Appeals constituted a defect in notice which would extend the applicable appeal period. The court found that Chapter 40A, Section 15, MGL, requires that the notice of the decision be mailed by the Zoning Board of Appeals, and that the Zoning Board of Appeals does not have a duty to ensure that the notice is received by the petitioner.

In Elder Care, the court made note of the question as to whether a petitioner can waive his rights to a constructive grant on an application for a special permit. Though not deciding the question, the court referred to the statutory provisions of Chapter 41, Section 81U, MGL, which requires a record in the city or town clerk's office within the statutory time period, showing a waiver of a right to constructive approval. The court would not consider what effect a written waiver, if filed, would have on an application for a special permit.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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CONSTRUCTIVE GRANT - WHO'S ON FIRST

LIn the last edition of the Land Use Manager, we reviewed the provisions of the Zoning Act relative to the statutory time periods governing the decision making process of a Zoning Board of Appeals and Special Permit Granting Authority. Court cases have clarified the fact that a failure to act and file a copy of the written decision within the prescribed time periods results in a constructive approval of the requested relief, special permit or variance. What remains unclear in the Zoning Act is the extent of the time period within which a person aggrieved by a constructive approval may appeal to a court of competent jurisdiction.

AWhen reviewing the Subdivision Control Law, Chapter 41, Sections 81K-81GG, MGL, we find a procedure whereby a city or town clerk is authorized to certify that a Planning Board has constructively approved either a subdivision or non-subdivision plan. The Subdivision Control Law also addresses the issue of court action as to a constructive grant by specifying the time periods in which a person or persons aggrieved must commence a judicial appeal in cases where a Planning Board fails to act.

NIn comparison, the Zoning Act does not contain a procedure requiring a municipal official to certify that a special permit, variance or appeal has been constructively approved. Even more troublesome is the fact that the judicial appeal provisions of Chapter 40A, Section 17, MGL, remain silent as to what event triggers the 20-day appeal period in situations where there has been a constructive grant of an appeal, special permit or variance. The lack of legislative directives in these two areas has led to a great deal of confusion as to the rights of property owners and aggrieved persons when there has been a constructive grant by a Board of Appeals or Special Permit Granting Authority.

DUnfortunately, the Massachusetts Appeals Court has not had much success in solving the statutory puzzle.

U**S****E** **M****A****N****A****G****E****R**

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In Noe v. Board of Appeals of Hingham, 13 Mass. App. Ct. 103 (1982), the court was faced with a situation where a Zoning Board of Appeals had constructively granted a petition for a variance. The Board had failed to act within the 75 day time period as required by Chapter 40A, Section 15, MGL, but at a later date made and filed its decision granting the variance. The central question before the court was when must an aggrieved party seek judicial review when a variance has been constructively granted.

On February 27, 1980, a petition for a dimensional variance was filed with the Town Clerk. For reasons unknown, the Town Clerk failed to transmit a copy of the petition until the latter part of April. On May 15, 1980, the Board held a public hearing on the petition. Since 1980 was a leap year, the variance was constructively granted by the Board on May 12, 1980, as that was the seventy-fifth day after the filing of the petition with the Town Clerk (See Land Use Manager, Vol. 2, Ed. No. 6).

On July 24, 1980, Noe, who was an abutter, brought a complaint in the Superior Court seeking a determination as to the invalidity of the variance which might have been constructively granted by the Board. Noe's complaint was filed seventy-five days after the seventy-fifth day (May 12, 1980) for Board action on the variance. In late July, the Board voted to grant the variance and on August 5, 1980, a copy of that decision was filed with the Town Clerk.

Congratulations if you're still with us at this point, but there is more. On August 21, 1980, sixteen days after the Board had filed its tardy decision with the Town Clerk, Noe filed an amended complaint in Superior Court seeking to annul the written decision of the Board. A motion was filed to dismiss Noe's appeal as untimely. The motion was allowed by the Superior Court and Noe appealed.

The major issue raised by the individuals who had obtained the variance was that Noe's appeal was not timely as it was not filed within twenty days following the constructive grant which occurred on May 12, 1980. Unfortunately, the Massachusetts Appeals Court did not say "no" to "Noe" and left two important questions unanswered.

NOE V. BOARD OF APPEALS OF HINGHAM
13 Mass. App. Ct. 103 (1982)

Excerpts:

Grant, J. ...

We deal first with the owner's contention that the action was properly dismissed because the plaintiff failed to file a complaint for judicial review within twenty days following the date (May 12, 1980) when the board constructively granted their petition ., .

Following the entry of the judgment in the present case, the Supreme Judicial Court ... held that "[t]he language of ... [the Zoning Act] obligated a board of appeals to act on an appeal within the statutory time period, otherwise the appellant prevails by default." Rinaudo v. Zoning Board of Appeals of Plymouth, Mass. Adv. Sh. (1981) 1244, 1244. More recently, in Building Inspector of Attleboro v. Attleboro Landfill, Inc., Mass. Adv. Sh. (1981) 1653, it was held that the failure of a planning board which was acting as a special permit granting authority ... to file a copy of its written decision on an application for a special permit with the city clerk within the ninety-day period ... resulted in a constructive grant of the application for the permit. ... We conclude, therefore, that as between the owners and the board of appeals in the present case, the latter must be taken to have constructively granted the petition for a variance as early as May 13, 1980.

It does not follow from the foregoing, ... that one in the position of the present plaintiff is precluded from securing judicial review of a constructive grant of a petition for a variance or of a subsequently filed written decision which expressly grants a variance merely because he fails to run off to an appropriate court house within twenty days of the date of the constructive grant. It must be recognized that the ... Rinaudo and Attleboro cases were all concerned with the rights and duties of a land-owner in relation to the municipal authorities and that none of those cases was concerned with the rights of someone else (such as the present plaintiff) who might be aggrieved by the constructive grant of a variance or a special permit. It must also be recognized that in the Attleboro case the court gave the need for certainty as to when the appeal period would start running Indeed, the court specifically said that "unless the board's decision is filed with the clerk, there would be no commencement of the statutory time within which appeals may be taken,"

It is with that insight that we turn to the express language of the appeal provisions found in the present c. 40A When we do so, we find in the very sentence of s. 15 which provides for the constructive grant of a variance that such a grant is "subject to an applicable judicial appeal ... ; we also find ... that the notice which is given to the

petitioner (among others) of the decision which is to be filed with the city or town clerk "shall specify that appeals ... shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing such notice [sic] in the office of [the] city or town clerk." In the first paragraph of s. 17, ... we find the sole grant of jurisdiction to any court to entertain an appeal from and to review a decision of a board of appeals or a special permit granting authority. That paragraph is explicit that an appeal by a "person aggrieved" is to be taken by "bringing an action with twenty days after the decision has been filed in the office of the city or town clerk"

In the case before us the plaintiff's original complaint sought to attack the constructive grant of the petition for a variance which arose out of the board's failure to take any action on the petition within the seventy-five day period Well within the twenty-day period following the date on which the board filed its decision with the town clerk, the plaintiff secured an amendment of his complaint so as to attack an express desision which (in effect) confirmed the earlier constructive grant of a variance and belatedly explained the reasons therefor. All the defendants appeared and answered the amended complaint without raising any question as to the manner or timeliness of the service of process. We conclude that in the circumstances of this particular case the Superior Court has jurisdiction to entertain the amended complaint, and we reserve for another day the questions of how and when review can be had in a case in which a board of appeals or a special permit granting authority fails to take any action on a petition or application or, if it does act, fails to file its decision with the city or town clerk.

Judge Dreben dissented from the majority in the Noe decision. In dissenting, Judge Dreben noted the problems raised by the majority opinion and presented a more practical solution.

The purpose of the statute is to induce a zoning board of appeals to act promptly and, in my view, is a legislative determination that an applicant whose application is not acted upon by the board within the requisite period is to be placed on a par with a successful applicant. By not limiting the "applicable judicial appeal" to a definitive

period where the board not only fails to act but also fails timely to file its "decision" ... in the office of a city or town clerk, the majority, it seems to me, emasculates the statute. Unlike the landowner who obtains relief through positive action by the board, one who receives constructive approval cannot safely rely on board inaction, even though as acknowledged by the majority, the municipality is bound. There is no time period after which he is protected from action by abutters or other parties in interest, even if such persons had notice of the application. Abutters, who have a very limited private action under the statute, ... are now accorded, for what may be an unlimited period of time, the ability to cloud the rights of a land-owner to use his land. In addition, the majority also neglects the reasoning of the Supreme Judicial Court in [Attleboro] ... where the court pointed out that "[s]uch an unlimited appeal period is contrary to our appellate practice generally, ... and to the legislative mandate in similar matters,"

Although I acknowledge the shortcomings of [the Zoning Act] ..., I think it is plain that the Legislature intended no "gaps and uncertainties in the specification of a procedure designed to provide definitive rights to accrue ... within stated times."

I would, accordingly, hold that the period for the "applicable judicial appeal ..." does not depend on when the board files its decision, ... but begins to run, in cases involving constructive approval, at the time of the failure of the board to take action where, as here, the aggrieved person had notice of the application. This construction, in my view, accords with the legislative intent, the reasoning of the Pembroke and Attleboro cases, and is the "one which will cause the least confusion to attorneys and others concerned with the law relating to land use."

In Girard v. Board of Appeals of Easton, 14 Mass. App. Ct. 334 (1982), the court added a little twist to the appellate process by holding that an appeal to the Superior Court was timely even though the Zoning Board of Appeals had not filed its decision with the Town Clerk. In this case, Alfred and Martha Gomes petitioned for a variance. The Zoning Board of Appeals held a public hearing but failed to make a decision within seventy-five days after the petition had been filed with the Town Clerk. Recognizing that the Board had constructively granted a variance to the Gomeses, the Girards appealed to the Superior Court.

On the date the Girards appealed to the Superior Court, which was within 20 days after the constructive grant, the Zoning Board of Appeals had not filed a decision with the Town Clerk.

GIRARD V. BOARD OF APPEALS OF EASTON
14 Mass. App. Ct. 334 (1982)

Excerpts:

Kass, J. ...

... In Noe ..., we left open how and when review can be had in a case in which a board does not take action or, if it does, fails to file its decision with the city or town clerk.

Now faced with that question, we have no difficulty concluding that a party may seasonably file a complaint seeking judicial review of a constructively granted variance or special permit before a copy of the decision has been filed with the city or town clerk. This is because when statutes fix a certain time after a procedural event for taking action, the action may be taken before the event. ... Early action when the underlying facts giving ground to the action are known works no prejudice to the adverse party and is different from premature action, where the basis of a cause of action is still uncertain "[I]t is a general policy of the law to prevent loss of valuable rights ... because [something] was done too soon."

Zoning relief granted constructively is not beyond judicial review. The relief so granted may be tested on appeal under G.L. c. 40A, s. 17, to determine whether facts exist which would have enabled the board to grant the relief. Were it otherwise a board of appeal could, through non-action, put fragrantly unlawful zoning relief beyond review.

However, it appears that a Zoning Board of Appeals, when challenging its own constructive grant, is subject to a different appeal period than parties in interest. In Elder Care Services v. Zoning Board of Appeals of Hingham, 17 Mass. App. Ct. 480 (1984), the court held that a Zoning Board of Appeals could not challenge their constructive grant of a special permit more than twenty days after the date of the constructive grant. The court also made the following interesting observation.

We need not consider whether the board itself or other town officials are the appropriate persons to bring the appeal under G.L. c. 40A, § 17, nor whether the statutory remedy is exclusive in all cases. See Ryckman, Judicial and Administrative Review in Massachusetts Zoning and Subdivision Control Cases, 52 Mass. L.Q. (No. 4.) 297, 348 ff. (1967).

SUMMARY

After reading the Noe and Girard decisions, one is reminded of the Abbott and Costello classic, Who's on first, What's on second, and I don't know's on third. In cases where a decision is not filed with the city or town clerk, Noe has created an unlimited period of time in which a person aggrieved by a constructive grant may seek judicial review.

In deciding Noe, the court found that the filing of the decision was the key event in establishing the appeal period for a person aggrieved by a constructive approval. However, in Girard, the court ruled that a person aggrieved by a constructive grant could also seek judicial review prior to a decision being filed with the city or town clerk. This was an interesting result in light of the requirement found in Chapter 40A, Section 17, MGL, that a copy of the decision be attached to the complaint filed with the court. Considering Girard, it could be assumed that the petitioner would also be eligible to seek a judicial determination as to a constructive grant when a decision is not filed within the required time period.

Chapter 40A, Section 11, MGL, compounds the problem relative to a constructive grant. Section 11 requires that no variance or special permit can take effect until a copy of the decision is recorded in the appropriate Registry of Deeds. Since the Zoning Act does not authorize a municipal official to certify that a constructive grant has occurred, a building inspector cannot issue a building permit without a recorded decision or judicial determination that a special permit or variance has been granted or constructively granted. It appears that the onus is on the petitioner to initiate legal action for a determination that his variance or special permit has been constructively granted before obtaining a building permit. Such a process is contradictory to the constructive approval concept, but because of statutory constraints and an unlimited appeal period, such a process becomes a necessity.

Confused? So are we. However, we would recommend that a Board file its tardy decision which either grants or denies the petition as soon as possible after the date the decision should have been filed so as to trigger the commencement of the Section 17 appeal period.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
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Vol. 2, Edition No. 8
October, 1985

HOW TO BEAT A ZONING CHANGE

L

Chapter 40A, Section 6, MGL, affords certain exemptions which allows a landowner to protect his land from future changes to a zoning bylaw or ordinance. In past issues of the Land Use Manager, we have reviewed some of the techniques which can protect land from a proposed zoning amendment.

A

Vol. 2, Edition No. 3, April, 1985, of the Land Use Manager looked at the fifth paragraph of Section 6 which protects land shown on preliminary or definitive plans from all zoning changes for a period of eight years. If a preliminary plan is submitted, a definitive plan must be submitted within seven months. When the definitive plan is ultimately approved, the land will be governed by the zoning in effect at the time of the submission of the preliminary plan.

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However, the submission of a preliminary plan is not essential since it is optional under the Subdivision Control Law. If a landowner initially submits a definitive plan, and the definitive plan is subsequently approved, the land shown on the definitive plan will be governed by the zoning in effect at the time of submission of the definitive plan.

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In either case, the eight year protection period runs from the date of the Planning Board's endorsement of its approval of the definitive plan. Further, the zoning in effect is the zoning regulations which have been adopted by City Council or Town Meeting. The publication of the public hearing notice by the Planning Board does not prevent a landowner from filing a subdivision plan to protect his land from future zoning changes.

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Vol. 2, Edition No. 4, May-June 1985, of the Land Use Manager looked at the sixth paragraph of Section 6 which protects land shown on approval not required plans from future zoning changes related to use.

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E

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As is the case with preliminary and definitive plans, the date of the submission of the plan determines what zoning is in effect, while the date of endorsement that approval is not required commences the three-year use freeze. The protection afforded approval not required plans extends only to the types of uses permitted by the zoning bylaw or ordinance at the time of the submission of the plan, and not to other applicable provisions of the bylaw or ordinance.

Again, just like preliminary and definitive plans, the public hearing notice of the zoning change by the Planning Board does not prevent a person from filing an approval not required plan to protect land from future zoning changes relating to use. This technique is an easy way to protect land from a proposed building moratorium.

The fourth paragraph of Section 6 protects certain residential lots from increased dimensional requirements to a zoning bylaw or ordinance. The first sentence protects separate ownership lots and the second sentence affords protection for lots held in common ownership.

The separate lot protection provision was reviewed in Vol. 1, Edition 1, January 1984, of Land Use Manager. In Sieber v. Zoning Board of Appeals, Wellfleet, 16 Mass. App. Ct. 901 (1983), the Massachusetts Appeals Court determined that if a lot: 1) has at least 5,000 square feet and fifty feet of frontage; 2) is in an area zoned for single or two-family use; 3) conformed to existing zoning when legally created, if any; and 4) is in separate ownership prior to the town meeting vote which made the lot nonconforming, such lot may be built upon for single or two-family use provided the lot has maintained its separate identity. At a later date, the Massachusetts Supreme Court reached the same conclusion in Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985).

The second sentence of the fourth paragraph of Section 6 which provides protection for common ownership lots was inserted into the Zoning Act in 1979 (see St. 1979, c. 106). As enacted, the "grandfather" protection for common ownership lots provides as follows:

Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two-family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership.

Recently, in Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829 (1985), the Massachusetts Supreme Judicial Court found that the grandfather provision for common ownership lots is not limited to lots which were created by a plan and recorded or endorsed by January 1, 1976. The court's interpretation of the common lot provision provides a unique opportunity to landowners and developers.

In Baldiga, the plaintiff had purchased three lots in the town of Uxbridge. The lots were shown on a plan, dated February 20, 1979, which contained the Planning Board's endorsement that "Approval Under the Sub-division Control Law Not Required." At the time of the Planning Board's endorsement, the three lots conformed with the requirements of the zoning bylaw that single family building lots have a minimum frontage of 200 feet, and a minimum lot area of one acre.

On May 13, 1980, the Town amended its zoning bylaw requiring that single family building lots have a minimum frontage of 300 feet, and a minimum lot area of two acres. In October, 1983, the plaintiff filed building permit applications for the three lots. The Building Inspector denied the applications. The plaintiff appealed to the Zoning Board of Appeals, and the Board denied the plaintiff's appeal because the lots did not meet the 300 foot frontage requirement that had been adopted by the town meeting in 1980.

Both the Town and the plaintiff agreed that, at all relevant times, the three lots were held in common ownership, and that the lots complied with the zoning in effect at the time of the Planning Board's endorsement, as well as to the zoning requirements in existence as of January 1, 1976. However, the Town contended that the plaintiff's lots were not entitled to "grandfather rights" since the plan for such lots was not "recorded or endorsed" as of January 1, 1976. The plaintiff argued that the lots were entitled to zoning protection as the phrase "as of January 1, 1976" only qualifies the condition that the lots conform with zoning requirements as of that date, and that lots shown on a plan "recorded or endorsed" after January 1, 1976 are entitled to a zoning freeze.

BALDIGA V. BOARD OF APPEALS OF UXBRIDGE
395 Mass. 829 (1985)

Excerpts:

Abrams, J. ...

We agree with the plaintiff. ... the first part of the second sentence of Section 6 entitles an owner of property to an exemption from any increase in minimum lot size required by a zoning ordinance or bylaw for a period of five years from its effective date or for five years after January 1, 1976, "whichever is later." ... We conclude ... that "the statute looks to the most recent instrument of record prior to the effective date of the zoning change." If we were to interpret the

"as of January 1, 1976" clause as qualifying the "plan recorded or endorsed" condition, it would negate the effect of the words "whichever is later." As we read the statute, the phrase "as of January 1, 1976" only modifies the condition immediately preceding, that requiring conformity with zoning laws.

We reject the town's contention that the statute's use of the word "conformed," rather than "conforms," to precede the phrase "to the existing zoning requirements as of January 1, 1976" suggests that the plan and the lot must not only conform at some later date to the zoning requirements in effect on January 1, 1976, but also must have been in existence in 1976 and conformed to the zoning requirements at that time. The town's argument ignores the fact that the statutory language consistently uses the past tense to describe all of the conditions needed for a lot to qualify for "grandfather" protection. The word "conformed" is thus appropriate in the context of the statutory provision as a whole and does not specifically signify that the lot or plan must have existed before 1976. ...

The town also argues that the interpretation proposed by the plaintiff would permit the practice of "checkerboarding" as a means of avoiding compliance with local zoning requirements. This result, the town asserts, would contravene the recognition by the new G.L. c. 40A, ... of local autonomy in dealing with land use and zoning issues. However, the specific purpose of the disputed sentence ... was to grant "grandfather rights" to owners of certain lots of land. If we accept the town's interpretation, the ability to checkerboard two or three parcels would be eliminated as of January 1, 1976. But there also would be a substantial reduction in "grandfather rights," a result which is inconsistent with the general purposes of the fourth paragraph of Section 6, which is "concerned with protecting a once valid lot from being rendered unbuildable for residential purposes, assuming the lot meets modest minimum area ... and frontage ... requirements. ..."

We thus conclude that the second sentence of the fourth paragraph of G.L. C. 40A, s. 6, does not require that the plan of the lot in question be recorded or endorsed before January 1, 1976. We also conclude that for lots to be entitled to a five-year exemption from the requirements of a zoning amendment, pursuant to the second sentence of the fourth paragraph of G.L. C. 40A, s. 6, the plan showing the lots must have been endorsed or recorded before the effective date of the amendment.

SUMMARY:

Through the years, one prime concern of the Legislature has been to protect certain divisions of land from future increases in local zoning requirements. Zoning protection for subdivisions and non-subdivision plans has always been measured from the date of the Planning Board's endorsement. However, the common ownership freeze runs from the effective date of the zoning amendment, and not from the date the Planning Board endorsed the plan.

The interpretation of the common ownership grandfather protection by the Massachusetts Appeals Court opens doors which would otherwise not be available to landowners. Since the freeze period does not commence until the effective date of the zoning amendment, having a plan recorded or endorsed guarantees a landowner a future five-year zoning exemption from increased dimensional requirements to single or two-family use. The common ownership provisions also provides an opportunity to checkerboard lots shown on a definitive plan in clusters of three so as to obtain the five-year additional protection from future increased dimensional requirements to single or two-family use. This technique, in many instances, could extend the life of a definitive plan beyond the eight-year exemption.

The interpretation by the Massachusetts Appeals Court also increased the protection afforded "Approval Not Required Plans." In addition to land being protected from use changes to the zoning bylaw or ordinance, the lots shown on such plans will also be protected from increased dimensional requirements to single and two-family use if they meet the conditions for common ownership protection.

The common ownership zoning freeze protects no more than three adjoining lots from increases in area, frontage, width, yard, or depth requirements to a lot for single or two-family use. In order for a lot to qualify for the grandfather protection, it must meet the following conditions:

1. The lot must be shown on a plan which is either recorded or endorsed before the effective date of the increased zoning requirements.
2. The lot must have at least 7,500 square feet of area, and at least 75 feet of frontage.
3. The lot must comply with applicable zoning requirements when recorded or endorsed and conform to the zoning requirements in effect as of January 1, 1976.
4. The lot must have been held in common ownership with any adjoining land before the effective date of the increased zoning requirements.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 2, Edition No. 9
November, 1985

ACCESS ROADWAYS

L

Basically, once an area has been zoned for certain purposes, only those uses which are specifically allowed are permitted within the zoning district. A zoning bylaw need not be both permissive and prohibitive in form. It is a familiar principle when interpreting zoning bylaws that express mention of one matter excludes by implication other similar matters not mentioned. If a zoning bylaw enumerates certain permitted uses but contains no express prohibition or restriction as to other uses then uses which are not specifically authorized in a zoning district as being permitted are deemed to be prohibited.

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When zoning regulations are imposed which vary from one district to another, the result is the application of different restrictions to abutting lands. In many instances, zoning district boundary lines follow topographical features or public improvements such as rivers, highways, or streets. However, in some instances, a zoning district boundary line splits a lot so as to leave part of a lot subject to one set of restrictions, and the other part of the lot subject to a different set of restrictions. In such situations, the availability of access, or the ability to construct an access roadway, becomes a major issue when the bylaw does not expressly authorize the use.

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This issue first came to light when in 1954 the town of Braintree amended its zoning map by changing a large parcel of land from a residential district to an industrial district. The rezoning resulted in creating an industrial district which was entirely surrounded by residential zoning districts. Textron Industries purchased a tract of land in which the major portion was located in the industrial district and constructed a factory. Textron also constructed roadways for access to the factory built in the industrial zone; however, the access roadways passed through residential zoning districts. Tredwell Harrison, an abutter, sought enforcement action as to the construction of the access roadways and requested their relocation. Textron argued that the access over the residential land was necessarily implicit in a zoning scheme which completely surrounds an industrial area with residentially zoned land and pointed out that without access across the residentially zoned land, the industrially zoned land could not be used for the purposes intended in an industrial district.

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The court found that since the residential zone did not expressly authorize industrial use, then the use of the land in the residential zone as an access roadway for an industrial use violated the requirements of a residential zone. The court did not rule on Textron's claim that the 1954 amendment was an unreasonable classification of the industrial land without the necessary access as there was no statutory basis for modifying the requirements of the residential zone so as to make reasonable the classification of the industrial zone.

The court noted that if the 1954 amendment was invalid because of unreasonable classification, it would appear that the residential land, as well as the industrial land, would remain residential. In deciding against Textron, the court delayed any order for compliance with the zoning bylaw so as to allow the town of Braintree an opportunity to determine whether to provide legal access to the land in the industrial zone. See Harrison v. Building Inspector of Braintree, 350 Mass. 559 (1966).

The town of Braintree undertook to rectify the problem of the inaccessibility of the industrial land and amended its zoning bylaw by adding to permitted uses in a residential district the following:

Access or egress ways, public or private, to or from land in any other district; subject to approval by the Board of Appeals, however, on such ways established after the adoption of this amendment.

The intent of the zoning amendment was to validate all existing access roadways which were in violation of the zoning bylaw prior to the adoption of the amendment and require all new access roadways to obtain a special permit from the Zoning Board of Appeals.

Harrison challenged the validity of the zoning amendment, and the Land Court ruled that the zoning amendment was invalid. On appeal, the Massachusetts Supreme Judicial Court found that bylaw provision authorizing the Zoning Board of Appeals to grant a special permit for the use of residentially zoned land for access to land located in another zoning district was valid. However, the court affirmed the Land Court judge's decision that the amendment, insofar as it purported to validate existing access roadways, was invalid as it was arbitrary and discriminatory in its effect on Harrison's land. However, the court pointed out various ways in which the Town could rectify the access problem.

HARRISON V. BRAINTREE
355 Mass. 651 (1969)

Excerpts:

Whittemore, J. ...

We assume that it would not violate the requirement of uniformity for the town to zone for access use residential parcels, already in such use, but to provide that parcels not in such use may thereafter be subjected to access use only with board of appeals approval. The town could determine as to each such existing access parcel, judging in its surroundings

as they existed before illegal use began and applying appropriate criteria, that access use was reasonable. Here, however, there is no suggestion that the town made any such determination. On the contrary, the wording of the amendment and the planning board report indicate that the rezoning was made as to those parcels because the access use over them existed.

The presumption of the validity of legislative action does not enfold within the town's vote all the determinations that might have been made but which it is reasonably to be concluded from the vote and the record were not made. There has therefore been unequal treatment of residential areas near parcels in illegal use in 1966, on the one hand, and areas not near such parcels, on the other hand. We rule, moreover, that the use for industrial access to the extent found by the judge of strips of residentially zoned land on both sides of the petitioners' property is unreasonable as a matter of law.

The town is not in a straitjacket. It may lay out public ways; it may extend its industrial or business areas to public ways if such areas are reasonably laid out in relation to adjacent or nearby residential areas. It may, as we have indicated, allow access use of particular lots, suitable for such use, by specific vote or with consent of the board of appeals.

The issue of the Textron access roadways would be considered in yet another court case. Eventually, however, the problem would be solved when the town accepted the access ways as town ways. See Harrison v. Textron, Inc., 367 Mass. 540 (1975).

Since the first Harrison decision, there have been other cases which have looked at the issue of access roadways and their relationship to local zoning. Richardson v. Zoning Board of Appeals of Framingham, 351 Mass. 375 (1966), dealt with an access way for a forty-four unit apartment house. The access roadway was located on land zoned for single family. An apartment house was not listed as a permitted use in a single family zone. The Zoning Board had determined that the implied intent of the zoning bylaw was to allow access roadways in single family zones. The court overturned the board's decision reasoning that access roadways should be expressly dealt with in the bylaw. The court also noted that other access was available to the apartment building.

In Building Inspector of Dennis v. Harney, 2 Mass. App. Ct. 584 (1974), the court found that the use of land lying within a residential zone as an access roadway for a commercial use located in an unrestricted zone was not authorized by the bylaw. As was the case in Richardson, other access was available to the property.

Sometimes a tract of land will be divided by a municipal boundary so that the land will be subject to different zoning regulations on each side of the municipal boundary line. Town of Chelmsford v. Byrne,

6 Mass. App. Ct. 848 (1978) involved access to property located in the city of Lowell and zoned for industry by means of an access road which was located in a residential zone in the town of Chelmsford. The court held that the principle established in the first Harrison case that an owner of land in an industrial district may not use lots of land in an adjacent residential zone as access roadways for its industrial use is also controlling when districts zoned for different uses lie in different municipalities. However, the access roadway was the only means of access to the industrial land. The court remanded the case to the Superior Court for a determination as to whether the effect of the Chelmsford bylaw was to bar any access to the land located in Lowell for a lawful use.

Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967), also shows the concern of the court as to the availability of access to a split lot when it noted that to construe a bylaw so as to bar any access to land for a lawful use would be arbitrary and invalid. In Lapenas, the court faced a situation where a tract of land consisting of a strip from 14-23 feet wide was located in an area of the city of Brockton which was zoned residential, and the remainder of the parcel was located in the town of Abington and zoned for business. The only access to the business portion of the land was through the residentially zoned strip located in Brockton.

Lapenas sought a variance under the Brockton ordinance for access to a gasoline station for which the building inspector of Abington had issued a permit. The variance was denied by the Zoning Board of Appeals. The court held that the Zoning Board of Appeals' interpretation of the Brockton ordinance was in error and could not be construed as prohibiting access to the land located in Abington. Even though a variance was not considered necessary, the court found that since the land in the residential zone was too narrow to be useable for any permitted purpose, and the commercially zoned land in Abington was without other access, Lapenas was entitled to relief from the literal operation of the Brockton zoning ordinance.

LAPENAS V. ZONING BOARD OF APPEAL OF BROCKTON
352 Mass. 530 (1967)

Excerpts:

Whittemore, J. ...

We recognize that the Abington business area is not part of the Brockton zoning scheme and that, consistently with that scheme, the classification of the plaintiffs' land might have been for other than business use. Reasonable access roadways over the Brockton strip will, however, leave the residential area across North Quincy Street protected by an area free of buildings. We think that Brockton's zoning interests support no more than this.

In the circumstances, the plaintiffs are entitled to relief from the literal operation of the zoning ordinance. In the absence of variances, this might be sought in proceedings under G.L. c. 231A.

In the cases at bar, however, the plaintiffs sought variances. Although, as it turns out, the plaintiffs' rights of access do not depend on variances, it is not inappropriate that the apparent conflict between the imperative need of access to abutting land, zoned for business, and the Brockton ordinance be removed of record in variance proceedings. The plaintiffs do not seek to exempt their Brockton parcels from all residential district restrictions.

SUMMARY:

A zoning bylaw which is comprehensive in nature in that it lists uses which are permitted by right or by special permit, but contains no expressed authorization or prohibition of other uses, effectively prohibits such uses. In other words, a use is not permitted unless expressly dealt with in the bylaw. Building Inspectors and Zoning Boards of Appeals should not assume that a use is permitted by implication when interpreting local zoning bylaws.

The use of land in one zoning district as an access roadway to another zoning district is not permitted unless authorized by the zoning bylaw. Providing for such uses by special permit can avoid future problems. In cases where a split lot has no available access, the reasonableness of the zoning classification will come under question.

Zoning is an ongoing process. Communities, through their Planning Board, should review zoning regulations on a continuous basis to assure clarity as well as reasonable zoning classifications. The story of Tredwell Harrison and access roadways is a good example of the need for continual review of zoning regulations.

Harrison v. Textron, Inc., 367 Mass. 540 (1975) discussed two issues relative to the creation of a public way. The court found that the establishment of a public way would not be held invalid merely because a nearby landowner would be adversely affected by the use of way. The question of whether or not the use of a public way must conform to zoning was also addressed and the court noted that although a municipality is subject to its own zoning regulations, a public way which is laid out by a municipality is not governed by the use restrictions contained in the local zoning bylaw.

There are other circumstances in which a lot may lack frontage or fail to have adequate access which have not been addressed. We must stress that this edition of the Land Use Manager has only reviewed the rather limited issue as to the use of land for access roadways and the availability of access when a lot has been split by a zoning district or municipal boundary line.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

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REDUCING LOT FRONTAGE BY SPECIAL PERMIT

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In Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981,) the court reviewed the procedure that must be followed when creating a substandard building lot which will not meet the minimum frontage requirements of a local zoning bylaw. The court decided that an owner of land who wishes to create a substandard building lot which will have less than the required lot frontage needs to obtain approval from both the Planning Board and the Zoning Board of Appeals.

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The Zoning Board of Appeals must grant a variance from the lot frontage requirements of the zoning bylaw and the Planning Board must waive the frontage requirements of the Subdivision Control Law pursuant to Chapter 41, Section 81R, MGL. The waiver by the Planning Board gives marketability to the lot through recordation and the variance by the Zoning Board of Appeals enables the lot to be built upon for zoning purposes. The waiver and the variance are two separate and distinct approvals which serve different purposes and both are necessary before a building permit can be issued by the Building Inspector. See Land Use Manager, Vol. 1, Edition No. 9, September 1984.

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The Arrigo case should not be read, however, as the only available procedure for creating a building lot which will not meet normal frontage requirements. Some zoning bylaws contain a special permit process whereby a Special Permit Granting Authority is empowered to grant a special permit allowing a building lot to have less than the required lot frontage.

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In Haynes v. Grasso, 353 Mass. 731 (1968), the court reviewed such a zoning bylaw provision which had been adopted by the Town of Needham. The bylaw authorized the Zoning Board of Appeals to grant a special permit reducing the minimum lot frontage requirement after making certain findings which were specified in the bylaw. The Zoning Board of Appeals granted a special permit which reduced the normal frontage requirements for two lots. The approval of the special permit authorized the subdivision of a tract of land into the two lots. One of the questions before the court was whether the division of land authorized by the Zoning Board of Appeals by the granting of the special permit constituted a subdivision within the meaning of the Subdivision Control Law. If it constituted a subdivision, then the division would also require the approval of the Planning Board pursuant to the provisions of the Subdivision Control Law.

HAYNES V. GRASSO
353 Mass. 731 (1968)

Excerpts:

Whittemore, J. ...

The planning board had no jurisdiction There was no subdivision under the subdivision control law. General laws c. 41, s. 81L, as amended by St. 1965, c. 61, provides: "'Subdivision' shall mean the division of a tract of land into two or more lots... provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way ... Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot . . ." The lots on Brookside Road are on a public way. The frontage requirement is met by the granting of the exception [special permit]. This was not a variance from the by-law, but a special application of its terms. ...

The minimum frontage requirement of the Subdivision Control Law is found in Chapter 41, Section 81L, MGL which states that lot frontage is the same as is specified in the local zoning bylaw, or 20 feet in those cases where the local zoning bylaw does not specify a minimum lot frontage. If a zoning bylaw authorizes a reduction in lot frontage by special permit, the Haynes case tells us that if a special permit is granted then that is the lot frontage requirement as specified in the zoning bylaw. If a reduction in a lot's frontage has been approved through a special

permit process then it is not necessary for a landowner to obtain a waiver from the Planning Board pursuant to Chapter 41, Section 81R, MGL. A plan showing such a lot would be entitled to an endorsement that approval under the Subdivision Control Law is not required provided the plan met all other requirements for such an endorsement as stated in Chapter 41, Section 81L, MGL.

If a zoning bylaw does not provide a special permit process for the reduction of lot frontage, then a reduction in lot frontage can only be granted by way of the variance process. If a variance is necessary, then the principle established in the Arrigo case would control which is that the landowner would have to obtain a variance from the Zoning Board of Appeals and a waiver from the Planning Board.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
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Vol. 3, Edition No. 1
January, 1986

SEPARATE LOT PROTECTION: A SECOND LOOK

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In Vol. 1, Edition No. 1, January 1984, of the Land Use Manager, we looked at the issue of separate lot protection.

Chapter 40A, Section 6, MGL, provides the following protection for lots which are held in separate ownership.

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

The imprecise language of the separate lot provision which has caused the most confusion is the requirement that the lot "at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land."

As was discussed in our January, 1984 edition of the Land Use Manager, the Massachusetts Appeals Court first looked at the issue of when a protected lot must be held in separate ownership from adjoining land when it decided Sieber v. Zoning Board of Appeals, Wellfleet, 16 Mass. App. Ct. 901 (1983). The court found that if a lot was in separate ownership prior to the town meeting vote which made the lot nonconforming, then the lot may be built upon for single or two family use. The separate lot provision also requires that the lot:

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- 1). conformed to existing zoning when legally created, if any;
- 2). has at least 5,000 square feet and fifty five feet of frontage; and
- 3). is in an area zoned for single or two-family use.

The Sieber case dealt with a lot which contained an area of 5,600 square feet and had a minimum lot frontage of 80 feet. The lot was first recorded on a plan which was filed in the Registry of Deeds on November 26, 1889. At the time of that recording, the lot was held in common ownership with adjoining land. However, as was evidenced by recorded deeds, the lot had been held in separate ownership from all adjoining land since 1891.

On August 24, 1979, a building permit was issued for the construction of a single family dwelling. At the time of the issuance of the building permit, the zoning bylaw required that a lot have a minimum of 20,000 square feet and a minimum lot frontage of 125 feet. The single family dwelling was substantially completed when an abutter sought enforcement action on the basis that the lot did not meet the minimum area and frontage requirements and that the structure did not meet the current front, rear and side yard requirements of the zoning bylaw. The abutters pursued their administrative remedies which culminated in a decision by the Wellfleet Board of Appeals to the effect that Chapter 40A, Section 6, MGL exempted the lot from the area, frontage and yard requirements of the zoning bylaw. The abutters appealed.

Basically, the issue before the Sieber court was whether a lot could obtain the separate lot protection if it had been held in common ownership with adjoining land at the time the plan, on which the lot first appeared, was recorded.

In opposing the construction of the single family dwelling, the abutters argued that since the lot in question was held in common ownership with adjoining land when the lot was shown on the recorded plan in 1889, it was not entitled to the separate lot protection. The court rejected the abutters' argument and held that the grandfather protection extended to lots which were separately owned prior to the effective date of the zoning change. In establishing whether a lot was separately owned, the court noted that it would be reasonable to look to the effective date of the zoning change from which the exemption was sought. The court reasoned that to interpret the Zoning Act, as suggested by the abutters, to require separate ownership of a lot at the time of the recording or endorsement of a subdivision plan would be to attribute a "Catch-22" mentality to the Legislature's intent. The court also noted that:

There is no point in creating a plan of lots already separately conveyed. To interpret Section 6 to require separate ownership at the time of recording or endorsement of a plan showing more than one lot is to render it meaningless because such a plan by its very nature implies that the lots created thereon are all initially in common ownership and then subsequently deeded to individual owners.

One cannot have separate ownership before the plan because there must be a plan showing the tract of land so divided before lots may be separately deeded and owned. However, if there is such a plan, the separate ownership criteria of Section 6 would never be satisfied, even to subsequent individual lot owners, because initially all lots shown on the plan were commonly owned. The language of Section 6, therefore, becomes a nullity. It is hard to place any reliance on an analysis which results in such a barrenness of result in legislative effort.

While the Massachusetts Appeals Court was deciding Sieber, landowners were battling the Town of Ipswich over the interpretation of the separate lot provision. Eventually, through a roundabout process, their appeal reached the Massachusetts Supreme Judicial Court. The landowners had initially sued the town in Federal court and on appeal, the United States Court of Appeals for the First Circuit requested the Massachusetts Supreme Court to interpret the separate lot provision.

The town of Ipswich had refused to issue building permits on the view that the Massachusetts Appeals Court had incorrectly interpreted the separate lot protection provision of the Zoning Act in the Sieber decision. In deciding Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985), the Massachusetts Supreme Judicial Court interpreted the separate lot provision by responding to three questions which had been posed by the Court of Appeals. The court agreed with the Sieber decision and reached the following conclusions:

- 1). the word "recording" as appearing in the separate lot provision means the recording of any instrument, including a deed;
 - 2). the statute looks to the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought; and
 - 3). a lot meets the statutory requirements of the separate lot provision if the most recent instrument of record prior to a restrictive zoning change reveals that the lot was separately owned, even though a previously recorded subdivision plan may reveal that the lot was at one time part of land held in common ownership.
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SUMMARY:

The Adamowicz and Sieber decisions have ended the confusion relative to the separate lot provision found in Chapter 40A, Section 6, MGL. A lot qualifies for the separate lot protection if it: (1) has at least 5,000 square feet and fifty feet of frontage; (2) is in an area zoned for single or two-family use; (3) conformed to existing zoning when legally created, if any; and (4) is in separate ownership prior to the town meeting vote which made the lot nonconforming.

In reviewing the separate lot protection, much attention is focused on the exemption from future increases in minimum lot area and frontage requirements. It should be noted, however, that the protection afforded separate lots by the Zoning Act also extends to future increases in minimum yard requirements. In deciding Sieber, the court upheld the construction of a single family dwelling on a separate lot which did not meet all the current front, rear and side yard requirements of the zoning bylaw.

All cities and towns are governed by decisions of the Massachusetts Appeals Court. In Adamowicz, the town of Ipswich had refused to issue building permits on the mistaken belief that the town was not governed by decisions of the Massachusetts Appeals Court. In brushing aside the town's argument, the court noted:

It goes without saying that Appeals Court decisions may appropriately be cited as sources of Massachusetts law. An intermediate court... is a maker of law in the same sense as the supreme court. A town or any other person affected by an Appeals Court decision is governed by the Appeals Court decision until and unless either that court or this court declares otherwise (citations omitted).

INVERSE CONDEMNATION BACK BEFORE SUPREME COURT

The Fifth Amendment prohibits governments from taking private property without just compensation. The United States Supreme Court will again look at the question as to when a land use regulation constitutes a taking without just compensation. The issue is whether federal, state or local governments must pay money damages to a landowner whose property has been temporarily taken by the application of government regulations.

This is not the first time that the taking issue has been before the Supreme Court. In 1980, in Agins v. Tiburon, the issue as to a zoning restriction was left undecided because the property owners had not submitted a development plan. In 1981, in San Diego Gas & Electric Co. v. San Diego, the Court refused to address the issue citing procedural reasons. Last June, in Williamson County Regional Planning v. Hamilton Bank of Johnson City, the court failed to resolve the issue when it concluded that the case was not ripe for its consideration.

This spring, the Supreme Court will hear arguments in a case that may finally settle the issue. The case, McDonald et al. v. County of Yolo and City of Davis, involves a group of developers who have been denied local approval for a residential subdivision. The developers' complaint notes that the city has refused to allow the extension of city streets into the property and the County has disapproved the proposed development because of the lack of access. The developers argue that since the land is unsuitable for agriculture, they are left with no feasible economic use of the property. The trial court in California dismissed the developers' suit for compensation and the appellate court affirmed, saying that overburdensome regulation does not give rise to a right of compensation. The California Supreme Court refused to hear the case.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
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GROUP HOMES V. SINGLE FAMILY ZONES

NEIGHBORS KILL HOUSING PROPOSAL

It was clear from the outset that the opposition was both adamant and overwhelming. ... Foxboro Housing Authority learned they had virtually no public support for a proposal to build ... on a 16 acre parcel... two duplex apartments for low to moderate income residents and one duplex apartments for mentally retarded young adults.

Tim O'Leary, ... asked Selectmen and FHA to consider the serious traffic hazards which would be present for the occupants of the proposed housing units.

Carol Ienello said she was concerned with the adverse affect the residents of the mentally retarded duplex might have on her children. "How do I know something isn't going to happen to my children?" ... "Is my child's safety too abstract for them to understand?"

Peter Tetreault ... said the residents of the neighborhood have a right to keep the zoning which was in force when they purchased their homes. "People in that neighborhood bought their homes knowing they would be protected by ... zoning.

Speaking on behalf of a newly formed citizen group called the Precinct Four Association, Richard Kelm read a prepared statement at the hearing. Among other things, Kelm said ... "We do not want any low income or mentally retarded housing in our precinct."

- The Foxboro Reporter, 1/9/86 -

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LAND LIMITS PROPOSED TO BLOCK RETARDED, LOW-INCOME HOMES

Foxboro - Residents opposed to low-income and mentally retarded housing on Walnut Street asked selectmen to help declare part of their neighborhood as conservation land Tuesday.

- The Sun Chronicle, 1/22/86 -

PRECINCT 4 ASSOCIATION SEEKS LAND

The self-titled Precinct Four Association, successful two weeks ago in thwarting a proposal to construct housing for the mentally retarded in its Walnut Street neighborhood, has apparently shifted its focus to making sure nothing at all is built in the neighborhood.

- The Foxboro Reporter, 1/23/86 -

The establishment of a group home in a single family district frequently meets with stiff opposition from neighboring property owners. The above newspaper excerpts illustrate the not uncommon level of opposition by individual landowners against mentally retarded individuals living in or near their neighborhood.

The operation of a group home in a single family zone is a relatively new area of land use regulation. A group home is basically a family-like residence which functions as a single family housekeeping unit. Group homes, such as homes for mentally and physically handicapped persons, attempt to prepare people for independent and productive lives in the community. The rationale behind group home living is to place dependent people in an environment closely resembling life in normal society in order to provide the handicapped person an opportunity to integrate into society.

Despite studies which indicate that such fears are unwarranted, abutting residents often cite concern for safety, property values, traffic and noise as grounds for their resistance. In many instances, the question of zoning compliance becomes an issue which is raised by those who wish to prevent the establishment of a group home. Over the past few years, both the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court have had an opportunity to examine the educational exemption found in the Zoning Act as it related to the operation of a group home. In interpreting the educational exemption of the Zoning Act, the Courts have been more sensitive to the broad issue of providing housing for the mentally retarded than the "not in my neighborhood" attitude of local property owners.

Chapter 40A, Section 3, MGL, presently provides as follows:

No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for ... educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. ...

It has been determined by the courts that the above zoning exemption for educational purposes extends to the operation of a group home. As to the educational character of a group home, it is immaterial whether the facility will care for emotionally disturbed children or emotionally disturbed adults. The courts have specifically expressed that it was not the Legislature's intent to allow communities the authority to exercise its preference as to what kinds of educational uses it will welcome.

The first case that looked at the concept of whether the operation of a group home was of an educational nature so as to be exempt from local zoning requirements was Harbor School, Inc. v. Board of Appeals of Haverhill, 5 Mass. App. Ct. 600 (1977). Harbor Schools is a corporation which operated three facilities devoted to the education and improvement of emotionally disturbed children. They wished to operate a new facility in the City of Haverhill which would be confined to girls ranging in age from five to eighteen years.

However, on an appeal, the Zoning Board of Appeals revoked a building permit which had authorized repairs and changes to a building which Harbor Schools had contemplated using as its new facility. The reason given by the Zoning Board of Appeals for its decision was that the Zoning Enabling Act did not exempt the proposed use of the building from the provisions of the local zoning ordinance. Harbor Schools appealed to Superior Court which held that they were entitled to operate the proposed facility as it was educational in nature and therefore exempt from the provisions of the zoning ordinance.

At the same time that Harbor Schools and the Zoning Board of Appeals were at odds over the issuance of the building permit, six residents brought a complaint against Harbor Schools seeking declaratory and injunctive relief. That case, which raised the same issues as the Zoning Board of Appeals case, was also decided in favor of Harbor Schools. On appeal, both cases were referred to a master and the only question before the Massachusetts Appeals Court was whether the master's report yielded a basis for the judgements that were decided in favor of Harbor Schools.

The master viewed one of the facilities operated by Harbor Schools which was similar to the facility proposed to be operated in the City of Haverhill. He found that Harbor Schools works with emotionally disturbed children with educational and in most instances psychological problems. Each child admitted needs emotional psychiatric adjustment as well as daily educational indoctrination in the basic studies such as english, mathematics and science. Most of the children are so emotionally maladjusted that it is impossible to keep them in any public school facility as they need special attention and individual care. When admitted, each child is given various tests to determine his intellectual capacity, any social problem, his spirit of cooperation and his ability to become involved and socialize with his fellow students. The master also found that the facility operated by Harbor Schools lacked some of the sophisticated and modern equipment found in some public schools but it offered an atmosphere of calm, home life, coupled with educational indoctrination in each case suitable and essential for the children.

In view of the master's report, the Zoning Board of Appeals abandoned its original argument that the proposed use was merely a care facility for children, with a minimal educational aspect and argued that the education supplied to the children was, at the very most, an equal objective with their rehabilitation. However, the court found that "education" and "rehabilitation" do not denote functions so distinct that they are mutually exclusive and continued its long tradition of defining the term "education" in its broadest sense.

HARBOR SCHOOLS, INC. V. BOARD OF APPEALS OF HAVERHILL
5 Mass. App. Ct. 600 (1977)

Excerpts:

Goodman, J. . .

Almost one hundred years ago the Supreme Judicial Court characterized "education" as "as broad and comprehensive term. It has been defined as 'the process of developing and training the powers and capabilities of human beings.' ... Education may be particularly directed to either the mental, moral, or physical powers and faculties but in its broadest and best sense it relates to them all." ...

The definition seems to us still serviceable despite the new jargon (e.g., "rehabilitation," "therapeutic") which has accompanied attempts to create new disciplines. The definition is echoed in Webster's Third New International Dictionary 723 (1971) which gives as one of the definitions of "education": - "the act or process of providing with knowledge, skill, competence, or usu[ally] desirable qualities of behavior or character or of being so provided esp[ecially] by a formal course of study, instruction, or training."

We see nothing inconsistent with educational purpose in the fact that the facility provides live-in accommodations. This is well settled. ... Nor is its purpose any less educational because it is confined to emotionally disturbed children ... Armstrong v. Zoning Board of Appeals, 158 Conn. 158 (1969) (a nonprofit facility "designed for the education of children with mild emotional disturbances and ... utiliz[ing] tutoring, remedial educational and rehabilitative techniques" ... "conforms with an accepted meaning of the word 'school' under 'the broad modern concept of education and within the meaning of the term as it was used in the [zoning] ordinance' " ... Wiltwyck School for Boys, Inc. v. Hill, 11 N.Y. 2d 182, 190, 193 (1962) (an institution for the care and education of emotionally disturbed, delinquent, dependent or neglected boys aged 8 to 12 operated by a private nonprofit corporation is a "school" as that term is defined in a zoning ordinance "despite the fact that the students require special attention"). ...

Judgements affirmed.

Three years later, the Massachusetts Supreme Court would face the issue of whether the use of a residential building for the rehabilitation of formerly institutionalized adults was of an educational nature. The North Central Massachusetts Mental Health Association wished to operate a group home in a single family house owned by the Fitchburg Housing Authority. The proposed facility would care for chronically disturbed adults who would require medical treatment while participating in a training program aimed at developing or learning social and interpersonal skills such as learning to keep themselves physically clean, learning to shop and how to use money, and learning to cook. The basic purpose of the facility was to train the adults so that they would be qualified to live independently by themselves in a community. There would be full-time house managers, whose qualifications would include a bachelor's degree in human services. In selecting personnel, the emphasis would not be on teaching experience or qualifications, but more on social and psychological training and abilities.

The Housing Authority applied for a building permit to convert the single-family home into a community residence. The building official denied the permit and the Housing Authority appealed to the Zoning Board of Appeals. The Housing Authority claimed that the proposed use was authorized since the zoning by-law permitted "Private and Public Schools" and that the Zoning Enabling Act exempted the use from the provisions of the zoning ordinance. The Board of Appeals upheld the denial of the building permit reasoning that the proposed use was not a school. The Board did not address the question as to whether the proposed use was exempt from the provisions of the zoning by-law.

The Housing Authority appealed to the Superior Court where the judge concluded that the proposed facility would not be a school but a medical facility. The judge acknowledged the claim by the Housing Authority that the use was an exempt educational use but did not discuss the question in determining that the group residence would not be a school. A judgement was entered upholding the Board of Appeals' decision. The Housing Authority appealed.

The central question before the Supreme Court was whether the proposed group residence was a use for an "educational purpose" which would be exempted from local zoning restrictions as authorized by the Zoning Enabling Act.

FITCHBURG HOUSING AUTHORITY V. BOARD OF ZONING APPEALS OF FITCHBURG
380 Mass. 869 (1980)

Excerpts:

Wilkins, J. ...

The fact that many of the residents of the facility will have been residents of mental institutions and will be taking prescription drugs does not negate its educational purpose or make its dominant purpose medical. There will be no nurses or doctors regularly in attendance at the facility. There is no indication that the residents will be a threat to themselves or to the public.

The fact that the residents will be adults does not deprive the use of its educational character. ... Nor is it controlling that the nature of what is taught is not within traditional areas of academic instruction or that the instructors will not be certified by the Commonwealth. ...

The present case concerns the issue of what is an educational use in circumstances not as closely related to the fulfillment of traditional educational goals as were the circumstances in the Harbor Schools case. This court, however, has long recognized "education" as "a broad and comprehensive term." Mount Hermon Boys' School v. Gill, 145 Mass. 139, 146 (1887). In the Mount Hermon case, we accepted as a definition of education "the process of developing and training the powers and capabilities of human beings," and embraced the idea that education is the process of preparing persons "for activity and usefulness in life." Id. at 146. The proposed facility would fulfill a significant educational goal in preparing its residents to live by themselves outside the institutional setting. Instruction in the activities of daily living is neither trivial nor unnecessary to these persons. On the contrary, for the prospective residents of the proposed facility to learn or relearn such skills is an important step toward developing their powers and capabilities as human beings. Inculcating a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational process. That is the dominant purpose of the proposed facility.

Similar reasoning guided the court in School Lane Hills, Inc. v. East Hempfield Township Zoning Hearing Bd., 18 Pa. Comm. W. Ct. 519, 525 (1975), where a center for the training of retarded youth to assume a role in society by providing them with industrial skills was held to be "educational in nature" under a local zoning ordinance. The court said that "[w]hile such skills may appear simplistic to a 'normal' person, their assimilation nonetheless represents a great improvement in the normal human condition of the trainees. The nature of the Child Development Center is no less educational than that of the most demanding university." Id, at 524. Past and continuing emotional or psychiatric problems may determine the character of the training furnished to residents of the proposed facility, but they do not mark the facility as "medical" or render it any less educational. The judgement is reversed. Judgement shall be entered declaring that the proposed use is a public educational use that may not be barred under the Fitchburg zoning ordinance and that a permit to use the premises may not be denied to the Association and the Housing Authority on the ground that the proposed use is not permitted as a matter of law.

So ordered.

SUMMARY

A local zoning by law cannot prohibit the use of land for educational purposes which are protected by the provisions of Chapter 40A, Section 3, MGL. Educational uses which are protected by the Zoning Act can be required to obtain a special permit from a special permit granting authority. However, a community may impose reasonable regulations concerning bulk, dimensional and parking requirements. See Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19 (1979).

Examples of zoning requirements which would not be applicable to qualified group homes would be a restrictive definition of "family" or group residence provisions. The courts have given a broad zoning protection for group homes on land owned or leased by the Commonwealth or any of its agencies, subdivisions or bodies politic, by a religious sect or denomination, or by a non-profit educational corporation.

Although the court decisions protect group homes for the mentally handicapped from restrictive zoning requirements, the opposition by neighboring property owners will, in many cases, continue to prevent such homes from being located within a community. From a land use perspective, the following suggestion represents an approach which communities should consider when addressing the need for providing such housing.

Perhaps, instead of instantly seeking to thwart plans for such housing, we could pause a moment to ascertain just how pressing a need there is. Then, instead of forming a group to oppose the offering, we could more creatively seek a means of taking advantage of the opportunity offered in a manner which would be acceptable to the community. There are unlimited opportunities for compromise, and no reason why we cannot benefit from the housing without posing a problem for a particular neighborhood.

Jack Authelet, Managing Editor
Foxboro Reporter

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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OPEN MEETINGS

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Over the years, we have been made aware of a number of instances where local municipal boards or board members have conducted meetings in conflict with the provisions of the Open Meeting Law. For example, we have heard that members of local boards have voted on specific issues by means of a telephone. Such a procedure is not a well advised course to follow as part of a local board's decision making process.

Upon being elected or appointed to a Planning Board or Zoning Board of Appeals, each member is given a copy of the Open Meeting Law. Every board member should understand the basic necessity for conducting open meetings. Decisions made by a Planning Board or Zoning Board of Appeals affect the property rights of landowners within their municipality. Therefore, to ensure full public acceptance as well as meet various legal requirements, the powers of a Planning Board and Zoning Board of Appeals must be exercised at open public meetings where each board member announces his or her vote, which is duly recorded by the clerk.

The Open Meeting Law exposes the decision making process of a Planning Board and Zoning Board of Appeals to the scrutiny of the public and the press in order to increase the opportunities for citizen knowledge and participation and to avoid the innuendos which sometimes arise after closed-door meetings. As a member of a Planning Board or Zoning Board of Appeals, it is important that you are aware of the provisions of Chapter 39, Sections 23A-24, MGL (Open Meeting Law), which governs the activities of all boards, commissions, committees and sub-committees in a city or town.

The basic framework of the Open Meeting Law is that, every meeting of a local board must be posted in advance and the meeting as well as an accurate record of it must be open to the public and press, and no secret or written votes are permitted. A meeting is defined in Section 23A as:

Any corporal convening and deliberation of a local board for which a quorum is required in order to make a decision at which any public business or public policy matter over which the local board has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

Public officials, however, might be unduly hampered in the performance of their duties if all meetings of their board were to be open to the public. Thus, one feature of the Open Meeting Law allows for executive sessions in certain circumstances. An executive session is a meeting of a local board which is closed to certain persons for deliberation on certain matters. An executive session may only be held for one of the purposes expressly set forth in Section 23B of the Open Meeting Law.

A Planning Board or Zoning Board of Appeals are rarely placed in a position which would allow them to conduct an executive session. For a more detailed explanation of the procedure and type of meeting which may be closed to the public, please refer to Section 23B. In short, however, a local board may call an executive session for the following purposes:

1. To discuss the reputation, character, physical condition or mental rather than the professional competence of an individual.
2. To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual.

3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the local board, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

4. To discuss the deployment of security personnel or devices.

5. To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

6. To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the local board and a person, firm or corporation.

7. To comply with the provisions of any general or special law or federal grant -in-aid requirements.

Chapter 39, Section 24, MGL, specifies that the provisions of the Open Meeting Law shall be in force only so far as they are not inconsistent with the express provisions of a general or special law. The City of Newburyport argued before the Massachusetts Appeals Court that the legislative mandate that meetings of a local board should be open to the public did not apply to a Zoning Board of Appeals as the provisions of the Open Meeting Law were inconsistent with the provisions of the Zoning Act.

The Zoning Board of Appeals of Newburyport gave notice and held a public hearing on a petition for a special permit to construct residential condominiums. The hearing was conducted on July 10, 1979, at the city hall and for approximately two hours the public spoke for and against the petition. The Board adjourned and its members proceeded to another room in the city hall where, as was their usual practice, the Board deliberated and voted in the absence of the public. This session lasted about twenty minutes and concluded with the Board voting to grant the special permit. The Board did not take minutes of this meeting nor did they take a roll call vote. The members of the Board signed their written decision on July 19, 1979, and filed their decision with the city clerk on July 23, 1979.

Four registered voters in the City of Newburyport brought an action in Superior Court seeking to invalidate the Board's decision. They contended that the Board of Appeals failed to comply with the provisions of the Open Meeting Law. The judge in Superior Court concluded that the requirements of the Open Meeting Law were inconsistent with the provisions of the Zoning Act and therefore the requirements of the Open Meeting Law were not applicable to a Zoning Board of Appeals. The voters appealed and the Massachusetts Appeals Court reversed the Superior Court decision.

YARO V. BOARD OF APPEALS OF NEWBURYPORT
10 Mass. App. Ct. 587 (1980)

Excerpts:

Perretta, J. ...

Section 23B requires that "[a]ll meetings of a governmental body shall be open to the public," and this legislative mandate applies to a zoning board of appeals. ... When, on July 10, 1979, the board adjourned the public meeting to convene privately, it did so for purposes of deliberating and voting on the petition, and this session was a meeting of the board held in violation of Section 23B. Moreover, it was an executive session which was convened for an improper purpose and in an improper manner

The board would not be bound to follow [the] requirements of Section 23B if to do so would be inconsistent with its obligation under other statutes. General Laws, c. 39, s. 24, states in relevant part that "[t]he provisions of this chapter [the Open Meeting Law] shall be in force only so far as they are not inconsistent with the express provisions of any general or special law." The board argues that Section 23B conflicts with c. 40A, Sections 11 and 15. ...

Section 11 relates to public hearings and notice of them, and Section 15 pertains to the manner by which appeals are taken to permit granting authorities. ... "[T]he essential and dominating design of any zoning law... is to stabilize property uses in the specified districts in the interests of the public health and safety and the general welfare, and not to permit changes, exceptions or relaxations except after such full notice as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair representation and consideration of all aspects of the proposed modification. This is not a technical requirement difficult of performance by the unwary. It is dictated by common sense for protection of an established neighborhood to be subject to change only after fair notice." This design is complemented and expanded, not contradicted, by Section 23B. "The open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." ...

Notwithstanding the express language of the open meeting law and the harmony in purpose between c. 40A, Sections 11 and 15, and c. 39, s. 23B, the board argues that the statutes are inconsistent because the Legislature did not intend that a zoning board of appeals "deliberate and write their decision in the public arena." This is an overstatement of the possible impact of Section 23B upon hearings, deliberations and decisions by zoning boards of appeals. Section 15 mandates public hearings in the first instance; Section 23B mandates that the board deliberate and arrive at its decision under public observation.

This mandate includes neither public verbal participation during the board's deliberations, nor the writing of a final decision under public scrutiny. Sections 23A and 23B do not require a board to hold a public hearing for purpose of reducing to writing a decision reached at a meeting which was open to the public and where accurate records of the meeting are kept and the substance of the decision was made known to the public. ...

Accordingly, the judgement is reversed and the matter is remanded to the Superior Court for further proceedings.

SUMMARY:

Any session at which information, evidence or testimony is present to a Zoning Board of Appeals or Planning Board must be an open meeting. A Zoning Board of Appeals and Planning Board must comply with the provisions of the Open Meeting Law. A good rule to remember is that no board can get into procedural trouble by conducting public meetings in compliance with the Open Meeting Law on all of its official considerations and determinations.

Except in the case of emergencies, a notice of every meeting of a local board must be filed with the city or town clerk at least 48 hours prior to the meeting. Also, the notice must be publicly posted in the clerk's office or on the principal official bulletin board at least 48 hours prior to the meeting. Saturdays, but not Sundays or legal holidays, are counted in the 48 hour period.

A local governmental body may call an executive session and close the meeting to the public if (1.) it has first convened in an open session for which notice has been given, (2.) a majority of the members formally votes to go into executive session, (3.) the presiding officer announces the purpose of such session, and (4.) prior to the closed session, the presiding officer states whether the body will reconvene after the executive session.

If two board members have lunch together, have they met in violation of the Open Meeting Law? No. The requirements of the Open Meeting Law do not apply to a chance meeting or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. Also, meetings for the purposes of the Open Meeting Law do not include any on-site inspections of any project or program.

A Planning Board must meet when denying or endorsing an "approval not required" plan. See Kelley v. Planning Board of Dennis, 6 Mass. App. Ct. 24 (1978), where Planning Board denied endorsement of "approval not required" on a plan without affording parties adequate notice.

In J. & C. Homes, Inc. v. Planning Board of Groton, 8 Mass. App. Ct. 123, (1979), the Planning Board violated the Opening Meeting Law, whereby they approved a definitive plan subject to certain conditions which were not made known to the developer or members of the public at a public meeting. The Planning Board approved the plan then met in private to determine what conditions they would impose on the developer.

A "Governmental Body" as defined in the Open Meeting Law includes a subcommittee of any board, commission or committee of a city or town. See Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, (1984), where a subcommittee of a town's conservation commission making factual investigations and reporting its findings and recommendations to the full membership of the Conservation Commission was required to hold open meetings, give notice of its meetings and maintain accurate records.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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THE MERGING OF SUBSTANDARD LOTS

(Part I)

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MANAGER

One of the more complicated issues in zoning involves the question of whether a landowner can build on an existing residential lot which was legal when created but which has become substandard due to an increase in minimum lot area or lot frontage requirements. How to determine when a substandard lot meets the separate lot requirements of the Zoning Act is a troublesome aspect of land use regulation for many local officials. Most of the difficulty centers on the issue as to when adjoining parcels must be combined and treated as one lot for zoning purposes.

This and the next few issues of the Land Use Manager will make some observations concerning the so-called separate lot protection provision of the Zoning Act, Chapter 40A, Section 6, MGL. We have thought at attempting to set down a comprehensive explanation of the various grandfather protections afforded certain lots by the Zoning Act, but the explanation would turn out to be so long and complicated than the law itself that it would hardly be worthwhile. However, a closer look at the separate lot protection, taken up in successive editions of the Land Use Manager, may convey a better understanding as to some of the general issues concerning the grandfathering of building lots.

Historically, the story of land use regulation in Massachusetts has been one of those living in a municipality at any given time, attempting to limit the number of people who might follow them by increasing the minimum lot area and lot frontage requirements for single family residential use. The power to

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regulate property under zoning regulations is a branch of the police power. The extent of the exercise of this police power and its limitations have long been settled in the Commonwealth. In general, where it can be shown that the application of a bylaw to a particular parcel of land or to a specific use of the land, in a situation where the imposition of the zoning regulation has no real or substantial relationship to a valid zoning purpose but would amount to an arbitrary, unreasonable, and oppressive deprivation of the landowner's interest in his private property, then the application of the regulation will be held invalid.

It has also been well settled that a municipality may not destroy the economic value of an isolated lot by adopting a zoning bylaw prescribing minimum lot size or lot frontage requirements which would prohibit the erection of a single family dwelling on the isolated lot unless relief is available to such a substandard lot. A New York Court best summarized the necessity of grandfathering when, in discussing the adoption of minimum lot requirements by a municipality, it stated that:

. . . it does so with at least constructive notice of the existence therein of every substandard parcel held in single, separate ownership. It is under an absolute duty to make adequate provisions for such parcels . . . it cannot render them useless . . . the municipality is bound to compensate the owner if it proposes in the public interest, to bar his property from any practical use . . . Any complete sterilization of private property by legislative fiat without compensation to the owner is confiscatory and violative of the Fifth Amendment of the United States Constitution.

Long Island Land Research Bureau v. Young, 159 N.Y.S.2d 414 (1957)

A sampling of Court decisions in other jurisdictions which have reached a similar conclusion include:

1. Florida, Miami Shores v. Village of Ellis, 53 So.2d 324 (1951) (When application of the Zoning Act "reduces to nothing any legitimate construction by the appellee on his 50-foot lot . . . the zero mark is thus reached, it follows that the owner's constitutional guarantees are being invaded . . .")
2. California, Morris v. Los Angeles, 254 P.2d 935 (1953) (Prohibition in an old settled district of the division of a lot with 2 houses into 2 nonconforming lots which did not have 5000 S.F. of area as required by zoning was oppressive on the property owner and accomplished little good.)
3. Michigan, Robyns v. Dearborn, 67 N.W.2d 718 (1954) (Where requirements of an ordinance with respect to area, width, and yards cannot be complied with so as to permit construction of usable residences on 8 separately owned lots such ordinance is unreasonable and confiscatory.)

4. Georgia, Hill v. Busbia, 125 S.E.2d 34 (1962)
(Although zoning required compliance with setback and area requirements it would destroy all uses and constitute a taking without compensation to construe the ordinance to prohibit construction of a residence on a record lot which cannot meet setback and area requirements.)
5. Connecticut, Lessner v. Zoning Bd. of Appeals, 195 A.2d 437 (1963)
(Where application of dimensional requirements to an undersized lot practically destroys its value for construction of a dwelling and where other undersized lots within the subdivision already have dwellings located on them, the application of zoning to such individually owned property would be confiscatory and oppressive and thus a variance was warranted.)
6. New Hampshire, R.A. Vachon & Son, Inc. v. Concord, 289 A.2d 646 (1972)
(Increased zoning requirements are invalid as to lots which at the time of adoption of the requirements are substandard, if the application of the new requirements would render the lots completely valueless.)
7. Illinois, Hyndiuk v. Chicago, 304 N.E.2d 6 (1973)
(Provisions requiring 5000 S.F. of area for construction of a residence were unconstitutional as applied to a lot approximately 3,120 S.F. where the lot owner would lose his entire investment while the only public benefit would be enforcement of dimensional requirements which were much greater than those required for existing improvements.)
8. Colorado, Landmark Universal, Inc. v. Pitkin County Board of Adjustment, 579 P.2d 1184 (1978) (A zoning ordinance is unconstitutional as applied to property if the owner can show that the zoning ordinance precludes the use of the property for any reasonable use.)

In recognition of the doubtful validity of certain zoning restrictions as applied to lots which would become substandard due to the passage of a zoning bylaw, the Zoning Act specifically exempts certain residential lots which do not meet the required area, frontage or yard requirements of a bylaw. As to substandard separate lots, Chapter 40A, Section 6, MGL, presently provides that:

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or bylaw shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

Municipalities, when enforcing their local zoning bylaws, are governed by the above noted grandfather provision found in Section 6 of the Zoning Act. A common misconception relative to this provision is that a local bylaw cannot provide relief for the owner of a substandard lot. This is not so. A municipality can also enact a zoning protection for substandard lots in addition to the protection already afforded certain substandard lots by the state Zoning Act.

For example, in Gaudet v. Building Inspection of Dracut, 358 Mass. 797 (1970), six contiguous lots containing an area of 10,280 square feet were located in a residential zone which required a minimum lot area of 22,000 square feet. The local zoning bylaw provided that the minimum area requirements would not apply to a lot "lawfully laid out and duly recorded by plan or deed prior to the effective date of the bylaw." The Court held that the owner could treat the six contiguous lots as a single lot for the purpose of the zoning bylaw and noted that the owner of the six lots had the benefit of the exemption provided in the bylaw as well as the exemption found in the Zoning Enabling Act for lots having a minimum of 5,000 square feet and 50 feet of frontage. (See Ch. 40A, S.5A, as amended through St. 1961, c.435, s.1).

Although many decisions regarding substandard lots have been concerned with the interpretation or application of a local bylaw provision exempting certain lots from zoning requirements, similar to the provision found in Gaudet, such decisions have been of great benefit in helping to understand the separate lot provision of the Zoning Act. To summarize, the decisions have interpreted the separate lot protection of the Zoning Act as grandfathering substandard building lots in single and separate ownership and, when appropriate, requiring the merger of adjoining parcels so as to make such lots conforming or, at least less substandard. That is an impressive sounding summary but what does it all mean? Let's take a closer look.

One of the criteria found in the Zoning Act which must be satisfied in order to qualify for the separate lot protection is that the lot cannot adjoin other land. One of the issues in Sturges v. Chilmark, 380 Mass. 246 (1980), was whether two lots which came together only at a point were adjoining lots within the meaning of the separate lot protection found in Chapter 40A, Section 6, MGL. The Town argued that the two lots were adjoining and not entitled to the Section 6 exemption. The Court did not agree.

The meaning of the word "adjoining" must be arrived at by consideration of the legislative purpose of S.6. The word may have different meanings in different contexts. In Sherer v. Trowbridge, 135 Mass. 500, 502 (1883), we noted that a lot might be adjoining another if it had a common boundary only "part way" along the second lot. Section 6 is concerned with protecting a once valid lot from being rendered unbuildable for residential purposes, assuming the lot meets modest minimum area (at 5,000 square feet) and frontage (at least fifty feet) requirements.

(more)

Requirements of area and frontage, as well as set-back requirements from lot boundaries, are designed to assure a reasonable spacing of dwelling houses. Joining two lots which meet only at a point cannot provide greater connected frontage for either lot, nor can it furnish any additional area accessible from one lot to the other for water supply or sewage disposal purposes, for example. Practical considerations thus support our conclusion that S.6 was not intended to restrict residential use of two otherwise qualifying adjacent lots which meet only at one point.

However, if two lots adjoin each other for such a distance so that either lot can be used for any reasonable purpose with the other, they are considered adjoining for the purposes of the Section 6 exemption. In Clark v. Zoning Board of Appeals of Nahant, 338 Mass. 473 (1959), the Court considered a zoning bylaw which required a minimum lot area of 10,000 square feet but contained a grandfather provision that the 10,000 square foot requirement would not apply if it prevented the construction or placing of a building on a lot containing a smaller area if the lot on the effective date of the zoning bylaw did not "adjoin other land of the same owner available for use in connection with said lot."

There was no question that the two lots were under common ownership. However, the Court had to decide whether the adjoining parcels on the date the zoning bylaw took effect were available for use by the owner of both lots. The two lots adjoined each other for about 13 feet. The lots abutted on different ways, were separated by a substantial stone wall and were at different elevations to give the appearance that the parcels were separate lots.

The Court found that the differences in elevation did not preclude pedestrian travel and if a driveway was constructed, vehicular travel would be available between the two lots. The Court interpreted the term "available for use" as meaning a use for any reasonable purpose.

Each lot abuts on a way or street. The term "available for use" employed in the bylaw we construe as meaning "susceptible of use for any reasonable purpose." The term would include accessory use of one lot in connection with the other as well as the use of a part of each lot to support a single dwelling. It is obvious that No. 289 could be used by the owner of lot No. 19 for an accessory garage, shed, garden, or yard. Under the circumstances, the proviso in the 1940 amendment, . . . would prevent granting a building permit to the plaintiff.

With this background information in mind, in next month's issue of the Land Use Manager, we will look at the issue of separate lots held in common ownership prior to the zoning change.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Volume 3, Edition 5
July, 1986

THE MERGING OF SUBSTANDARD LOTS (Part II)

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In last month's edition of the Land Use Manager, Vol. 3, Edition No. 4, June, 1986, we looked at the necessity of protecting isolated single family building lots from increases in lot area, frontage and yard requirements. We also discussed the issue of when lots are considered adjoining for the purposes of the separate lot protection provision of the Zoning Act, the fourth paragraph, first sentence of Chapter 40A, Section 6, MGL. With this general information in mind, we will now look at how the Courts have treated substandard single family building lots which were held by the same owner at the time of the increased zoning requirements.

The Section 6 grandfather clause protects a lot which was recorded or endorsed prior to the effective date of the bylaw if it is a single lot and in separate ownership as of that date. If a landowner owns an adjoining lot, he is not entitled to the grandfather protection for both lots. Rather, the two lots are combined to form one lot which will meet, or more closely approximate the area and frontage requirements of the bylaw.

Generally, the concept that separately described adjoining lots are not single and in separate ownership has been based on a zoning bylaw's definition of the word "lot" which usually has ignored the manner in which the components of a total area have been assembled and has concentrated instead on the question of whether the sum of the components meets the require-

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ments of the bylaw. Vetter v. Zoning Board of Appeals of Attleboro, 330 Mass. 628 (1953), was one of the earlier Court decisions which expressed the theory that adjoining substandard lots are combined so as to meet the minimum requirements of the bylaw. In 1942, Attleboro adopted an ordinance requiring that each dwelling be located on a lot of at least 12,000 square feet. However, the ordinance also contained the following grandfather provision which exempted certain lots from the lot area requirement.

Nothing ... shall prevent the erection or placing of any building on any lot . . . containing a smaller area, provided such lot on the effective date hereof does not adjoin other land of the same owner available for use in connection with said lot.

At the time the ordinance took effect, Vetter owned a tract of land composed of two lots with each lot containing slightly more than 6,000 square feet. Vetter had acquired the lots at different times from different sources and argued that he should have the benefit of the grandfather protection adopted by the City as he had two separate lots on the effective date of the ordinance as shown on the assessors' plans.

The Court found that the intent of the grandfather provision, though obscurely expressed, was to save a person who, at the time the ordinance took effect, had a vacant tract of land containing a total area of less than 12,000 square feet from the hardship of not being able to use it at all for residence purposes. In deciding that Vetter only had one lot, the Court noted that nothing in the zoning ordinance suggested that lots for the purpose of the zoning protection were to be determined by assessors' plans, assessments or sources of title. See also Smigliani v. Board of Appeals of Saugus, 348 Mass. 767 (1965); Giovanni v. Zoning Board of Appeals of Plainville, 4 Mass. App. Ct. 239 (1976); Heald v. Zoning Board of Appeals of Greenfield, 7 Mass. App. Ct. 286 (1976).

Later, in Vassalotti v. Zoning Board of Appeals of Sudbury, 348 Mass. 658 (1965), the same result would be reached in a situation where three substandard lots, when combined, could not meet the minimum lot area requirements of the bylaw. Again, the Court treated the adjoining lots as one building lot for zoning purposes.

What happened in Vassalotti was that prior to the adoption of a zoning bylaw, a plan was recorded at the registry of deeds showing numerous lots with each lot having an area of about 2,500 square feet and a street frontage of about 25 feet. In 1932, three contiguous lots shown on such plan were conveyed by a single deed and at a later date the same three lots were subsequently conveyed to Vassalotti.

The Town, in 1939, enacted a comprehensive zoning bylaw which required a minimum lot area of 40,000 square feet and a minimum lot frontage of 180 feet. The zoning bylaw also contained a grandfather provision which allowed the erection of a dwelling on a lot having less than the required area or frontage if the lot was "shown on a plan or deed recorded" at the registry of deeds and complied with the zoning at the date of the recording.

In deciding the case, the Court treated the three contiguous lots as one lot and found that Vassaloti could erect a dwelling as he had one lot which was not only protected by the grandfather provision of the zoning bylaw but was also protected by the provisions found in the State Zoning Enabling Act which grandfathered certain separately owned substandard building lots. See Ch. 40A, S. 5A, (as amended by St. 1961, c. 455 s. 1).

The same conclusion was also reached in Charter v. Zoning Board of Appeals of Milton, 348 Mass. 237 (1964), where the Court noted that if other adjacent land of the same owner was available it must be added to the recorded lot and that lot so enlarged could then be used for a dwelling even though it still was undersized. For the same proposition, also see Girard v. Zoning Board of Appeals of Easton, 14 Mass. App. Ct. 334 (1982).

The Court again faced the single and separate ownership question in Heald v. Zoning Board of Appeals of Greenfield, 7 Mass. App. Ct. 286 (1979). Although this case was concerned as to whether a certain tract of land could be used for a commercial purpose, the Court, in Heald, summarized past decisions which had dealt with the status of adjoining substandard lots held in common ownership at the time of the enactment of the zoning requirement. Greenfield had first adopted a zoning bylaw in 1957 which defined a lot as "a piece or parcel of land occupied or to be occupied by one main building and its accessory buildings." At the time of the zoning change, three lots were held in common ownership although each lot had been described separately. Heald had applied for a building permit to construct a fast food restaurant on the three lots. The Building Inspector refused the building permit and the Zoning Board of Appeals upheld the Building Inspector's denial. A Superior Court judge annulled the decision of the Board.

The issue before the Court was whether the definition of lot, as contained in the zoning bylaw, should mean a lot as described in a deed, record plan, or other source of title, or should mean contiguous lots held in common ownership. The Court again found that the definition of "lot" allows an owner of contiguous parcels which were conveyed separately to treat them as one lot for zoning purposes. Since the three lots, when combined, would meet the requirements for a building lot for the restaurant, Heald was entitled to a building permit. It should be noted, that in deciding Heald, none of the cases cited by the Court dealt with a situation where common ownership of adjoining land occurred after the legislative action.

HEALD V. ZONING BOARD OF APPEALS OF GREENFIELD
7 Mass. App. Ct. 286 (1979)

Excerpts:

Kass, J. ...

Even before the advent of zoning laws, our courts have held that where contiguous parcels were conveyed as separate parcels, or designated as such on recorded plans, the whole tract constituted one "lot" of land for purposes of determining to what a mechanic's lien might attach. ... In the absence of specific zoning code provisions defining a "lot" in terms of sources of title or assessors' plans, the Supreme Judicial Court has consistently held that adjoining parcels may and, indeed, in certain instances, must be considered one lot for zoning purposes. ... we have had occasion to say that "[t]he usual construction of the word 'lot' in a zoning context ignores the manner in which the components of a total given area have been assembled and concentrates instead on the question whether the sum of the components meets the requirements of the by-law." ... Changing patterns of land use frequently require land assembly and realignment of historic lot lines. Garden apartments, office and industrial parks, supermarkets, and shopping centers are among examples of contemporary uses of land which are likely to involve land assembly. It would be a peculiarly restrictive zoning code which tied owners to descriptions of record. Nor does the rule cut only in favor of assembly. By its application, owners of adjoining record lots have been prevented from artificially dividing them so as to restore old record boundaries for the sake of availing themselves of the grandfather provisions of G.L. c. 40A, s. 6 (inserted by St. 1975, c. 808, s.3, and appearing as s. 5A of the previous zoning enabling act).

The defendants have also argued that since at all times material, parcels 1,2, and 3 were separately assessed, and at values suggesting residential use, this assessment history determines their status for zoning purposes. At best, assessment practices serve only as "some indication of the status of the property." ... Nothing in G.L. c. 40A substitutes the board of assessors for the zoning administrator or board of appeals of a municipality as the administrator of its zoning code.

Conveyancing maneuvers so as to protect a residential lot from all future zoning changes has not produced favorable consideration. For example, "Checkerboarding" is a device whereby an owner conveys title to lots in a subdivision to related persons in such a manner so that no adjoining lots are owned by the same person. The Court has viewed such a scheme as a "transparently ineffective attempt to defeat" lot combination provisions. Lee v. Board of Appeals of Harwich, 11 Mass. App. Ct. 148 (1981).

In Sorenti v. Zoning Board of Appeals of Wellesley, 345 Mass. 348 (1963), a conveyance of a lot to a straw prior to the zoning change did not accomplish the desired result for the landowner. A parcel was subdivided into three lots whereby Lot 1 had a frontage of 100 feet on Oak Street and Lots 2 and 3 each had frontage of 9.9 feet on the same street. On June 20, 1951, Sorenti, who owned all three lots, sold Lot 1. On the same day, he also conveyed Lot 2 to Joyce Webber, who was a straw title-holder for Sorenti. The next day, the Town amended its zoning by-law so as to require a minimum lot frontage of 40 feet. However, the Town also enacted a grandfather provision from the frontage requirement which provided:

This requirement shall not apply to any lot having a frontage of less than 40 feet, if such lot on June 21, 1951, does not adjoin other land of the same owner available for use in connection with said lot,

On September 23, 1954, a building permit was issued for a house and garage on Lot 2. On June 22, 1956, Lot 2 was reconveyed to Sorenti by Webber, the straw, and on the same day Sorenti conveyed Lot 2 to Covati. On August 24, 1960, Sorenti was denied a building permit on Lot 3 on the basis that the lot did not meet the 40 foot frontage requirement of the bylaw. The Zoning Board of Appeals upheld the Building Inspector's denial of the building permit.

A Superior Court judge found that the 40 foot frontage requirement of the bylaw applied to Lot 3 and that Sorenti was not entitled to a building permit because Lot 3 was not protected by the grandfather provision. The Judge reached this decision by concluding that on June 21, 1951, when the 40 foot frontage requirement became effective, Lot 3 adjoined Lot 2 which was available for use in connection with Lot 3 because, at that time, Lot 2 was merely being held by Webber, the straw, for the benefit of Sorenti. The Court agreed.

We now proceed to an analysis of the amended s.9-C of the by-law. This section requires that there shall be provided for each lot upon which a building or structure is erected or placed a frontage of not less than 40 feet. The section specifically exempts from the frontage requirement "any lot having a frontage of less than 40 feet, if such lot on June 21, 1951, does not adjoin other land of the same owner available for use in connection with said lot."

The obvious purpose of the quoted provision is to make the frontage requirement inapplicable to lots which were nonconforming at the time the amendment became effective. The nonconforming exemption was not to apply, however, when the lot owner had adjoining land available for use in satisfying the minimum frontage requirement. The rationale of such a provision is that an owner who has or has had adjacent land has it within his power, by adding such land to the substandard lot, to comply with frontage requirement, or, at least, to make the frontage less substandard. ... In other words, the owner cannot avail himself of the nonconforming exemption unless he includes his adjacent land in order to minimize the nonconformity. Otherwise, in a situation like the present, an owner who owned adjacent lots with frontages of 19 feet and 20 feet, respectively, would have greater building rights than the owner of a single lot with a frontage of 39 feet.

The judge specifically found that on June 21, 1951, the plaintiff had adjoining land which was available for use in connection with lot 3. Therefore, after the passage of the amendment, the plaintiff had a right to only one building permit for lots 2 and 3 if he relied on his Oak Street frontage. The building of the dwelling on lot 2 exhausted his right to build structures on the basis of the Oak Street frontage. This construction is implicit in the decision of the court below, and we are of opinion that it was right.

AUTHOR'S NOTE:

This Land Use Manager is the second of three consecutive editions dealing with the merging of substandard lots. Next month's edition will look at the issue of a separate lot which comes into common ownership with an adjoining lot after the date of the zoning change.

DEFINITION OF FAMILY HELD INVALID

The Supreme Court of Michigan has held that a zoning ordinance limiting occupancy of single family dwellings to two or more persons related by blood, marriage or adoption, and not more than one other unrelated person, violates the due process clause of the state constitution. Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (1984).

The Michigan Court found that the ordinance was valid under federal constitutional law, see Village of Belle Terre v. Boraas, 416 U.S.1 (1974), but held that the distinction between biological and functional families for purposes of preserving family values is irrational and unconstitutional under state law.

Michigan becomes the fourth state, after New Jersey, California and New York, to hold that state constitutional law forbids the imposition of relational requirements when defining family for zoning purposes. See Berger v. State, 364 A.2d 993 (1976); City of Santa Barbara v. Adamson, 610 P.2d 436 (1980); McMinn v. Town of Oyster Bay, 488 N.E. 2d 1240 (1985).

SIGN BYLAW VIOLATES FIRST AMENDMENT

A Needham bylaw prohibiting the posting of political signs on residential property was invalidated by a Federal District Court. The District Court decision was later affirmed by the Federal Court of Appeals. Matthews v. Town of Needham, 596 F. Supp. 932 (D. Mass. 1984).

The bylaw permitted the posting in residential districts of real estate "For Sale" signs, construction and development signs, and temporary signs promoting charitable and religious causes, but prohibited the display of all other signs. The Court ruled that the bylaw discriminated against residential property owners' First Amendment right to freedom of speech and improperly granted commercial speech greater constitutional protection than non-commercial speech.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
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August, 1986

THE MERGING OF SUBSTANDARD LOTS (Part III)

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MANAGER

This month's Land Use Manager is the last edition of a three part series concerning the issue of when substandard building lots must be combined to form one lot which will meet or more closely approximate the minimum lot area and frontage requirements of a local zoning bylaw.

All the court cases cited in last month's issue of the Land Use Manager (See Vol. 3, Edition No. 5, July, 1986) dealt with a situation where the lot or lots in question were held in common ownership with adjoining parcels at the time of the increased zoning requirements. It is clear, that in such circumstances, adjoining lots are treated as one lot for the purposes of the single and two family separate lot protection provision of the Zoning Act. See Ch. 40A, S.6, MGL, fourth paragraph, first sentence. What had been noted but not discussed by the Court was the status of a lot which at the time of the zoning change was a single lot held in separate ownership, but after the effective date of the zoning change the isolated lot is conveyed to an individual who happens to own the adjacent lot. See Vassalotti v. Board of Appeals of Sudbury, 348 Mass. 658, 661 (1965).

Lindsay v. Board of Appeals of Milton, 362 Mass, 126 (1972), is the first case since Vassalotti which at least dealt with a situation where a separate lot lost its grandfather protection, due to a conveyance, after the effective date of the zoning change. In Lindsay, the zoning bylaw had defined a lot as "a single area of land ... [laid out] by metes [and] bounds ... in a recorded deed

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or on a recorded plan." The bylaw also provided that a dwelling could be erected on a lot containing less than the required minimum lot area and lot frontage if the lot was "recorded at the time of the adoption of [the] bylaw", which was January 29, 1938.

Two adjoining lots which were shown on a recorded 1903 plan first came under common ownership in 1920 when Carrie Murdock, the owner of Lot 1 since 1910, acquired title to Lot 2. The 1910 and 1920 deeds, both duly recorded, described each lot by metes and bounds according to the 1903 plan. In 1945, Murdock transferred title to the two lots to Leavitt by a single deed which contained separate metes and bounds descriptions and separate areas for each lot. On the same day in 1945, Leavitt, probably acting as a "straw", conveyed the lots back to Carrie Murdock and six other members of the Murdock family. This second deed, however, identified the lots as a certain parcel of land with one metes and bounds description and one area. In 1967, when the Lindsays acquired the property, the deed also identified the property with one description and one area.

In seeking a building permit for Lot 2, the Lindsays argued that the lot was protected by the grandfather provision of the bylaw as it was a lot in existence at the time of the adoption of the bylaw on January 29, 1938. It was conceded that Lot 2 was separate and distinct from Lot 1 in 1938. The issue was whether, for zoning purposes, the Lindsays, by their deed, acquired separate lots or a single lot consisting of the two lots shown on the 1903 plan.

In reviewing the zoning bylaw's definition of lot, the Court determined that the framers of the zoning bylaw meant the most recent recorded deed or plan. The Court found that where the most recent deed described the property as a single parcel and set out a metes and bounds description of a single area, the effect of the deed was to convey one lot for the purposes of the zoning bylaw. Therefore, in order to be eligible for the grandfather protection for the construction of a dwelling on a substandard lot as provided in the bylaw, the Court concluded that the lot not only had to have been in existence at the time of the enactment of the lot area and frontage requirements, but the lot also had to retain its identity as a separate lot.

The decision in Lindsay was based on the fact that the second deed in 1945 effectively conveyed one lot and not two separate lots. Since, after the zoning change, the Lindsays only acquired one lot, they were then prevented from artificially dividing them so as to restore old record boundaries for the sake of availing themselves of the grandfather provision which would have allowed building to occur on both lots. Therefore, Lindsay was not prevented from building on the basis that the lot came into common ownership with an adjoining lot after the enactment of the zoning change but rather on the fact that the two lots did not maintain their separate identity when, after the zoning change, they were conveyed as a single lot.

Reviewing the legislative history of the present Section 6 separate lot protection provision, as appearing in St. 1975, c. 808, shows that the Legislature considered specific language which would have required the merger of single and separate ownership lots after the effective date of the zoning change if such lots were acquired by the same owner. Courts have ruled that, absent such a specific provision, the protection afforded a single and separate ownership lot is not lost when subsequent to the enactment of a zoning change, an adjacent lot is acquired by the same owner. Feldman v. Commerdinger, 213 N.Y.S. 2d 484 (1960); Fina Homes v. Beckel, 204 N.Y.S. 2d 69 (1960); Soros v. Board of Appeals, 269 N.Y.S. 2d 796 (1966); Camarerri v. Michaelis, 192 N.Y.S. 2d 861 (1959); Irace v. Kramer, 198 N.Y.S. 2d 532 (1959).

In 1970, the Department of Community Affairs (DCA) was designated by the Legislature to investigate the need for a comprehensive revision to the Zoning Enabling Act. The DCA succeeded an advisory committee which had been appointed by the Legislature in 1967 to study and report on the Zoning Law. In its initial report to the Legislature in 1972, the DCA recommended that the State statute contain specific language requiring the merger of substandard lots if subsequently held in common ownership. Recognizing that past legislation had remained silent in this area (See St. 1958 c. 492; St. 1961 c. 435 s.1; St. 1960 c. 789.), the Department recommended in its report, 1972 House Doc. No. 5009 at 42, that:

Lots held in separate ownership at the time of the zoning change would be subject to an absolute freeze with respect to residential use, if not subsequently held in common ownership with that of adjoining land located in the same residential district.

Again, in 1973, the DCA made the same recommendation to the Legislature. 1973 House Doc. No. 6200 at 22. The DCA reports and recommended legislation were referred to the House Committee on Urban Affairs. 1972 House Doc. No. 6001; 1973 House Doc. Nos. 6035, 7072. That committee ultimately recommended legislation which included the DCA recommendation requiring the merger of substandard lots if subsequently held in common ownership with adjoining land after the effective date of the bylaw. 1973 House Doc. No. 7227 at 19; 1974 House Doc. No. 2522 at 24. However, the Committee on Urban Affairs in future reports and recommendations to the General Court deleted the merger requirement that had been contained in the previous proposals. 1974 House Doc. No. 5864 at 11; 1975 House Doc. No. 5457 at 10; 1975 House Doc. No. 5600 at 9. It appears that the Legislature considered and rejected language which would have required the merger of separate lots if subsequently held in common ownership after the effective date of the bylaw. It should be noted that the Court has placed great reliance on the reports of the DCA and other legislative proposals when interpreting other provisions of the Zoning Act. See Hunters Brook Realty Corp. v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 76 (1982).

Absent expressed statutory language to the contrary, both the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court have determined that the key factor, when dealing with the question of the merger of substandard lots, is the status of the lot as of the effective date of the bylaw. In Giovannucci v. Zoning Board of Appeals of Plainville, 4 Mass. App. Ct. 239 (1976), two lots were in common ownership at the time of the effective date of the bylaw. After the bylaw change, the lots were conveyed separately. The zoning bylaw contained elaborate provisions for the combination and replatting of contiguous lots in common ownership. In interpreting the merger provisions of the bylaw, the Court noted:

It seems obvious that in dealing with nonstandard lots, as with the analogous nonconforming use, our point of reference is the effective date of the by-law. . . .

More recently, in Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985), the Court reached the same conclusion when interpreting the Section 6 separate lot protection provision of the Zoning Act. The Court was asked if whether the first sentence of the fourth paragraph of Chapter 40A, Section 6, MGL, refers to the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought.

ADAMOWICZ V. IPSWICH
395 Mass. 757 (1985)

Excerpts:

Abrams, J. . . .

We conclude that the statute looks to the most recent instrument of record prior to the effective date of the zoning change.

Our conclusion was prefigured in dicta from other cases. In Sturges v. Chilmark, 380 Mass. 246, 261 (1980), a declaratory judgement was sought as to the effect of the phrase "adjoining land" contained in the exemption provided by G.L. c. 40A, s.6. As in the instant case, all of the Sturges lots were held in common ownership at the time the plan creating the lots was recorded. Although our discussion of the provisions of s.6 other than the meaning of "adjoining land" was dictum, we said, "Section 6 is concerned with protecting a once valid lot from

being rendered unbuildable for residential purposes, assuming the lot meets modest minimum area...and frontage...requirements." Sturges v. Chilmark, supra at 261. That language supports the construction that the status of ownership of a lot is determined as of the date of the zoning change. Other decisions by this court and the Appeals Court also assume this interpretation, but did not base their conclusions on this ground. See Warren v. Zoning Board of Appeals of Amherst, 383 Mass. 1, 7-8 (1981); Girard v. Board of Appeals of Easton, 14 Mass. App. Ct. 334, 336-337 (1982).

See also Sieber v. Zoning Board of Appeals of Wellfleet, 16 Mass. App. Ct. 985 (1983).

Finally, in Carciofi v. Board of Appeals of Billerica, 22 Mass. App. Ct. 926 (1986), the Court noted that even if separate lots came into common ownership at a later date, the lots would still be protected if they had been separately owned at the time of the zoning change.

Carciofi dealt with two adjoining substandard building lots numbered 2 and 3. In 1951, Lot 3 was owned by Carciofi and in 1953 Carciofi and Richard Gertz acquired Lot 2 as tenants in common. In 1956, the zoning bylaw was amended making the lots substandard. However, the bylaw also contained a grandfather provision for separate lots.

In 1959, Carciofi caused Lot 3 to be conveyed to himself and his wife Rose as tenants by the entirety. In April of 1962, Gertz conveyed his interest in Lot 2 to Carciofi and his wife as tenants by the entirety. Thus, at that time, Lot 2 was owned one-half by Carciofi and his wife as tenants by the entirety, and one-half by Carciofi individually.

On November 7, 1980, Carciofi was denied a frontage variance on Lot 2. A Superior Court judge ruled that Lot 2 was grandfathered and that Carciofi was entitled to a building permit. The Massachusetts Appeals Court Agreed.

CARCIOFI V. BOARD OF APPEALS OF BILLERICA
22 Mass. App. Ct. 926 (1986)

Excerpts:

We agree with the judge. As noted, the parties agree that in 1956 lot 2 was protected although nonconforming as to frontage. The grandfather clause of the 1956 by-law had a proviso that "such lot did not at the time of the adoption of this amendment adjoin other land of the same owner available for use in connection with such lot." The proviso of course did not apply to the situation in 1956. Neither did it apply after the conveyances of 1959 and 1962: First, there was no single ownership of both lots at the time (or at any time), as lot 3 was owned by Carciofi and wife as tenants by the entirety, while lot 2 was held in the different ownership above described. Second, even if it be assumed that in some rough sense the two lots were owned by "the same owner" in 1962, the lots were not so owned at the time of the adoption of the amendment in 1956, as the text of the proviso specified.

In order to determine whether a lot qualifies for the separate lot protection found in Chapter 40A, Section 6, MGL, look for the following:

1. Does the lot have at least 5,000 square feet and 50 feet of frontage?
2. Is the lot located in an area zoned for single or two family use?
3. Did the lot conform to existing zoning when legally created?
4. Does the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought show that the lot was separately owned? See Adamowicz v. Ipswich, 395 Mass. 757 (1985); Carciofi v. Board of Appeals of Billerica, 22 Mass. App. Ct. 926 (1986).

5. When conveyed after the zoning change, has the lot retained its separate identity by continually being described as a separate and distinct lot? See Lindsay v. Board of Appeals of Milton, 362 Mass. 126 (1972).
6. Has the lot been a separate lot and not available for use in connection with adjoining land on the effective date of any zoning requirement which made the lot substandard or more substandard? See Clark v. Zoning Board of Appeals of Nahant, 338 Mass. 473 (1959); Sorenti v. Zoning Board of Appeals of Wellesley, 345 Mass. 348 (1963); Sturges v. Chilmark, 380 Mass. 246 (1980).

If the answer is yes to all of the above questions, then a lot is entitled to grandfather protection under the provisions of Chapter 40A, Section 6, MGL.

Congratulations if you have read the last three Land Use Managers to this point. Again, we must stress that we have only addressed the issue of the separate lot protection provision of the Zoning Act. In applying other grandfather provisions of the Zoning Act to a specific situation or plan, please refer to the actual text of the law. While we hope to stimulate your interest and perhaps increase your understanding, it is inevitable that subtle differences of meaning or inferences may have been unintentionally introduced. When in doubt, consult your Town Counsel or City Solicitor.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

Volume 3, Edition 7
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BUILDING MORATORIUMS

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Over the past few years, there has been increased interest at the municipal level concerning the enactment of interim zoning provisions. It appears that the most popular type of temporary growth control has been a moratorium on the issuance of building permits for certain types of development.

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The process of enacting an interim zoning provision usually begins when increased growth pressures creates a concern at the local level as to the ability of a community to manage rapid growth and still provide an adequate level of public services. A moratorium is often seen as the most effective method of preserving the integrity of a local zoning bylaw so that future development within the municipality will not undermine the enactment of new zoning regulations. Whether a moratorium is an effective growth management tool is fairly debatable. However, it is dangerous to assume that there are no limits to a municipality's authority when adopting a building moratorium.

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The Massachusetts Supreme Judicial Court first had an opportunity to look at the issue of interim zoning when, on May 21, 1973, the Town of Methuen enacted a so-called moratorium which had an expiration date of no later than Sept. 23, 1974. The moratorium was supposedly adopted pursuant to the Town's zoning power and prohibited the construction of residential building units in new subdivisions so as to give the Town an opportunity to revise its zoning bylaw in accordance with an updated comprehensive plan. However, in Tra-Jo Corporation v. Town Clerk of Methuen, 366 Mass. 845 (1974), the Court dismissed a petition challenging the validity of the moratorium because the case had become moot even though both sides requested the Court to determine the validity urging that it presented a question of first impression in the Commonwealth.

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It appears that the Methuen moratorium had prevented all development in certain subdivisions. Such a total prohibition on the use of land is extremely vulnerable so that the dismissal of the petition by the Court may have been a stroke of good luck for the Town.

However, shortly after the Methuen case, the Court took a look at a two year moratorium adopted by the Town of Arlington. Prior to the moratorium, the Town had experienced a substantial increase in multi-family development. Over two-thirds of the dwelling units constructed during the previous ten years had been apartments. The Town had started the process of revising its comprehensive plan when it enacted the following moratorium:

Section 9A. Restrictions in Moratorium District #1

In Moratorium District #1, no new building or part thereof shall be constructed for use as an apartment house or for apartments or for any use in an Industrial District in Moratorium District #1 for a period of two years from the date of approval of this section by the Massachusetts Attorney General's Office, or September 1, 1975, whichever date is the longer period of time. Whereas the Town of Arlington is in the process of updating its Comprehensive Plan, it is desired to protect certain parts of the Town from ill-advised development pending the final adoption of a revised Comprehensive Plan, and a moratorium on the issuance of building permits for the construction of apartment houses in a Moratorium District in excess of two families is hereby in effect for a period of time described above.

A landowner wishing to construct apartment buildings challenged the validity of the moratorium. He questioned whether the Town had adopted the moratorium as an amendment to its zoning bylaw and if it had, whether the Town had the authority to enact such an interim zoning restriction. The trial judge ruled that the Town had not adopted the moratorium as an amendment to its zoning bylaw and that the landowner was entitled to a building permit for the construction of apartments. The trial judge did not rule on whether the Town had the authority to enact a zoning bylaw moratorium. After review was sought in the Appeals Court, the Massachusetts Supreme Judicial Court, on its own initiative, ordered direct appellate review.

COLLURA V. TOWN OF ARLINGTON
367 Mass. 881 (1975)

Excerpts:

Donahue, J. ...

We cannot agree with the judge's conclusion. ... The new S. 9A of the by-law is an example of what has been called "interim zoning." ... Though it lacks the same degree of permanence typically found in zoning laws, ... it effectively reclassified the district to a more restrictive use, if only for a temporary period. Regardless of the time period, it is still a zoning provision. ... "Indeed, all zoning regulations are in a sense 'interim' because they can be amended at any time, after proper notice and subject to certain limitations." ... Since the effect of S. 9A was to rezone the district for a two-year period, it must be deemed an "amendment" to the existing zoning by-law. ... Plainly the town did everything it could to enact the interim measure as an amendment to the zoning by-law. Whether the town has the authority to do so is another matter, ... We thus turn to an examination of the fundamental question of the town's constitutional and statutory authority.

The basic source of a town's zoning power is G.L. c. 40A, ... We have not yet had occasion, as we have now, to consider whether the authority to adopt interim zoning provisions can be implied from that general language. ... We believe that the objectives of an interim provision such as the one here are consistent with the purposes of zoning. Interim zoning can be considered a salutary device in the process of plotting a comprehensive zoning plan to be employed to prevent disruption of the ultimate plan itself. As this court has stated, "[I]t is proper for a town to review its zoning regulations, to take into account its probable future development, and to plan for the welfare of its inhabitants, present and future." ... It is noteworthy that, since the procedures under G.L. c. 40A, were complied with, the landowner whose property is subject to the interim provision in this case is no worse off than if the town had simply rezoned the area to exclude apartment buildings in the traditional manner, with the intent of again amending the by-law in two years to reflect a new comprehensive plan...

In light of the authority which we believe can be found in The Zoning Enabling Act, the particular provision adopted by the town is permissible. First, it is significant that S. 9A does not prohibit all uses of realty within the moratorium district but is primarily directed at construction of apartment buildings. This is an allowable restriction under G.L. c. 40A, ... Second, the interim amendment was adopted in the circumstance that the town was in fact in the process of reviewing its comprehensive plan, and is limited to a two-year period of applicability. We cannot say that two years is an unreasonable length of time for the town to undertake and complete a thorough review of its comprehensive plan. ...

In upholding the moratorium enacted by the Town of Arlington, the Court noted decisions in other jurisdictions supporting interim zoning provisions. One of the more interesting cases cited by the Court was Steel Hill Development, Inc. v. Sanbornton, 469 F. 2d 956 (1st Cir. 1972), which upheld an interim zoning measure in a situation where the Town sought to control a rapid demand for vacation homes by increasing its minimum lot size from 35,000 square feet to three and six acres. The Court termed the Town's method of controlling growth "crude" but approved the lot size restriction as a temporary measure until the Town could work out a permanent growth policy and plan. However, the Court noted in Steel Hill that were they to "adjudicate this as a restriction for all time, ... we might well come to a different conclusion."

The Collura decision provides the framework whereby a community may enact a building moratorium. In reviewing the circumstances found in Collura, a moratorium which is adopted by a municipality to protect a valid public interest will most likely be upheld in Massachusetts under the following conditions:

- A. A building moratorium should be adopted as an amendment to a local zoning bylaw or ordinance in accordance with the provisions of Chapter 40A, The Zoning Act.

The Town of Arlington had adopted a building moratorium by amending its zoning bylaw and the Court confined its review as to whether such a restriction was allowable under the provisions of the Zoning Enabling Act. The Collura decision should not be read as authorizing communities to enact building permit moratoria outside of its zoning authority.

Municipalities can adopt bylaws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature. Chapter 40A, Section 1A, MGL, defines "zoning" as "ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and town to protect the health, safety and general welfare of their present and future inhabitants."

The Court has found that a community exercises its zoning power when it prohibits or permits any particular listed uses of land or the construction of buildings or the location of businesses or residences in a comprehensive fashion or when a community regulates density or denies or invites permission to build any structure. See Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979). A bylaw enactment will also be treated as an exercise of a community's zoning power when the subject matter has been historically dealt with as part of the local zoning bylaw. See Rayco Investment Corp. v. Board of Selectmen of Raynham, 368 Mass. 385 (1975).

A building moratorium has the nature and effect of a municipality's zoning power. Since Chapter 40A, MGL, preempts the manner and method in which a community may exercise its zoning authority, a building permit moratorium is subject to the procedural requirements and freeze protections of the Zoning Act.

- B. A building moratorium should be directed at the type of development needing control and should not prohibit all uses within a zoning district.

The moratorium adopted by the Town of Arlington was directed at the construction of apartment buildings. The Court did not uphold a moratorium on the issuance of all building permits within a zoning district. In fact, the Collura decision suggests that an absolute ban on all development, even if temporary, might be considered unreasonable.

The rationale behind the Collura decision was that the Town could have amended its zoning bylaw in the traditional manner and excluded apartment buildings from the zoning district. The Court noted that the exclusion of apartments from a zoning district is an allowable restriction under the Zoning Act citing Moss v. Winchester, 365 Mass. 297 (1974). In Moss, the plaintiff had argued that a total exclusion of apartments from a municipality was invalid citing a Pennsylvania decision which held that a municipal zoning power does not extend to a total prohibition of apartments. See Appeal of Girsh, 437 Pa. 237(1970). The Moss court did not rule on the question of whether a town could constitutionally exclude all apartments but stated that the Girsh case appeared to represent a minority viewpoint among courts which had spoken on the issue. Whether Collura now stands for that proposition is unclear because of the temporary nature of the moratorium.

- C. The enactment of a building moratorium should be for the purpose of allowing a municipality an opportunity to study the effects of probable future development.

A community has the authority to enact a temporary building moratorium to protect the public interest while enaging in comprehensive planning studies. In Collura, the Town had recommended and initiated a study of their comprehensive plan prior to the adoption of the moratorium. Though a community is not obliged to conduct studies before the enactment of a moratorium, there should be evidence of a good faith effort by the community that a new comprehensive plan or study is in the offering. The Court, in Sturges v. Town of Chilmark, 380 Mass. 246 (1980), when upholding a growth rate bylaw, noted that they assumed the Town would proceed with its studies in good faith and warned communities that a very different case would be presented if it was determined that the Town was not proceeding with the necessary studies which were the basis for the enactment of the growth control.

- D. The length of a building moratorium must be reasonably related to the amount of time necessary to study the growth problem and implement recommendations.

When considering a building moratorium, the Court found in Collura that two years was not an unreasonable amount of time for the Town to undertake and complete a review of its comprehensive plan. In Sturges, the Court assumed, in the absence of a contrary showing, that a ten year time period was reasonable in order for the Town of Chilmark to complete their land use studies and implement recommendations.

However, the Sturges court dealt with a growth rate bylaw which phased development over a period of time by placing limitations on the issuance of building permits rather than a total ban on multi-family construction, which was the case in Collura. The Court noted in Sturges that the growth rate bylaw did not effect an existing regional demand for primary housing as it was not generally designed to exclude persons from acquiring a place of permanent residence but rather partly closed the doors to affluent outsiders primarily seeking vacation homes. Such distinctions may have influenced the Court in assuming that ten years was a reasonable time period for the Town of Chilmark to impose a growth rate bylaw.

It is important to note that the moratorium adopted by the Town of Arlington was effective as a stop-gap measure for one very important reason. The Town of Arlington had not accepted the provisions of the Subdivision Control Law. Therefore, when the Planning Board published the public hearing notice in the newspaper relative to the proposed moratorium, all building and special permits issued after that date were subject to the provisions of the moratorium once it was enacted by town meeting.

A landowner can submit certain plans of land as authorized under the provisions of the Subdivision Control Law. If a community has subdivision control powers, then the submission of subdivision or non subdivision plans prior to town meeting vote will exempt the land shown on such plans from the operation of the moratorium. This is the reason that communities, who are considering enacting a moratorium, experience a dramatic increase in the number of plans which are submitted to the Planning Board.

Zoning protection for subdivision and non subdivision plans run from the date of the Planning Board's endorsement. Subdivision plans obtain an eight year protection from all zoning changes. The protection afforded non subdivision plans is for three years and only protects the land from use changes. However, since a moratorium temporarily suspends the use in a given zoning district, the submission of a non subdivision plan would also exempt the land from the moratorium.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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CONTRACT ZONING

"Contract Zoning" is a process where a city or town promises to rezone land in accordance with a landowner's request if the landowner enters into a covenant in which he restricts the use of his land in some way. To make such a contract workable, a municipality must acquire some property interest in adjoining land so as to have a "dominant estate" with the right of enforcing the restrictions placed on the "servient estate." The notion is that covenants exist to protect a continuing property interest in land and can be logically enforced only by those who hold such interests. A device for acquiring such an interest is through an option, purchased for a small fee but exercisable over a long period of years, for the municipality to buy part of the landowner's land, that part becoming the "dominant estate" upon its purchase.

Several states have clearly outlawed contract zoning under any and all conditions. Contract zoning has been found to be objectionable on at least three grounds: (1) that the use of such an arrangement eliminates uniformity and equal treatment under the zoning bylaws; (2) that a municipality cannot contract away the exercise of its police powers, and (3) that the State Zoning Enabling Act authorizes zoning only by ordinance or bylaw.

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However, Massachusetts is one of a number of states which has upheld contract zoning. If your community is going to consider zoning by contract, read carefully the following case and then consult your Town Counsel or City Solicitor.

In Sylvania Electric Products v City of Newton, 344 Mass. 428 (1962), the City of Newton rezoned for limited manufacturing use a tract of land of approximately 153 acres. Before the rezoning, a series of land use restrictions were agreed upon with Sylvania. Also, the City was granted an option to purchase a strip of adjoining land apparently so as to give them standing to enforce the restrictive covenants. The rezoning was passed and Sylvania recorded a deed incorporating the restrictions. The existence of this deed was a significant factor in inducing the rezoning. A majority opinion favored contract zoning with Justice Kirk dissenting.

SYLVANIA V CITY OF NEWTON
344 Mass. 428 (1962)

Excerpts:

Whittemore, J. . . .

This appeal ... by landowners in Newton, challenges the decision of the Land Court which held valid an amendment to the Newton zoning ordinance The amendment changed from a single residence A district to a limited manufacturing district the classification of 153.6 acres of land ... of ... Sylvania

2. The principal issue is the effect of Sylvania's imposition of restrictions on the locus in connection with the enactment of the amending ordinance and of steps taken by the planning board, and others acting for the city, to cause Sylvania so to do.

... (T)he judge found these facts: Sylvania, ...having an option to purchase a parcel containing 180 acres, inclusive of the rezoned locus, petitioned the board of aldermen ... to reclassify the parcel. (T)he planning board, after a public hearing held jointly with the aldermen's committee, ... reported that it had asked the city's planning consultant to review the petition and had decided to withhold action until he should report. ...

Meanwhile, Sylvania, in consultation with the planning consultant ... and members of the planning board and the claims and rules committee ..., had agreed to certain restrictions upon its use of ... (the locus), The restrictions, to be operative for thirty years ... were set out in draft of a deed attached to a proposed option agreement whereby Sylvania would give the city an option to purchase, within a thirty year period, for \$300, a strip of land on ... the river side of the parcel ... containing thirty and one half acres. By the option agreement Sylvania would agree to abide by the restrictions in the draft deed during the option term pending the city's exercise thereof. The intention would be to give the city a dominant estate capable of enforcing the restrictions. The deed was to convey the thirty and one-half acres subject to the restriction for the benefit of Sylvania's adjoining premises that for a period of fifty years no buildings or structures (other than fences) should be erected or maintained on the granted premises.

The proposed restrictions limited the floor area of all buildings to be constructed on the premises to 800,000 square feet; required that sixty percent of the ground area, or seventy-three and nine-tenths acres, be maintained in open space not occupied by buildings, parking areas or roadways; set back the building line from forty to eighty feet; imposed a sliding scale of height restrictions; called for a buffer zone of comparable size to the three acres to be ceded to Oak Hill Park Association and adjacent thereto, on which no structures might be erected; restricted the number and type of signs and the type of lighting; limited the use of buildings to certain, but not all, of the uses permitted in a limited manufacturing district; and established a pattern for traffic in connection with construction on the premises.

... (T)he aldermen's committee ... reported its approval of the petition as modified by the planning board in its formal vote of approval.

Thereafter, ... the aldermen enacted the ordinance which approved Sylvania's petition as modified in accordance with its committee's recommendation "and in connection therewith passed (the) order ... authorizing the mayor to accept the proposed option agreement."

Sylvania took title to the ... parcel ... and thereafter on that day executed the option agreement with attached form of deed. The deed form and option agreement were recorded

....

We turn to an analysis of what was done in Newton and note that although no condition was imposed by the aldermen in their vote, the conclusion is inescapable that the option proposal was a significant inducement of the zoning amendment and the amendment induced the giving of the option.

It is said that there was a purported, invalid exercise of the zoning power, for the vote operated to subject the locus not only to the restrictions of a limited manufacturing district but also to the restrictions of the option and deed form. But that is not, precisely, what happened. The induced voluntary action of Sylvania, not the vote of the council, imposed the option restrictions; the vote reclassified land which was being subjected to those restrictions. The zoning decision was that the locus, so restricted by its owner, should be made a limited manufacturing district. That, in form, was an appropriate and untainted exercise of the zoning power.

What was done involved no action contrary to the best interest of the city and hence offensive to general public policy. It involved no extraneous consideration (as, for example, a request to give land for a park elsewhere in the city) which could impeach the enacting vote as a decision solely in respect of rezoning the locus.

We discern no aspect of spot zoning, lack of uniformity, or failure to conform to the comprehensive zoning plan. Even if the restrictions had been made a part of the zoning ordinance, they would not have created spot zoning. The site was all the land in the neighborhood which was proposed for reclassification. The private restrictions in no way made the locus less appropriate for classification as a limited manufacturing district. It is inconsequential that other areas elsewhere in the city, in, or to be put in, such a zoning district, would not have those restrictions. Requirements of uniformity and conformity to a plan do not mean that there must be identity of every relevant aspect in areas given the same zoning classification.

It does not infringe zoning principles that, in connection with a zoning amendment, land use is regulated otherwise than by the amendment. Zoning regulations, as Sylvania points out, exist unaffected by, and do not affect, deed restrictions. The owner of the locus could have imposed restrictions on it prior to the original filing of the petition for rezoning without effect upon the subsequent rezoning vote.

Since the private regulation was, beyond dispute, harmonious, consistent, and beneficial, no hurtful effect requires that we look behind the form of what was done.

It is pointed out that proposals for zoning change can be adopted only after notice and a hearing. ... But the option restrictions did not make the locus a different subject for rezoning from what it was when the notice was given and the hearing held. The voluntary limitations imposed on the use of the land, although relevant in considering the proposal to rezone it, did not call for a new notice and hearing. They could have no adverse effect on anyone other than Sylvania. As noted, none of these restrictions was inconsistent with the requirements for the zoning district. It is far fetched to suggest that citizens opposed to any change might have stayed away from the original hearing in expectation that the proposal would be disapproved. The imposition of these restrictions, subsequent to the hearing, is no more significant than are changes in the zoning proposal itself which are within the scope of the original proposal. Such changes do not require further notice. . . .

It is objected that the council has not determined that the locus, unrestricted, is appropriate to be put in the limited manufacturing district. We agree that the zoning decision applied to the locus as affected by the option agreement. It was not, however, conditioned upon the validity of the option restrictions. The council made an appropriate zoning decision when it determined that the locus, subject to whatever limitations on its use the option effectively placed thereon, be put in the limited manufacturing district. Although not directly in issue, it may be noted that the restrictions appear to have been validly imposed by a sealed and recorded instrument. Sylvania is bound for thirty years even if the option is not exercised. Nothing now turns on an issue of the power of the mayor and council to pay for the dominant estate and take a deed.

The appellants urge that citizens should be able to look with confidence only to the zoning law to ascertain what are the zoning restrictions. The answer is that the option restrictions are not zoning restrictions, and all who have any interest in restrictions in the chain of title may find them of record.

The final objection is that even though the officials acted with good intent, beneficially to the city, and consistently with zoning principles, they were nevertheless making an unauthorized use of the zoning power. Unquestionably the officials let it be known that favorable rezoning depended in great likelihood on the adoption of the option restrictions.

The planning board acted as a board when it suggested that "the following conditions be obtained by agreement with the proper parties concerned"; the planning consultant was acting as an adviser in respect of zoning when he submitted to the aldermen and the mayor the memorandum which summarized the proposed restrictions; and the aldermen confirmed their participation as a board by the vote which authorized the mayor to accept the proposed option agreement. This was all extrastatutory but nevertheless, proper activity, precedent to the exercise of the zoning power, not the exercise thereof. Whether the city may have the benefit of the pressures of its officials on Sylvania without adoption of the restrictions into the zoning proposal turns on the effect of the restrictions thereon. Since, as stated, the zoning proposal was not essentially changed, it was not necessary to reinitiate the amending process.

The locus was a unique site which was about to go into a specialized use. It was appropriate and lawful to ask the prospective owner to take consistent action to ameliorate the effect of the pending drastic change of zoning classification.

Decision affirmed.

Editor's Note

As was previously noted, Justice Kirk strongly dissented with the majority opinion. Space limits are ability to adequately excerpt his dissent. However, in summary, his opinion points out that all the deed restrictions could have validly been imposed by the city under its zoning authority, and in fact the contract was imposed in order to further the purposes stated in the State Zoning Enabling Act. Justice Kirk found that when a municipality elects to impose such land use restrictions it must do so in accordance with the provisions of the State Zoning Enabling Act which requires that such restrictions be imposed by a zoning ordinance or bylaw.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 4, Edition No. 1
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LEGISLATION EXTENDING THE TIME PERIOD FOR REVIEWING SUBDIVISION PLANS

CHAPTER 699. AN ACT RELATIVE TO THE REVIEW OF CERTAIN PLANS SUBMITTED PURSUANT TO THE SUBDIVISION CONTROL LAW.

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The Legislature has amended the Subdivision Control Law by decreasing the time period for the review of preliminary plans and increasing the time period for the review of definitive plans. The new legislation also requires the mandatory submission of certain preliminary plans.

Under the present provisions of the Subdivision Control Law, the submission of a preliminary plan to the Planning Board is at the option of the applicant. Under the provisions of the new law, a distinction has been made between residential subdivisions and nonresidential subdivisions. In the case of a residential subdivision, the submission of a preliminary plan to the Planning Board remains optional. However, in the case of non-residential subdivisions, the submission of a preliminary plan to the Planning Board becomes a mandatory requirement. In either case, the review for a preliminary plan has been decreased from 60 days to 45 days. Chapter 699 of the Acts of 1986 amends Chapter 41 by striking Section 81S, as appearing in the 1984 Official Edition of the Massachusetts General Laws, and inserting in its place the following:

Section 81S. In the case of a subdivision showing lots in a residential zone, any person, before submitting his definitive plan for approval, may submit to the planning board and to the board of health, a preliminary plan, and shall give written notice to the clerk of such city or town by delivery or by registered mail, postage prepaid, that he has submitted such plan.

In the case of a nonresidential subdivision, any person before submitting his definitive plan for approval shall submit to the planning board and the board of health, a preliminary plan, and shall give notice to the clerk of such city or town by delivery or by registered mail, postage prepaid, that he has submitted such plan.

In either case, if the notice is given by delivery, the city or town clerk shall, if requested, give a written receipt therefor. Within forty-five days after submission of a preliminary plan, each board shall notify the applicant and the clerk of the city or town, by certified mail, either that the plan has been approved, or that the plan has been approved with modifications suggested by the board or agreed upon by the person submitting the plan, or that the plan has been disapproved and in the case of disapproval the board shall state in detail its reasons therefor. The planning board shall notify the city or town clerk of its approval or disapproval, as the case may be. Except as is otherwise provided, the provisions of the subdivision control law relating to a plan shall not be applicable to a preliminary plan, and no register or deeds shall record a preliminary plan.

In addition to the changes made relative to the submission and review of preliminary plans, the Legislature has also increased the time period for the review of definitive subdivision plans.

Presently, the Subdivision Control Law provides a 60 day review period for all definitive plans. Again, as was the case with preliminary plans, the new legislation makes a distinction between a residential and nonresidential plan. If an applicant submits a nonresidential definitive subdivision plan, the review period has been extended to 90 days. If an applicant submits a residential definitive subdivision plan, the review period has been increased to 135 days. However, if an applicant has previously submitted a preliminary plan showing the proposed residential lots, then the review period for the residential definitive subdivision plan is only 90 days. To accomplish these changes, Chapter 699 the Acts of 1986 amends Chapter 41 by striking the fourth paragraph of Section 81U, as appearing in the 1984 Official Edition of the Massachusetts General Laws, and inserting in its place the following:

In the case of a nonresidential subdivision where a preliminary plan has been duly submitted and acted upon or where forty-five days has elapsed since submission of the said preliminary plan, and then a definitive plan is submitted, the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within ninety days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

In the case of a subdivision showing lots in a residential zone, where a preliminary plan has been acted upon by the planning board or where at least forty-five days has elapsed since submission of the preliminary plan, an applicant may file a definitive plan. The failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action on the definitive plan within ninety days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

In the case of a subdivision showing lots in a residential zone, where no preliminary plan has been submitted and acted upon or where forty-five days has not elapsed since submission of such preliminary plan, and a definitive plan is submitted, the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within one hundred thirty-five days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

Summary:

Please refer to the statute for a more detailed explanation. However, in summary, Chapter 699 of the Acts of 1986 makes the following changes to the Subdivision Control Law.

1. Reduces the review period for preliminary plans to 45 days.
2. Requires the mandatory submission of preliminary plans for all nonresidential subdivisions.
3. Increases the review period for nonresidential definitive plans to 90 days.
4. Increases the review period for residential definitive subdivision plans to 135 days when no preliminary plan has been submitted.
5. Increases the review period for residential definitive subdivision plans to 90 days when a preliminary plan showing proposed residential lots has been submitted.

All of the above changes were approved by the Governor on January 7, 1987 and will take effect on April 7, 1987. The new changes will not apply to preliminary or definitive plans filed with the Planning Board prior to April 7, 1987. Also, if a preliminary plan has been filed with the Planning Board prior to April 7, 1987, then the definitive plan evolved therefrom will not be governed by the new changes.

ZONING BYLAW
PROHIBITION AGAINST PIGGERIES - INVALID

The sole issue before the court in Building Inspector of Mansfield v. Christopher Curvin, 22 Mass. App. Ct. 401 (1986), was whether a zoning bylaw provision prohibiting the keeping of four or more pigs at any one time conflicted with provisions of the Zoning Act, Chapter 40A, Section 3, MGL.

The Town of Mansfield adopted the following zoning bylaw provision:

No person, firm or corporation shall keep a piggery within the Town of Mansfield. The keeping of four or more pigs at any one time shall constitute a piggery.

Chapter 40A, Section 3, MGL, provides in part that no zoning bylaw shall:

prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, --- nor shall they prohibit or unreasonably regulate the expansion or reconstruction of existing structures thereon for the primary purpose of agriculture,--- except that all such activities may be limited to parcels of more than 5 acres in areas not zoned for agriculture... .

The court had to decide whether the operation of a piggery constituted "agriculture" within the meaning of Section 3 of the Zoning Act. "Agriculture" is not defined in the Zoning Act. Accordingly, the word must be given its plain and ordinary meaning. The court first looked at lexical definitions and found that "agriculture" is defined as "the science or art of cultivating the soil, harvesting crops, and raising livestock ..."

The court also looked at the definition of "agriculture" in other legislation. Chapter 128, MGL, which governs the general conduct of agriculture, defines "agriculture" to include "the raising of livestock, the keeping and raising of poultry, swine, cattle and other domesticated animals ---". Chapter 111, MGL, which addresses public health concerns, also defines "agriculture" so as to include the raising of livestock and the keeping of swine.

The court found that the obvious purpose of Section 3 of the Zoning Act is to promote agricultural use within all zoning districts in a municipality and that such use may not be prohibited or unduly restricted in an area not specifically zoned for the purpose as long as the parcel being used is one of more than 5 acres. The court concluded, when giving the word agriculture in Section 3 of the Zoning Act its plain and ordinary meaning and when considering the consistent and well established definition of agriculture in other statutory contexts, that the Mansfield zoning bylaw was in conflict with the Zoning Act and therefore invalid.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 4, Edition No. 2
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THE PROCESS OF ADOPTING A ZONING PROPOSAL

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The Zoning Act provides a specific procedure which a municipality must follow when adopting or amending its zoning bylaw. It is important that local officials understand the procedural requirements so as to prevent unnecessary litigation and avoid having the Attorney General disapprove a bylaw due to a procedural defect. This edition of the Land Use Manager highlights the procedural requirements of the Zoning Act which must be followed when adopting or amending a zoning bylaw or ordinance. For detailed language regarding this procedure, please refer to Chapter 40A, Section 5, MGL. If after reading the statute you are still unsure as to a particular issue, we would suggest that you seek the advice of your Town Counsel or City Solicitor.

STEP 1 Initiation

The process of adopting or changing a zoning bylaw begins with the filing of the proposal with the City Council or Board of Selectmen. A proposal may be initiated by:

1. a City Council
2. a Board of Selectmen
3. a Zoning Board of Appeals
4. an individual who owns land which would be affected by the proposal

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5. ten or more registered voters for an annual town meeting, or one hundred registered voters or ten percent of the total number of registered voters, whichever is less, for a special town meeting.
6. ten registered voters in a city
7. a Planning Board
8. a Regional Planning Agency
9. other methods provided by a municipal charter

STEP 2
Submission to Planning Board

Within fourteen days of receipt, the City Council or Board of Selectmen must submit the zoning proposal to the Planning Board for their review.

The statute is silent as to the failure of either the Board of Selectmen or City Council to submit the proposal to the Planning Board within the required fourteen day period. We must assume that any examination of a proposal must be completed within the fourteen days. However, in considering the Court's rationale in Vokes v. Lovell, 18 Mass. App. Ct. 471 (1984), the fourteen day period may only be directory and not mandatory.

STEP 3
Public Hearing

No zoning proposal may be adopted without a public hearing. The purpose of the public hearing is to give interested persons a chance to express their views and opinions. Doliner v. Town Clerk of Millis, 343 Mass. 10(1961); Gricus v. Superintendent and Inspector of Buildings of Cambridge, 345 Mass. 687(1963).

In towns, the Planning Board must hold a public hearing within sixty-five days after the zoning proposal has been submitted to the Planning Board by the Board of Selectmen. If there is no Planning Board, the Board of selectmen must hold the public hearing within sixty-five days after the zoning proposal has been submitted to them by one of the parties authorized to initiate a proposal.

In cities, the Planning Board, and the City Council or committee designated or appointed by the City Council for such purpose, must hold the public hearing within 65 days after the zoning proposal has been submitted to the Planning Board by the City Council. If there is no Planning Board, the City Council or committee designated or appointed for such purpose, must hold a public hearing within sixty-five days after the zoning proposal has been submitted to the City Council by one of the parties authorized to initiate a proposal.

On several occasions a question has arisen as to whether the statutory scheme requires separate hearings by the City Council or its committee and the Planning Board. Under similar language in Chapter 40A, MGL, prior to amendment by St. 1975, Chapter 808, a majority of the Massachusetts Supreme Court in Wood v. Newton, 351 Mass. 98 (1966), held that a joint hearing by a Planning Board and Board of Alderman was permissible.

STEP 4 Public Hearing Notice

The hearing authority must give notice of the public hearing. Notice of the public hearing must be published in a newspaper of general circulation in the municipality once in each of two successive weeks. The first publication cannot be less than fourteen days before the day of the hearing. (Do not count the day of the hearing in the fourteen days.) Notices of the public hearing do not have to be published in a newspaper a full week apart, but must be published in separate calendar weeks which are successive. Crall v. Leominster, 362 Mass. 95 (1972).

In addition to newspaper publication, the same notice must be posted in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of the public hearing, and copies of the notice must also be sent by mail, postage prepaid, to:

1. the State Department of Community Affairs
2. the Regional Planning Agency of the area, if any, and
3. the Planning Board of all abutting cities and towns

4. if the zoning ordinance or bylaw provides for notification of nonresident property owners when there is a boundary or use change within a district, then notice must be sent to any such property owner who files an annual request for notice with the municipal clerk no later than January first each year and pays any required fees.

The public hearing notice must contain the following information:

1. the time, date and place of the public hearing
2. the subject matter of the public hearing sufficient for identification
3. the place where the texts and maps may be inspected.

NOTE:

A notice which described the general area of a map change proposal and specified where a plan and detailed petition could be examined sufficiently identified the proposal so as to alert interested parties. Crall v. Leominster, 362 Mass. 95 (1972).

STEP 5

Planning Board Report

Following the public hearing, the Planning Board is allowed the opportunity to submit a report with recommendations to the City Council or Town Meeting. If the Planning Board fails to do so within twenty-one days after the hearing, the legislative body may proceed in the absence of such a report.

NOTES:

The Planning Board report must include recommendations on whether or not a proposal should be adopted. Shannon v. Building Inspector of Woburn, 328 Mass. 633 (1952); Caputo v. Board of Appeals of Somerville, 330 Mass. 107 (1953); Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965); Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971).

NOTES:

The Planning Board's report is only advisory and is not binding on the legislative body. Caires v. Building Commissioner of Hingham, 323 Mass. 589 (1949); Noonan v. Moulton, 348 Mass. 633 (1965); Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971); Maider v. Dover, 1 Mass. App. Ct. 683 (1974).

A Planning Board report which described an area being rezoned as an industrial and apartment district when it was actually a business district did not invalidate the recommendation for rezoning. Longo v. City of Malden, 350 Mass. 761 (1965).

The Planning Board may recommend amendments to the original proposal without another public hearing and report if the fundamental character and identity of the proposal are not changed but rather the proposal is merely perfected. Burlington v. Dunn, 318 Mass. 216 (1945); Doliner v. Town Clerk of Millis, 343 Mass. 10(1961).

A statement by the Planning Board that it was unable to make any recommendations due to a tie vote of its members does not constitute a report with recommendations. Whittemore v. Town Clerk of Falmouth, 299 Mass. 64 (1937).

A report of the Planning Board is a condition precedent to the adoption of zoning. The Town Meeting [or City Council] has no jurisdiction to take up adoption of zoning changes without a Planning Board report with recommendations or before the lapse of the twenty-one day period. Without jurisdiction, any action in adopting a zoning change would be a nullity. Whittemore v. Town of Falmouth, 299 Mass. 64 (1937); Canton v. Bruno, 361 Mass. 598 (1972).

STEP 6
The Vote

After receipt of the Planning Board's report or after the lapse of the twenty-one day period without such report, the legislative body may adopt, amend or reject the zoning proposal. The required votes to adopt or change a zoning ordinance or bylaw are as follows:

1. a two-thirds vote of Town Meeting
2. a two-thirds vote of all members of Town Council
3. a two-thirds vote of all members of City Council
4. a two-thirds vote of all members of each branch where there is a two branch form of government
5. for councils with less than twenty-five members, a three-fourths vote of all members of a Town Council or a City Council or a three-fourths vote of all members of each branch where there are two branches, when there is a written protest filed against the zoning change by the owners of twenty percent or more of the area to be included in such change, or of the area of land immediately adjacent extending three-hundred feet from the boundary of the area affected by the proposal.

If the Town Meeting fails to vote to adopt the zoning proposal within six months after the hearing by the Planning Board, no action can be taken on that proposal until after a subsequent notice, another public hearing and report by the Planning Board.

If a City or Town Council fails to vote to adopt the zoning proposal within ninety days after the hearing by the Planning Board, no action can be taken on that proposal until after a subsequent notice, public hearings or joint hearing and report by the Planning Board.

NOTES:

If the identity of the zoning proposal is utterly changed by an attempted amendment by Town Meeting. The Planning Board must hold a new public hearing and submit a new report. Fish v. Canton, 322 Mass. 219 (1948).

A new notice, hearing and report is required if the amendment to the zoning proposal:

1. changes the identity or substantial character of the original zoning proposal;
2. fundamentally departs from the original proposal; or
3. radically differs from the original proposal.

Amendments by Town Meeting to an original zoning proposal which did not require a new public hearing were upheld in: Sullivan v. Board of Selectmen of Canton, 346 Mass. 784 (1964); Johnson v. Framingham, 354 Mass. 750 (1968); Daly Dry Wall v. Board of Appeals of Easton, 3 Mass. App. Ct. 706 (1975).

Amendments by Town Meeting to an original zoning proposal without a new public hearing were overturned in: Nelson v. Belmont, 274 Mass. 35 (1931); Fish v. Canton, 322 Mass. 219 (1948).

Changes in the membership of a Board of Alderman after the public hearing, but before the vote on a zoning proposal does not require the newly constituted board to hold another hearing before it can vote on the proposal. Morgan v. Banas, 331 Mass. 694 (1954); Gricus v. Superintendent and Inspector of Buildings of Cambridge, 345 Mass. 687 (1963).

For a discussion regarding the requirement for an extraordinary vote when a protest is filed, see Trumper v. Quincy, 358 Mass. 311 (1970); Parisi v. Gloucester, 3 Mass. App. Ct. 680 (1975).

STEP 7
Unfavorable Action

If a City Council or Town Meeting acts unfavorably on a zoning proposal, such zoning proposal can not be considered by the City Council or Town Meeting within two years from the date of the unfavorable action unless the adoption of the zoning proposal is recommended in the final report of the Planning Board.

What is meant by the terminology "is recommended in the final report of the Planning Board" is open to debate.

It would appear that the meaning of final report is the last report of the Planning Board before the unfavorable action by the legislative body. A literal interpretation of the word "final" would result in that report which concludes or completes action on a particular issue. However, the terminology "is recommended in the final report" could mean the last report of the Planning Board in a sequence of events leading up to a particular legislative action.

Most of the repetitive petition paragraph is phrased in the past tense, yet the Planning Board's report follows the words "is recommended" which indicates an action in the present tense. Therefore, it appears that a proposal could be reheard by the Planning Board after the unfavorable action by the legislative body and during the two year time period; but unless the adoption of such proposal is recommended in one of the final reports following a public hearing, the legislative body must wait the two years before it can reconsider such proposal.

In Kitty v. Springfield 343 Mass. 321 (1961), the court noted that the repetitive petition provision indicated "a legislative intention that, with respect to changes not recommended by the planning board, unfavorable action by a city council shall for two years prevent any new action of the same character." How this statement relates to the final report issue is unclear as Kitty did not center on the question as to what constitutes a final report as in that case the Board's report was favorable.

STEP 8

Approval of Attorney General (applies only to Towns)

After Town Meeting has adopted a zoning proposal, the proposal must be submitted to the Attorney General for approval as required by Chapter 40, Section 32, MGL. A statement must also be sent which explains the proposal. This statement may be prepared by the Planning Board. After the proposal has received the Approval of the Attorney General, the Town must publish the proposal in a bulletin or pamphlet and post it, or publish the proposal in a newspaper pursuant to Chapter 40, Section 32, MGL.

STEP 9

Copy to DCA

After the approval of a zoning proposal by the Attorney General and after the adoption of a zoning proposal by the City Council, a copy of the latest effective zoning ordinance or bylaw must be sent by the City or Town Clerk to the Department of Community Affairs. The current mailing address is as follows:

Department of Community Affairs
Attn: Donald J. Schmidt
100 Cambridge Street
Boston, Massachusetts 02202

STEP 10

Claims of Invalidity Due to a Procedural Defect

After adoption of a zoning proposal, legal action may be commenced regarding defects in the procedure of adoption.

1. Chapter 40A, Section 5, MGL, provides that legal action may be commenced within one-hundred and twenty days after adoption of an ordinance or bylaw.

2. Chapter 40, Sections 32 and 32A, MGL, provides that legal action may be commenced within ninety days after the bylaw or ordinance is posted or has been published for the second time in a newspaper.

Until this inconsistency in the law is resolved by the courts or by corrective legislation, the more conservative approach would be that an appellant may bring an appeal within the longer of the two time periods.

If action is commenced, a copy of the petition submitted to the court must be filed with the City or Town Clerk within 7 days after the court action is commenced.

Unless an ordinance or bylaw is found to be invalid through the above action, a claim of invalidity based on a procedural defect may not be made in future legal proceedings.

General Provisions

Zoning bylaws and ordinances become effective on the date they are adopted by the legislative body. This statement seems simple enough but it does raise a number of issues. Although a zoning proposal takes effect on the date it was adopted by the legislative body, it will reach back and affect certain building or special permits that were issued prior to the adoption date. The enforcement and retroactivity of zoning proposals will be covered in a future edition of the Land Use Manager.

As was noted in this edition of the Land Use Manager, Chapter 40A, Section 5, MGL requires that the Department of Community Affairs must be notified as to any public hearing scheduled by the Planning Board or City Council relative to a proposed zoning change. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the date of the scheduled hearing.

In order to be assured that our records reflect proper notice, please mail such public hearing notices to the following address:

Donald J. Schmidt
Executive Office of Communities
and Development
100 Cambridge Street
Boston, MA 02202

Last year, the Office of the Attorney General wrote to all Planning Boards and commented on a number of the common mistakes and omissions that occur when submitting zoning bylaws to that Office for approval. Among the mistakes noted were:

1. failure to include a copy of the newspaper advertisement for the Planning Board's hearing that shows all dates of publication.
2. failure to correlate the items in the advertisement with the warrant articles to which they apply.
3. failure to adequately include in the advertisement the subject matter sufficient for identification of each proposed change.
4. failure to certify the date when notice was sent to the Department of Community Affairs, the Regional Planning Agency and abutting cities and towns and others.
5. failure to document the reporting process followed by the local Planning Board in its report to the town meeting.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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AMENDING A ZONING PROPOSAL

L

In the last issue of the Land Use Manager, we took a step by step look at the necessary procedural requirements for the adoption of a local zoning proposal. As was discussed, one of the steps requires that the Planning Board give notice and hold a public hearing on the proposed zoning bylaw or ordinance. Following the public hearing, the Planning Board has an opportunity to submit a report with recommendations to the legislative body.

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Question

After a Planning Board has held a public hearing on a proposed zoning proposal, how much can it change the original proposal, when making a recommendation to the Town Meeting or City Council, without holding a new hearing with a new publication of notice?

Question

How far can a Town Meeting or City Council go in amending the original proposal?

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The answers to these two questions have revolved around the statutory requirements found in Chapter 39 of the General Laws, which deals with the issuance and contents of a Town Meeting warrant, and Chapter 40A, which requires notice and a public hearing by the Planning Board prior to legislative action on a zoning proposal.

E

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Chapter 39, Section 10, MGL, requires that the warrant for a Town Meeting specify the time and place of the meeting and the "subjects to be acted upon thereat." No action by Town Meeting is valid unless the subject matter is contained in the warrant. It is a settled principle that warrants for Town Meeting are to be liberally interpreted and are not to be construed with great strictness. It has been held sufficient if the warrant indicates "with substantial certainty the nature of the business to be acted on." Coffin v. Lawrence, 143 Mass. 110. Also, as was noted in Haven v. Lowell, 5 Met. 35, "The articles ... are the mere abstracts or heads of the propositions which are to be laid before the inhabitants for their action; and matters incidental to and connected with such propositions are alike proper for their consideration and action."

Presently, Chapter 40A, Section 5, MGL requires that the Planning Board hold a public hearing on any zoning proposal. The notice of the public hearing must specify "the subject matter, sufficient for identification." As the court has noted, the purpose of the public hearing is to obtain public sentiment so that proper revisions can be made. Doliner v. Town Clerk of Millis, 343 Mass. 10 (1961). After the public hearing, the Planning Board is given an opportunity to make a report to the legislative body. When dealing with the question of amending the original zoning proposal, the court has also paid attention to the statutory authorization which provides that a City Council or Town Meeting "may adopt, reject, or amend" any zoning proposal after the required notice, hearing and opportunity to report. The following review of various Massachusetts cases may provide some insight.

One of the earlier cases was Nelson v. Belmont, 274 Mass. 35 (1931), where the Town voted to modify its existing zoning bylaw by establishing a zone boundary line between a general residence and business district. The proposed zoning district boundary line described in the warrant article and recommended by the Planning Board placed the front part of Nelson's land in the business district. However, Town Meeting amended the proposal so that all of Nelson's land would fall within the general residence district. The State zoning statute at that time required that no zoning by-law could be repealed or modified until "after reasonable notice of the proposed repeal or modification and an opportunity to objectors to be heard theron." The notice given was the warrant which described the original boundary line recommended by the Planning Board. The court interpreted the State zoning statute to require reasonable notice for any proposed modification. Since there was no notice given in the warrant for the new zoning boundary line, the court held that the amended proposal was not rightly before Town Meeting.

As was previously noted, it is a well settled principle that warrants for Town Meeting are to be liberally interpreted and are not to be construed with great strictness. That principle was not applicable in Nelson because of the requirement in the State zoning statute which specified that no zoning bylaw could be modified "except after reasonable notice of the proposed ... modification." However, the court has looked favorably at the ability of Town Meeting to modify zoning proposals under comparable language which presently exists in The Zoning Act, Chapter 40A, Section 5, MGL.

In Burlington v. Dunn, 318 Mass. 217 (1945), the court noted that the decision in Nelson which was required by the wording of the State zoning statute in existence at that time had no application to the very different wording of the State zoning statute in effect at the time of the Dunn decision. The Planning Board had held a public hearing on a proposed comprehensive zoning bylaw in which districts were delineated by reference to an accompanying map. The proposal was approved by the Planning Board and inserted in the warrant for a special Town Meeting. However, before the Town Meeting, the Planning Board held two more meetings of which no public notice was given. As a result of those meetings, the Planning Board decided to change the map which had been inserted in the warrant by zoning for business purposes five additional small parcels of land in scattered locations. The final report submitted by the Planning Board to the Town Meeting was accompanied by the amended map showing the changes. The Town Meeting voted to adopt the bylaw together with the amended map. Dunn contended that the Planning Board should have held another hearing on the proposed bylaw as changed and that the Town Meeting vote was invalid because the map so adopted differed from that inserted in the warrant with respect to the five parcels.

DUNN V. BURLINGTON

318 Mass. 217 (1945)

Excerpts:

Qua, J. ...

We see no necessity for this. The planning board; after adequate notice, held a hearing on the proposed by-law and submitted its final report with recommendations to the town meeting. The board therefore complied with the statute. This is

true whether the action of the board be construed as a recommendation of the original map or of the amended map. There is nothing in the statute requiring another hearing whenever, after one hearing, the board decides to amend what had previously been proposed. The amendments were not of a fundamental character. They did not change the identity of the proposal before the board. They were designed merely to perfect that proposal. From their terms it is apparent that they were intended to preserve permanently for business uses certain lots on which business was already being conducted. They could not deprive any landowner of any right which he already possessed, since no zoning by-law at all was then in force. Where a public hearing is required or is had before an officer or board upon a proposed measure it is at least very unusual to require or to hold successive public hearings in respect to perfecting amendments of this character.

General Laws (Ter. Ed.) c. 39, s. 10, as last amended by St. 1939, c. 182, includes provisions that the warrant "shall state . . . the subjects to be acted upon" at the meeting and that "no action shall be valid unless the subject matter thereof is contained in the warrant." This means only that the subjects to be acted upon must be sufficiently stated in the warrant to apprise voters of the nature of the matters with which the meeting is authorized to deal. It does not require that the warrant contain an accurate forecast of the precise action which the meeting will take upon those subjects. . . . Moreover, G.L. (Ter. Ed.) c. 40, s. 27, as appearing in St. 1941, c. 320, contains a provision that the "town meeting may adopt, reject, or amend and adopt any such proposed . . . by-law," showing that the bylaw as adopted need not exactly follow any proposal set forth in the warrant.

In Doliner v. Town Clerk of Millis, 343 Mass. 10 (1961), the court again dealt with a comprehensive revision to a zoning by-law. The Planning Board had held a public hearing on a proposed revision to the bylaw and map. Various changes, involving shifts in the classification of relatively small parcels from one district to another, were suggested both during and after the public hearing. The Planning Board recommended 13 changes to the Town Meeting which affected about 339 acres of the Town's total acreage of 7,788 acres. These changes were included on maps posted in the town meeting room and the chairman of the Planning Board explained the proposal including the recommended changes made since the public hearing. The court held that the trial judge was warranted in concluding that the changes "did not change the substantial character of the by-law" so as to require a new public hearing under the provisions of the State Zoning Enabling Act. The applicable provisions of the State statute read in part that, "Zoning ... by-laws may be adopted and from time to time changed by amendment ... no such ... by law ... shall be adopted until after the planning board ... has held a public hearing theron after due notice given and has submitted a final report with recommendations to the ... town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report After such notice, hearings and report ... a ... town meeting may adopt, reject, or amend and adopt any such proposed ... bylaw."

DOLINER V. TOWN CLERK OF MILLIS

343 Mass. 10 (1961)

Excerpts:

Cutter, J. ...

Changes made by the planning board after the public hearing ... did not render the zoning revisions invalid The planning board at the public hearing had before it a tentative proposed by-law and proposed zoning map. It then received suggestions for changes of zoning for certain small areas. These were embodied in maps posted in the town meeting room and were explained. The trial judge was warranted in concluding that these changes "did not change the substantial character of the (by-) law so that ... a new public hearing was required." As the judge pointed out "the purpose of such public hearing is to obtain public sentiment so that proper revision can be made." ... The recorded written approval of the proposed revised by-law by the planning board was a sufficient recommendation by the board to the town meeting that the by-law be adopted, particularly when taken with the explanations given by the chairman at the meeting. ... The persons at town meeting had ample knowledge of the position and advice of the planning board.

One of the more interesting cases dealing with a zoning map change was Sullivan v. Board of Selectman of Canton, 346 Mass. 784 (1964). The Town Meeting amended the zoning map by changing an area of land from a single residence district to a general residence district. The locus, as described in the warrant, fronted for 181.6 feet on a certain street in the Town. However, by amendment at Town Meeting the distance along the street was extended to 401.6 feet, with the depth of the locus remaining constant at 200 feet. The court found that the extension of the general residence district was not so fundamental a departure from the provisions of the article contained in the warrant so as to be an improper amendment which would require a new public hearing and notice by the Planning Board.

Reducing the amount of area to be rezoned has also been held valid. In Morgan v. Banas, 331 Mass. 694 (1954), it was contended that a previous hearing before the Planning Board and the recommendations of that Board were insufficient because they related to a petition by Banas for rezoning his entire 28 acre parcel. The City Council ultimately rezoned only about 17 acres out of that tract. It was argued by Banas that the amendment adopted by the City Council was not the same as that proposed and that a new public hearing by the Planning Board was necessary so as to comply with the State zoning statute, Chapter 40, Section 27, MGL (Ter. Ed.).

MORGAN V. BANAS

331 Mass. 694 (1954)

Excerpts:

Qua, C.J. ...

One answer to this contention is that paragraphs 8 and 9 of the plaintiffs' bill, the truth of which (with an exception not here material) is admitted in the defendants' answers, can only be construed as alleging that the entire tract included in the petition, whatever its area, was rezoned. The amended ordinance itself does not appear in the record. But even if it be the fact that only seventeen acres were rezoned out of twenty-eight petitioned for, and if that fact could be shown in spite of the pleadings, there would be nothing in the point. Section 27 provides that after the required hearings and the report by the planning board the city council "may adopt, reject, or amend and adopt any such proposed ordinance or by-law." An amendment as the result of which only part of the tract originally described is rezoned is within the wording above quoted. No further reference to the planning board was necessary.

Johnson v. Town of Framingham, 354 Mass. 750 (1968), dealt with a textual change to a zoning proposal. The Planning Board had held a public hearing on the following warrant article.

Article 56 To see if the Town will vote to amend Section III. A (1), SINGLE RESIDENCE, of the Zoning By-Laws, by adding the following:
k. Private and public golf clubs, tennis courts; pass any vote or take any action relative thereto."

At the Town Meeting it was voted to amend another section of the zoning bylaw so that golf clubs would only be permitted by special permit from the Zoning Board of Appeals. The bylaw was also amended so that private and public golf clubs had to be located on a parcel or parcels of land containing a minimum of 50 acres. Johnson argued that such amendments required another public hearing by the Planning Board.

JOHNSON V. FRAMINGHAM

354 Mass. 750 (1968)

Excerpts:

Wilkins, C.J. ...

We do not agree. Article 56 authorized the voters to act upon the amendment of the zoning by-law to permit golf clubs and tennis courts in single residence zones. The subject was stated very broadly in these words, "pass any vote or take any action relative thereto." This was the subject on which the town meeting undertook to act in passing the amendment. It was not outside the scope of the article to omit tennis courts, to prescribe a minimum size for golf clubs, or, instead of an unconditionally permitted use, to provide for action of the board of appeals by way of exception as to any such use. No logic requires that there must be tennis courts in order that there might be golf clubs. The fifty acre minimum and the board of appeals' action on exceptions both tend to restrict the number of clubs which may be authorized. It is not a serious matter that the proposed amendment was of a different subsection of Section III A.

Fish v. Canton, 322 Mass. 219 (1948), was a case where the amendments adopted by Town Meeting utterly changed the identity of the original zoning proposal. A petition was submitted to the Planning Board to see if the Town would vote to repeal in its entirety the existing zoning bylaw of the town of Canton. The Planning Board held a public hearing on the proposal and recommended that it not be adopted. The same proposal appeared as Article 28 in the town warrant for the annual Town Meeting. At the annual Town Meeting Article 28 did not pass and was dismissed. The Town Meeting was adjourned to another date. At the adjourned meeting Article 28 was reconsidered. Instead of repeal, it was unanimously voted to amend the existing bylaw by reducing minimum lot area and lot frontage in certain zoning districts and by changing a specific area in the community from one zoning district to another.

FISH V. CANTON

322 Mass. 219 (1948)

Excerpts:

Wilkins, J. . .

The judge in substance ruled the action of the town meeting to be invalid because the warrant did not contain the subject matter of that action, and because statutory preliminaries to amendment of a zoning by-law were not complied with. There are two material statutes. "The warrant for all town meetings shall state . . . the subjects to be acted upon thereat . . . No action shall be valid unless the subject matter thereof is contained in the warrant." G. L. (Ter. Ed.) c.39 s. 10, as most recently amended by St. 1939, c. 182. Zoning "by-laws may be adopted and from time to time be changed by amendment, addition or repeal, but only in the manner hereinafter provided. No . . . by-law originally establishing the boundaries of the districts or the regulations and restrictions to be enforced therein, and no . . . by-law changing the same as aforesaid, shall be adopted until after the planning board . . . has held a public hearing thereon after due notice given and has submitted a final report with recommendations to the . . . town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report. . . . After such notice, hearings and report, or lapse of time without report, a . . . town meeting may adopt, reject, or amend and adopt any such proposed . . . by-law." G.L. (Ter. Ed.) c. 40, s. 27, as appearing in St. 1941, c. 320.

In the case at bar, however, even if the action in form amending article 28 of the warrant be treated as an attempted amendment of the zoning by-law, the change thereby sought to be wrought was truly fundamental and could not be valid in the absence of a hearing and report on the new proposal by the planning board. The original article upon which the planning board held its hearing and which was inserted in the warrant for the town meeting sought to repeal the zoning by-law in its entirety. It was no mere perfecting amendment which was sought to be adopted reducing the area requirements in two kinds of districts and transferring certain land from one district to another. In brief, the identity of the original proposed article was utterly changed. The substance of the amendment involved too great a departure to be covered by the provisions of G.L. (Ter. Ed.) c. 40, s.27, as appearing in St. 1941, c. 320, under which, in certain circumstances, a "town meeting may adopt, reject, or amend and adopt" a proposed by-law. Furthermore, article 28 in the warrant did not sufficiently apprise the voters of the subject matter of the vote finally taken. It did not "indicate with substantial certainty the nature of the business to be acted on. . . . For these reasons, the amendment of the zoning by-law voted at the adjourned meeting was invalid.

SUMMARY

Town Meeting does have the flexibility to make amendments to a zoning proposal. Obviously, if the identity of the zoning proposal is utterly changed by a recommendation of the Planning Board or by an amendment by Town Meeting, then the Planning Board must hold a new public hearing. As has been noted by the court, a new notice, hearing and opportunity to report by the Planning Board will be required if the amendment to the zoning proposal:

1. changes the identity or substantial character of the original zoning proposal;
2. fundamentally departs from the original proposal; or
3. radically differs from the original proposal.

Perhaps a good rule of thumb to remember is whether a reasonable man could have foreseen the final action from reading the initial notice.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

Vol. 4, Edition No. 4
June, 1987



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

EFFECTIVE DATE

L

Determining at what time a proposed zoning amendment will apply to the future issuance of a building permit has been a subject which has caused some deal of confusion at the local level. The issue of effectiveness centers around the following two requirements found in the Zoning Act, Chapter 40A, MGL.

A

Section 5. "The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting;
 . . . "

N

Section 6. " . . . a zoning ordinance or by-law shall not apply . . . to a building . . . permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply . . . to a building . . . permit issued after the first notice of said public hearing, . . . "

D

Questions generally arise when the Planning Board's public hearing notice on a proposed zoning change, which is required by Section 5 of the Zoning Act, appears in the newspaper.

U

There are some municipal officials who are of the opinion that a new zoning proposal will apply, in all situations, after the first notice of the public hearing by the Planning Board. Such viewpoint is based on the assumption that the above noted provision found in Section 6 regarding the issuance of building permits after the public hearing notice

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is the controlling language in the statute when dealing with the question of the applicability of a zoning amendment. However, there are other provisions of the Zoning Act which must be taken into consideration in determining when a zoning amendment will apply to the issuance of a building permit. Sections five and six of the Zoning Act must be read in their entirety in order to obtain a clearer picture of the applicability question.

For example, what happens when a subdivision plan has been submitted to the Planning Board?

Section 6 of the Zoning Act also provides the following:

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted . . . before the effective date of (the) ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law . . . in effect at the time of the first submission while such plan or plans are being processed under the subdivision control law

When a plan referred to in section eighty-one P of chapter forty-one has been submitted . . . the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan

In Doliner v. Planning Board of Millis, 349 Mass. 687 (1985), the court noted that the above provisions are a direct and specific legislative statement that subdivision plans are to be governed by the bylaw in effect when the plan is filed and being processed under the Subdivision Control Law. Since Section 5 of the Zoning Act states that a zoning bylaw or ordinance takes effect when adopted by Town Meeting or City Council, the net effect of the Section 6 provisions is to impose a moratorium on the application of new and more stringent zoning requirements adopted by Town Meeting or City Council subsequent to the submission of a plan under the Subdivision Control Law provided the plan is duly approved and/or endorsed by the Planning Board.

In Ward & Johnson v. Planning Board of Whitman, 343 Mass. 466 (1962), the court found that a proposed bylaw was not in effect when the applicant's preliminary plan was submitted to the Planning Board since the bylaw had not been adopted by Town Meeting. The Planning Board disapproved a definitive plan which had evolved from a previously submitted preliminary plan, because the plan did not conform to the zoning bylaw adopted by the town.

The court found that the Planning Board was in error to disapprove the plan as the applicant's plan was governed by the zoning bylaw in effect prior to the Town Meeting vote. The relevant sequence of events was as follows:

February	4	- Notice of Public Hearing
February	8	- Submission of Preliminary Plan
February	19	- Submission of Definitive Plan
February	25	- Public Hearing
March	4	- Town Meeting Vote
March	24	- Attorney General Approval
April	18	- Disapproval of Plan

Therefore, in determining what zoning will apply to a subdivision plan, the key date is the date the zoning proposal is adopted by Town Meeting or City Council and not the date of the Planning Board notice on the proposed zoning change. See also Lavoie v. Building Inspector of Ludlow, 346 Mass. 274 (1963); Livoli v. Planning Board of Marlborough, 347 Mass. 330 (1964); Chira v. Planning Board of Tisbury, 3 Mass. App. Ct. 433 (1975).

A preliminary plan submitted prior to the date of the Town Meeting or City Council vote will also protect the land from future zoning changes provided a definitive plan is submitted within seven months from the date of submission of the preliminary plan. A definitive subdivision plan protects the land shown on such plan and, therefore, the issuance of any building permit protected by the plan, from all future zoning changes for a period of eight years from the date of endorsement.

The submission of an approval not required plan (ANR) will also protect the future issuance of building permits from having to comply with certain zoning changes. In Nyquist v. Zoning Board of Appeals of Acton, 359 Mass. 462 (1971), it was argued that the building permit issued after the first notice of the public hearing was not protected from the future enactment of a zoning change even though the landowner had a "ANR" plan endorsed by the Planning Board prior to the public hearing notice appearing in the newspaper. The relevant sequence of events was as follows:

December 13, 1968	ANR Plan Submitted
December 16, 1968	ANR Plan Endorsed by Planning Board
January 30, 1969	Notice of Public Hearing
April 7, 1969	Town Meeting Vote
May 28, 1969	Building Permit Issued

Nyquist argued that the issuance of the building permit was "a more meaningful event" than the filing of the ANR plan and that the zoning in effect at the time of the issuance of the building permit should apply to the land shown on the ANR plan. The court noted that such an argument ignored the clear and unequivocal language of the Zoning Enabling Act which extends a broad protection to subdivision plans. The court found that properly submitted plans are not governed by the provisions of the Zoning Enabling Act which affects building permits issued after the publication of the public hearing notice by the Planning Board. The court further noted in Nyquist that:

The statute gives a period . . . within which the owner of the land shown on the approved plan may proceed under the provisions of the zoning by-law as in force prior to (the zoning) amendment

The submission of an ANR plan prior to Town Meeting or City Council vote and subsequent endorsement by the Planning Board that approval under the Subdivision Control Law is not required will protect the land shown on such plan, and the issuance of building permits protected by such plan, from future zoning changes relative to use for a period of three years from the date of endorsement. An ANR plan does not afford protection from increases in dimensional or density requirements.

Building permits may also be issued, after the first notice of the public hearing, for separate and common ownership lots which are protected by the grandfather provisions found in Section 6 of The Zoning Act. For a further explanation of the lot protection provisions see Land use Manager, Vol. 2, Ed. No. 8, October, 1985. Therefore, the timely filing of a subdivision or ANR plan and the existence of separate and common ownership lots can produce situations where a building permit issued after the first notice of the public hearing will not have to comply with the new zoning regulation.

What happens if a building permit is not protected from a proposed zoning regulation? There is generally no argument that an unprotected building permit issued after Town Meeting or City Council vote must comply with the new zoning regulation. What has been debatable is whether an unprotected building permit issued after the public hearing notice must comply with the proposed zoning regulation. Does the Zoning Enforcement Officer apply the provisions of the proposed zoning amendment to any unprotected building permit once the Planning Board has given notice concerning the new zoning regulation?

The court has ruled that a zoning proposal should not be applied to a building permit until the zoning proposal has been adopted by Town Meeting or City Council. This opinion was first expressed by the court in Ouellette v Building Inspector of Quincy, 362 Mass. 272 (1972) which stated in part:

There is a distinction between a proposed zoning amendment, such as is involved in the instant case, and an amendment which has been adopted but has not yet been approved and published, . . . While a proposed zoning amendment may undergo substantial changes or may be abandoned entirely, once the town has adopted an amendment, it will generally receive the Attorney General's approval (either actual or constructive) and, after appropriate publication, will take effect. See G.L., c. 40, s. 32. Because of this fundamental difference, while a building inspector may refuse to issue a permit because of a newly adopted zoning amendment, we are unwilling to say that he may refuse to issue a permit merely because of a proposed zoning amendment. In any event, under [The Zoning Act], a building inspector is empowered to "withhold a permit" only "if the (proposed) building . . . as constructed . . . would be in violation of any zoning ordinance or bylaw or amendment thereof" (emphasis supplied). While the emphasized language is sufficiently broad to encompass an amendment which has been adopted but is not yet effective, we think that a fair construction must exclude a mere proposed zoning amendment.

See also Carstensen v. Zoning Board of Appeals of Cambridge, 11 Mass. App. Ct. 348 (1981), where the court reached a similar conclusion.

After the public hearing notice, a new zoning regulation will apply to unprotected building permits if the steps required for the adoption of the proposed amendment are taken in their usual sequence. See Land Use Manager, Vol. 4, Ed. No. 2, February, 1987. When an unprotected building permit is issued in accordance with the zoning in effect and the Planning Board has given notice on a proposed zoning amendment, the Building Inspector should note on the building permit that the construction or use authorized under such permit will have to comply if Town Meeting or City Council adopts the zoning proposal within the required time periods.

The situation where a Building Inspector must apply the zoning in effect at the time of the issuance of a building permit, with the caveat that the proposed zoning will apply retroactively if eventually made effective through proper adoption, is a difficult area of zoning enforcement. The landowner, in such situations, appears to proceed at his own risk.

If the time period between the issuance of an unprotected building permit and Town Meeting or City Council vote is relatively short, we would suggest seeking the advice of Town Counsel or City Solicitor.

U.S. SUPREME COURT DECIDES INVERSE CONDEMNATION ISSUE

The Fifth Amendment to the United States Constitution provides that:

No person shall be . . . deprived of . . .
property without due process of law; nor shall
private property be taken for public use, with-
out just compensation.

While the typical taking occurs when government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that a taking can occur without such formal proceedings. As Mr. Justice Holmes noted in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393;

While property may be regulated to a certain extent, if regulation goes to far it will be recognized as a taking . . . A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . .

In next month's issue of the Land Use Manager, we will look at First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S. L. W. 4781 (June, 1987) where the United States Supreme Court finally decided the issue of whether the Fifth Amendment requires compensation for a regulatory taking.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

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Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

INVERSE CONDEMNATION

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The Fifth Amendment to the United States Constitution prohibits governments from taking private property without just compensation. While the typical taking occurs when government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that a taking can occur without such formal proceedings. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781 (June 9, 1987), the United States Supreme Court finally decided the issue of whether the Fifth Amendment requires compensation for a regulatory taking.

This is not the first time that the question of inverse condemnation has been before the Supreme Court. In 1980, in Agins v. Tiburon, a decision as to a zoning restriction was left undecided because the property owner had not submitted a development plan. In 1981, in San Diego Gas & Electric Co. v. San Diego, the Court refused to address the issue citing procedural reasons. In 1985, in Williamson County Regional Planning v. Hamilton Bank of Johnson City, the Court failed to resolve the argument when it concluded that the case was not ripe for its consideration. Last year, in MacDonald et al. v. Yolo County, the Court again avoided the issue when it held that there had been no taking because MacDonald had not received a final definitive position as to how the County would apply its regulations to the land in question.

Prior to the First English decision, the questionable ingredient relative to the inverse condemnation theory centered on the available remedy. The Fifth Amendment to the United States

Constitution provides that:

No person shall be . . . deprived of . . .
property, without due process of law; nor
shall private property be taken for
public use without just compensation.

On one side, the argument had been that the excessive governmental regulation invoked the "Just Compensation Clause" so that the remedy was "just compensation." On the other side, the argument was that the excessive governmental regulation violated the "Due Process Clause" so the available remedy was not "just compensation" but rather the invalidation of the regulation.

In Agins v. City of Tiburon, 598 P. 2d 25 (1979), a landowner alleged that a zoning ordinance deprived him of substantially all use of his land and brought an inverse condemnation claim for damages. In that case, the California Supreme Court decided that a landowner could not maintain an inverse condemnation suit based upon a "regulatory taking" and, that compensation was not required until it was finally determined that the regulation constituted a taking and only then if the government decided to continue the regulation in effect. It was this case that the California courts relied upon when deciding First English.

The First English case involved a church that owned a camp near Los Angeles that was located on a floodplain. The camp was destroyed by a flood. In response to the flooding, the county enacted an ordinance which prohibited any construction or reconstruction within the floodplain. The Lutheran Church argued that the prohibition of the use was an unconstitutional taking of property which required compensation. The trial court granted a motion to strike the allegation, basing its ruling on the California Supreme Court's previous decision in Agins. Because the Lutheran Church alleged a regulatory taking and sought only damages, the trial court deemed the allegation that the ordinance denied all use of the church's land to be irrelevant. The California Court of Appeal affirmed the trial court's decision and the church appealed.

An interesting aspect of the First English case is how the U.S. Supreme Court eluded the taking question. The Court assumed that the ordinance had denied the church all use of its property and then focused its decision solely on the question of remedy. Therefore, the Court did not decide whether:

1. the ordinance actually denied the church all use of its property; or
2. whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations.

Both those questions were remanded to the California Court. In First English, the U.S. Supreme Court only decided whether the "Just Compensation Clause" requires that government pay for temporary regulatory takings. To this question, the Court responded:

We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period which the taking was effective.

Put another way, when a local government imposes a land use regulation which is tantamount to a taking, then the local government must reach into its municipal pockets and monetarily compensate the landowner for the damages incurred during the time the excessive regulation was in effect.

Recent reports and editorials by a number of newspapers have somewhat overstated the impact of the First English decision. The U.S. Supreme Court did not decide that a taking occurs when a municipality regulates or prohibits construction in a floodplain or wetlands nor did the Court establish any new criteria for determining the existence of a taking. Also, the Court carefully narrowed its decision by noting that:

We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.

It is important, however, that municipal officials understand the potential impact of the First English decision. In summary, the Court has determined that a temporary regulatory taking, which denies a landowner all use of his property, is no different in kind from a permanent taking for which the constitution clearly requires compensation. The First English decision exposes local governments to financial liability for enacting excessive zoning regulations. First English does, however, leave a number of questions unresolved such as:

1. how far a developer must go in seeking compensation before going to court; or
2. how long the excessive regulation must be in place in order to constitute a taking; or
3. how the amount of compensation will be determined when considering damages.

The Court has long recognized that land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner an economically viable use of his land. In examining public purpose v. private interest, the Court has upheld a broad range of governmental purposes and regulations. Most recently, the U.S. Supreme Court found no taking in Keystone Bituminous Coal Association v. DeBenedictis, 55 U.S.L.W. 4326 (1987). A group of mine operators attacked Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act and its implementing regulations. The regulations required coal mine operators to keep in place 50 percent of the coal beneath public and noncommercial building, dwellings, cemeteries, and water courses as a means of providing surface support and authorized the revocation of mining permits for failure to repair or pay for subsidence damage. The Court held that the Act and regulations did not constitute a taking of private property. As to public purpose v. private interest, the Court ruled that the Act was intended to serve genuine, substantial, and legitimate public interests in health, the environment, and the fiscal integrity of an area by minimizing subsidence damage. The Court added that the public interest in preventing activities similar to public nuisances is a substantial one, which in most instances does not require compensation.

In next month's issue of the Land Use Manager, we will look at Nollan v. California Coastal Commission where the U.S. Supreme Court found an impermissible regulatory taking.

AN ACT RELATIVE TO SUBDIVISION CONTROL LAW

Chapter 122 of the Acts of 1987 amends Chapter 41, Section 81P, MGL by increasing the time period for the review of approval not required plans.

The law gives Planning Boards twenty-one (21) days to make a determination as to whether a plan is entitled to be endorsed "Approval Under the Subdivision Control Law is not Required."

This law was approved on June 3, 1987 and will take effect on September 1, 1987.

AN ACT PROVIDING FOR THE EXPENDITURE OF DEFAULT FUNDS BY
MUNICIPAL PLANNING BOARDS

Chapter 236 of the Acts of 1987 amends Chapter 41, Section 81U, MGL by inserting in the next to the last paragraph the following paragraph concerning the disposition of performance guarantees:

In any town which accepts the provisions of this paragraph, the proceeds of any such bond or deposit shall be made available to the town for expenditure to meet the cost and expenses of the municipality in completing the work as specified in the approved plan. If such proceeds do not exceed twenty-five thousand dollars, the expenditure may be made without specific appropriation under section fifty-three of chapter forty-four; provided, however, that such expenditure is approved by the board of selectmen. The provisions of this paragraph shall not apply to cities or to towns having town councils.

This law was approved on July 14, 1987 and will take effect on October 12, 1987.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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REGULATORY TAKINGS

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In the landmark land use case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Justice Holmes stated:

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"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

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Justice Holmes also analyzed the taking issue by focusing on both the nature and extent of the public interest involved and the nature and extent of the loss to the property owner. This so called "balancing of interest" approach has been the framework for reviewing taking claims.

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In June of this year, the U.S. Supreme Court did something it has rarely done since Justice Holmes analyzed the taking issue back in 1922. It ruled that a government regulation amounted to a taking under the Fifth and Fourteenth Amendments. In a five to four vote, the Court overturned a development permit condition which required owners of a beachfront lot to dedicate an easement providing for public access across their property.

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E MANAGER

Nollan v. California Coastal Commission, 55 U.S.L.W. 5145 (June 26, 1987), was decided fifteen days after the First English case which was discussed in last month's issue of the Land Use Manager. First English was highly publicized while Nollan received far less attention from the press. Due to the fact that the media, in many instances, inaccurately reported the First English decision, the lack of attention to Nollan may have been a blessing. It is important that local officials, who are responsible for making land use decisions, be aware of both cases. The best advice one can give to such officials is not to rely on newspaper accounts for your source of information but to obtain and read both decisions. Also, the following summary should not be used as a substitute for your reading of the Nollan case. We have only attempted to highlight the decision. With that in mind, let's take a look at Nollan.

The Nollans owned a beachfront lot which was situated between two public beaches. A continuous seawall, approximately eight feet high, separated the beach portion of the Nollans' property from the rest of the lot. The Nollans had originally leased the property with an option to buy. The building on the lot was a small bungalow which had been rented to summer vacationers. After years of rental use, the bungalow had fallen into disrepair and could no longer be rented out. The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. However, in order to demolish the bungalow and build a larger home, the Nollans were required to obtain a coastal development permit from the California Coastal Commission.

After a public hearing, the Coastal Commission found that the Nollans' new house would block the view to the ocean, increase private use of the storefront and, hinder the public's ability to gain access along the storefront. The Coastal Commission granted a development permit on the condition that the Nollans grant an easement allowing the public to pass across a portion of their property bounded by the mean high tide line on one side and their seawall on the other side. The Nollans appealed arguing that the imposition of the lateral access condition was a regulatory taking. The California Court of Appeal upheld the Commission's condition basing their decision on an earlier case where the same Court ruled that the imposition of an access condition on a development permit to be constitutional. In addition, the California Court of Appeal found that the Nollans' taking claim failed because even though the condition diminished the value of the lot, it did not deprive the Nollans of all reasonable use of their property. The Nollans appealed to the U.S. Supreme Court.

In previous cases, the U.S. Supreme Court has held that a taking occurs when the effect of a regulation produces a permanent physical occupation of land. Considering the physical invasion theory, the Court found the access condition imposed by the Coastal Commission to be no different than a eminent domain taking.

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their house on their agreeing to do so, we have no doubt there would have been a taking. . . . where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Since the requiring of an uncompensated conveyance of an easement outright would violate the Fourteenth Amendment, the Court focused on the question as to whether the requiring of an easement to be conveyed as a condition for issuing a land use permit would alter such an outcome.

The U.S. Supreme Court has long recognized that a land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. The Commission argued that one such interest is to protect the public's ability to see the beach. The Court assumed, without deciding, that protecting the beach view was a legitimate state interest. The Commission then argued that they could deny the permit outright if the Nollans' house would substantially impede the public's ability to see the beach unless the denial would interfere so drastically with the Nollans' use of their property so as to constitute a taking. The Commission's argument was if their refusal to issue a development permit would not constitute a taking then, the imposition of a condition to protect the same legitimate state interest should also not constitute a taking.

We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house - for example, a height limitation, a width restriction, or a ban on fences - so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access of the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.

In determining whether the access condition advanced a legitimate state interest, the Court introduced, for the first time, the "essential nexus" test. State courts have used a "rational nexus" test when determining the validity of governmental exactions such as impact fees. In Nollan, the Court noted that:

the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

The Commission's position was that the deed restriction, which gave the public lateral access across the beach, advanced legitimate state interests in that construction of the Nollans' house would:

1. interfere with "visual access" to the beach;
2. interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access"(only in California would one worry about "psychological barriers") and;
3. increase the use of public beaches, thus creating the need for more access.

The Court, however, was not persuaded by the Commission's novel position that the above noted access problems would be alleviated by requiring the Nollans to grant a "lateral access" easement across their beachfront.

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.

The Court concluded by noting that the Commission's belief that the public interest would be served by a continuous strip of accessible beach along the coast may be a good idea but the Nollans cannot be compelled to contribute to its realization. If California wants an easement across the Nollans' property, "it must pay for it."

Marlin Smith, a noted land use attorney, identified six categories of taking cases when analyzing the taking issue. See Newsletter of the Planning and Law Division of the American Planning Association, Vol. 5, No. 1 (1984). The six categories are:

1. Cases where there has been a physical invasion of property. This category includes cases in which the effect of a regulation produces a physical invasion of land.
2. Cases of acquisitory intent where government has acquisition on its mind and has engaged in conduct which depreciates the value of land so that compensation will be substantially reduced.
3. Cases where regulation has deprived land of all reasonable economic use such as regulations which do not permit any development.
4. Cases where government designates land for future acquisition without any inequitable conduct on its part (for example, official map designations).
5. Cases where regulation diminishes value of land rather severely but does not destroy it entirely.
6. Cases where regulation is severe to the point of prohibiting all use, but only for comparatively short periods of time (for example, moratoria)

In the categories described by Marlin Smith, a taking is most likely to occur as land use regulation approaches physical invasion or when government is found to have acquisition on its mind. A taking is least likely to occur when land use regulation merely diminishes the value of the regulated property or when the effect on property value, though substantial, is temporary.

It is interesting to note that the Nollan decision is in one of the high risk category as described by Smith. The Nollan case dealt with the mandatory dedication of public access over private land which falls in the category of physical invasion. Whether Nollan has limited application in that the Court was reviewing a mandatory land dedication is open to debate. However, Nollan does note the following questions that the Court will look at when determining the existence of a regulatory taking.

1. Does the exaction serve a legitimate police power purpose (for example, does the exaction promote public health, safety or welfare)?
2. Does government have the authority to deny permission to build so as to protect the legitimate police power purpose and does such denial not interfere so drastically with the use of property so as to constitute a taking? This principle would include the balance of interest test where the Court would weigh the nature and extent of the public interest involved and the nature and extent of the loss to the property owner.
3. Does the imposition of the exaction further the legitimate police power purpose? Under this principle, the Court introduced the use of the "essential nexus" test. It was this principle that the Coastal Commission failed to meet as the Court found that the imposition of the access requirement did not substantially advance a clearly defined public purpose.

The Nollan and First English decisions will not affect the normal planning activities of local government. First English established the remedy and Nollan provided insight as to how the Supreme Court will review regulatory takings. However, both decisions represent strong arguments for communities to be more concerned with long range planning, as they cannot rely on the presumption that their regulation or condition is valid when there is a regulatory taking challenge. Local government will have to be able to justify the imposition of the restrictive regulation or condition.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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COMMON DRIVEWAYS

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The major purpose of the Subdivision Control Law is to insure that adequate access will exist to proposed building lots. The Subdivision Control Law specifically provides that the powers of a Planning Board shall be exercised with due regard for the provision of adequate access to all lots in a subdivision by ways that will be safe and convenient for travel. Any landowner who wishes to divide his property must seek the approval of the Planning Board if the Board has subdivision control powers.

The Subdivision Control Law, however, contains a process whereby a landowner may divide his property and record a plan which will not require the approval of the Planning Board. Chapter 41, Section 81-P, authorizes a Planning Board to endorse a plan "approval under the Subdivision Control Law not required" (ANR). As was noted in Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the purpose of the "ANR" process is not to enlarge the substantive powers of a Planning Board but rather to provide a simple method for informing the Register of Deeds that the Planning Board is not concerned with a plan because vital access to the lots is reasonably guaranteed.

Section 81-P further requires than an "ANR" endorsement can not be withheld unless a plan shows a subdivision. Whether a plan showing a proposed division of land requires approval or not rests with the definition of "Subdivision" as found in Chapter 41, Section 81-L MGL. In reviewing

the definition of "Subdivision", the Court has determined that three standards must be met in order for a plan to be entitled to an "ANR" endorsement by the Planning Board.

1. The lots shown on a plan must front on one of the three types of ways specified in Chapter 41, Section 81-L, MGL;
2. The lots shown on a plan must meet the minimum frontage requirements as specified in Chapter 41, Section 81-L, MGL, and;
3. A Planning Board's determination that vital access to the lots shown on a plan, as contemplated by Chapter 41, Section 81-M, otherwise exists.

We are frequently asked for advice as to whether a Planning Board should endorse a plan "approval under the Subdivision Control Law not required." One of the more interesting aspects of the "ANR" process, if not the Subdivision Control Law, is the vital access standard. It is not the intent of this Land Use Manager to address all the issues surrounding the question of vital access. Such a review would be a rather lengthy undertaking. However, one issue that has generated problems at the local level has been the use of common driveways as a means of providing the necessary vital access to proposed building lots.

Case law has established the principle that each lot shown on an "ANR" plan must be able to access onto the way from the designated frontage. For example, in McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980), the Massachusetts Supreme Court upheld the denial of an "ANR" plan because the landowner could not access his proposed lots to the public road shown on the plan. The Martha's Vineyard Commission had adopted a regulation which was in force in the town of Edgartown. The regulation required that any additional vehicular access (driveways) to a public road had to be at least 1,000 feet apart. McCarthy had submitted an "ANR" plan to the Planning Board. The Edgartown Zoning Bylaw required a minimum lot frontage of 100 feet. Each lot shown on McCarthy's plan had the required 100 feet of frontage on a public road. However, the Planning Board denied the requested "ANR" endorsement. The Planning Board contended that the Martha's Vineyard Commission's vehicular access regulation deprived the lots practical access as driveways could not be constructed to the public way. Therefore, the proposed lots did not have the type of frontage required by the Subdivision Control Law for the purposes of an "ANR" endorsement. The Massachusetts Supreme Court agreed with the Planning Board. See also Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 950 (1979), where the Massachusetts Appeals Court held that lots abutting a limited access highway did not have the required frontage on a way for the purpose of an "ANR" endorsement.

All lots shown on an "ANR" plan must be able to provide vehicular access to a way from the designated frontage. However, what happens when a landowner proposes to construct a common driveway rather than individual driveways to a way?

1. Is a proposed common driveway a relevant factor in determining whether a plan is entitled to an "ANR" endorsement?
2. In reviewing an "ANR" plan, does the Planning Board have the authority to make a determination that a proposed common driveway provides the necessary vital access to each lot?

The Massachusetts Appeals Court took a look at both questions in Fox v. Planning Board of Milton, 24 Mass. App. ct. 572 (1987). Robert Fox owned a parcel of land which abutted the Neponset Valley Parkway. Fox submitted a plan to the Planning Board for an "ANR" endorsement. The plan showed the division of his parcel into four lots. Each lot abutted parkway land for a distance of 150 feet which was the minimum frontage requirement of the Milton Zoning Bylaw. The proposed lots were separated from the paved portion of the parkway by a greenbelt which was approximately 175 feet wide. However, Fox had obtained an access permit from the Metropolitan District Commission for a "T" shaped common driveway connecting, at the base, to the paved road and, at the top, to the four lots where they abutted the greenbelt. The proposed common driveway was shown on the "ANR" plan. The Planning Board denied endorsement ruling that the plan showed a subdivision. Fox appealed.

The Planning Board, in denying its endorsement, relied on a line of previous court cases which have held that the frontage on a public way required by the Subdivision Control Law must be frontage that offers serviceable access from the buildable portion of the lot to the public way on which the lot fronts. In the Board's view, Fox's parcel was effectively blocked from the paved roadway by the greenbelt so that his proposal was essentially for the development of back land. Therefore, the Planning Board contended that the proposed common access driveway should be subject to their regulations governing the construction of roads in subdivisions.

The two issues before the Court were:

1. whether the parcel in question had a right of access over the greenbelt to the parkway; and
2. whether the proposed common driveway would prevent Fox from obtaining an "ANR" endorsement from the Planning Board

As to the question of access, the Court found that Fox had rights of access to the Neponset Valley Parkway. Chapter 288 of the Acts of 1894 authorized the Metropolitan Park Commissioners to take land for the construction of parkways and boulevards. Pursuant to this authority, the Metropolitan Park Commissioners took land in 1904 to construct the Neponset Valley Parkway. In Anzalone v. Metropolitan District Commission, 257 Mass. 32 (1926), the Court ruled that in contrast to roadways constructed within public parks, roadways constructed under the 1894 statute were public ways to which abutting owners had a common-law right of access. Anzalone also noted that if land, adjacent to roadways which were constructed under the authority of the 1894 statute, was divided into separate ownership lots then each lot owner would have a right of access from his lot to the roadway. The Court concluded that Fox's right of access to the parkway was not impaired or limited by the substantial intervening greenbelt. Since each of the proposed lots shown on the plan had a guaranteed right of access to the parkway, Fox argued that the construction of a common driveway rather than four individual driveways should be of no concern to the Planning Board when reviewing an "ANR" plan. The Court agreed.

FOX V. PLANNING BOARD OF MILTON
24 Mass. App. Ct. 572 (1987)

Excerpts:

Armstrong, J. . . .

The proposed common driveway is not relevant to determining whether Fox's plan shows a subdivision. If all the lots have the requisite frontage on a public way, and the availability of access implied by that frontage is not shown to be illusory in fact, it is of no concern to a planning board that the developer may propose a common driveway, rather than individual driveways, perhaps for aesthetic reasons or reasons of cost. The Subdivision Control Law is concerned with access to the lot, not to the house; there is nothing in it that prevents owners from choosing, if they are so inclined, to build their houses far from the road, with no provision for vehicular access, so long as their lots have the frontage that makes such access possible. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. at 272-273. Here, each of the proposed lots has the frontage called for by the Milton by-law. Under

the Anzalone case each has a guaranteed right of access to the road itself. These facts satisfy the requirements of Section 81L.

The Fox decision provides valuable insight concerning common driveways and vital access. Ask the following questions when reviewing "ANR" plans and proposed common driveways.

1. Do all the proposed building lots have the frontage on an acceptable way as defined in Chapter 41, Section 81-L, MGL?
2. Is access to any of the lots from such frontage illusory in nature? The lot frontage must provide practical access to the way or public way. A lot condition which would prevent practical access over the front lot line such as a steep slope is an appropriate matter for a Planning Board to consider before endorsing an "ANR" plan. See DiCarlo v. Planning Board of Wayland, 19 Mass. App. Ct. 911 (1984).
3. Does the proposed common driveway access over the frontage shown on the "ANR" plan to the acceptable way or public way? Access obtained by way of easement over a side or rear lot line is not authorized unless approved by the Planning Board. See DiCarlo v. Planning Board of Wayland, supra.

An issue that the Fox decision did not address was the question of zoning. Just because a proposed division of land may be entitled to an "ANR" endorsement for the purposes of the Subdivision Control Law does not mean that the lots or a proposed common driveway are buildable under the provisions of the local zoning bylaw. An "ANR" endorsement gives the lots no standing under the zoning bylaw. See Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980).

Access roadways are a use of land which must conform to the provisions of the local zoning bylaw. See Land Use Manager, Vol. 2, Edition No. 9, November, 1985. The first call as to whether a proposed common driveway will conform to local zoning rests with the zoning enforcement officer. If the local zoning bylaw remains silent relative to the use of land for a common driveway, then the zoning enforcement officer will have to determine whether a proposed common driveway would be an allowable accessory use. The answer to this question would be on a case by case basis. To eliminate confusion in this area, we would suggest that communities

adopt zoning provisions either authorizing or prohibiting common driveways. Specifically addressing the issue will be of great assistance to the zoning enforcement officer. If you choose to permit common driveways, consider the following regulations:

1. Authorize common driveways through the issuance of a special permit.
2. Limit the number of lots that may be accessed by a common driveway.
3. Specify that common driveways may never be used to satisfy zoning frontage requirements.
4. Establish construction standards for common driveways.
5. Require that common driveways access over approved frontage.
6. Designate a maximum length for common driveways.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 5, Edition No. 1
January, 1988

L

RECENT AMENDMENTS TO THE ZONING ACT AND SUBDIVISION CONTROL LAW

A

During the 1987 legislative session, the General Court made several amendments to the Zoning Act and the Subdivision Control Law. The following is a brief summary of those changes that have been signed by the Governor as of December 31, 1987. We have reproduced the new or amended paragraphs which we urge you to read. Please do not rely on our summary as the sole basis of your interpretation of the new legislation.

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ZONING ACT

CHAPTER 191

AN ACT EXEMPTING FAMILY DAY CARE HOMES FROM CERTAIN LOCAL ZONING ORDINANCES AND BYLAWS

This Act inserted a new paragraph in Section 3 of the Zoning Act which provides a limited zoning exemption for family day care homes. Such homes are now authorized as a matter of right in any zoning district unless the local zoning bylaw or ordinance prohibits or specifically regulates family day care homes. For the purposes of this exemption, a family day care home is defined as follows:

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Any private residence which on a regular basis, receives for temporary custody and care during part or all of the day, children under seven years of age or children under sixteen years of age if such children have special needs. In either case, the total number of children under sixteen in a family day care home can not exceed six, including participating children living in the residence. A family day care home does not mean a private residence used for an informal cooperative arrangement among neighbors or relatives, or the occasional care of children with or without compensation.

This Act was approved by the Governor on June 30, 1987 and took effect on September 1, 1987.

CHAPTER 481

AN ACT FURTHER REGULATING THE ILLEGAL USE OF BUILDINGS OR STRUCTURES

This Act amended Section 7 of the Zoning Act by providing an additional statute of limitations for challenging zoning violations. Presently, Section 7 contains a six year statute of limitations on challenges to compel the removal, alteration or relocation of a structure due to an alleged zoning violation if the alleged violation resulted from the issuance of a building permit by a duly authorized municipal official. Chapter 481 establishes an additional ten year statute of limitations on challenges to compel the removal, alteration, or relocation of a structure due to any alleged zoning violation including any violation of a condition imposed by a permit granting authority when granting a variance or special permit. Although the new law remains silent as to conditions imposed on special permits by special permit granting authorities, when other than the Zoning Board of Appeals, we feel that such conditions would also be included in the ten year statute of limitations.

This Act was approved by the Governor on November 10, 1987 and will take effect on February 8, 1988.

CHAPTER 498

AN ACT RELATIVE TO THE FILING PROCEDURE AND NOTIFYING PARTIES OF INTEREST REGARDING CERTAIN SPECIAL PERMITS AND VARIANCES

This Act amends Sections 9, 11, 15 and 17 of the Zoning Act. The major emphasis of this legislation

is to establish a procedure for the approval of a special permit, variance or appeal due to a constructive grant. In addition, Chapter 498 changes certain procedural requirements relative to the special permit, variance and appeal process. Some of the significant changes made by Chapter 498 are:

Section 9

All applications for special permits must be filed by the petitioner with the municipal clerk. A copy of the application, including a certification by the municipal clerk of the date and time of filing, must be filed forthwith by the petitioner with the special permit granting authority.

The decision of the special permit granting authority must be made within 90 days following the date of the public hearing.

The required time limits for holding the public hearing and making the decision may be extended by written mutual agreement between the petitioner and the special permit granting authority. A copy of any such agreement must be filed in the office of the municipal clerk.

Failure to take final action within 90 days following the public hearing, or any mutually extended time period, shall deemed to be a grant of the special permit. Any petitioner who seeks constructive approval must give written notice to the municipal clerk within 14 days from the expiration of the 90 days, or extended time period, of the approval of the special permit due to the failure of the special permit granting authority to take final action. The petitioner must also inform the municipal clerk that he has notified parties in interest of the constructive grant and that any appeal of such grant must be made pursuant to Section 17 of the Zoning Act. After the expiration of 20 days without notice of appeal, the municipal clerk must certify the date of the approval, the fact that the special permit granting authority failed to take final action and that the approval of the special permit by such failure has become final. Such certification must be forwarded to the petitioner by the municipal clerk.

Section 11

If a variance or special permit has been approved by failure of a board of appeals or special permit granting authority to act within the required time periods, a copy of the special permit application or variance petition, along with the certification of the municipal clerk of the constructive grant, must be recorded in the registry of deeds. No variance or special permit takes effect until it has been so recorded.

Section 15

Any appeal must be filed by the petitioner with the municipal clerk. A copy of the appeal, including a certification by the municipal clerk of the date and time of filing, must be filed forthwith by the petitioner with the zoning board of appeals and the officer or board whose order or decision is being appealed.

Any petition for a variance shall be filed by the petitioner with the municipal clerk. A copy of the petition, including a certification by the municipal clerk of the date and time of filing, must be transmitted forthwith by the petitioner to the zoning board of appeals.

The zoning board of appeals must hold a public hearing within 65 days from receipt of an appeal or petition for a variance.

The zoning board of appeals must make its decision on an appeal or variance within 100 days after the date of filing with the municipal clerk.

The required time limits for holding the public hearing and making the decision may be extended by written mutual agreement between the petitioner and the zoning board of appeals. A copy of such agreement must be filed in the office of the municipal clerk.

Failure of the zoning board of appeals to act within 100 days, or any mutually extended time period, shall be deemed to be a grant of the appeal or variance. Any petitioner who seeks constructive approval must give written notice to the municipal clerk within 14 days

from the expiration of the 100 days, or extended time period, of the approval of the appeal or variance due to the failure of the zoning board of appeals to make a decision. The petitioner must also inform the municipal clerk that he has notified parties in interest of the constructive grant and that any appeal of such grant must be made pursuant to Section 17 of the Zoning Act. After the expiration of 20 days without notice of appeal, the municipal clerk must certify the date of approval, the fact that the board of appeals failed to take final action and that the approval of the appeal or variance by such failure has become final. Such certificate must be forwarded to the petitioner by the municipal clerk.

Chapter 498 was approved by the Governor on November 17, 1987 and will take effect on February 15, 1988.

SUBDIVISION CONTROL LAW

CHAPTER 122 AN ACT RELATIVE TO SUBDVISION CONTROL LAW

This legislation amended Section 81-P of the Subdivision Control Law by increasing the time period for the review of approval not required plans from 14 days to 21 days.

This Act was approved by the Governor on June 3, 1987 and took effect on September 1, 1987

CHAPTER 236 AN ACT PROVIDING FOR THE EXPENDITURE OF DEFAULT FUNDS BY MUNICIPAL PLANNING BOARDS

This legislation amended Section 81-U of the Subdivision Control Law by inserting a new provision concerning the disposition of performance guarantees to secure the construction of ways and installation of municipal services shown on an approved subdivision plan. It is questionable as to the necessity of this legislation. It would be advisable to seek the opinion of your city solicitor or town counsel before your community accepts the provisions of the statute.

This Act was approved by the Governor on July 14, 1987 and took effect on October 12, 1987.

No local zoning law shall provide penalty of more than three hundred dollars per violation; provided that nothing herein shall be construed to prohibit such laws from providing that each day such violation continues shall constitute a separate offense. No action, suit or proceeding shall be maintained in any court, nor any administrative or other action taken to recover a fine or damages or to compel the removal, alteration, or relocation of any structure or part of a structure or alteration of a structure by reason of any violation of any zoning by-law or ordinance except in accordance with the provisions of this section, section eight and section seventeen, provided, however, if real property has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized to issue such permits, no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation of the provisions of this chapter, or of any ordinance or by-law adopted thereunder, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within six years next after the commencement of the alleged violation of law; and provided, further, that no action, criminal or civil, the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation of the provisions of this chapter, or any ordinance or by-law adopted thereunder, or the conditions of any variance or special permit granted by a permit granting authority, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for such county or district in which the land lies within ten years next after the commencement of the alleged violation. Such notice shall include names of one or more of the owners of record, the name of the person initiating the action, and adequate identification of the structure and the alleged violation.

ZONING.

40A:3. Limitations on Subject Matter.

[Paragraph inserted following second paragraph by 1987, 191 effective September 28, 1987.]

Family day care home, as defined in section nine of chapter twenty-eight A, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.

40A:7. Enforcement and Penalties; Superior Court Jurisdiction.

[Second paragraph as amended by 1987, 481, Sec. 1 effective February 8, 1988. For text effective until February 8, 1988, see 1986 Edition.]

40A:9. Special Permits.

[Eighth paragraph as amended by 1987, 498, Sec. 1 effective February 15, 1988. For text effective until February 15, 1988, see 1986 Edition.]

Zoning ordinances or by-laws may provide that certain classes of special permits shall be issued by one special permit granting authority and others by another special permit granting authority as provided in the ordinance or by-law. Such special permit granting authority shall adopt and from time to time amend rules relative to the issuance of such permits, and shall file a copy of said rules in the office of the city or town clerk. Such rules shall prescribe a size, form, contents, style and number of copies of plans and specifications and the procedure for a submission and approval of such permits.

[Paragraphs inserted following eighth paragraph by 1987, 498, Sec. 1 effective February 15, 1988.]

Each application for a special permit shall be filed by the petitioner with the city or town clerk and a copy of said application, including the date and time of filing certified by the city or town clerk, shall be filed forthwith by the petitioner with the special permit granting authority. The special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven, on any application for a special permit within sixty-five days from the date of filing of such application; provided, however, that a city council having more than five members designated to act upon such application may appoint a committee of such council to hold the public hearing. The decision of the special permit granting authority shall be made within ninety days following the date of such public hearing. The required time limits for a public hearing and said action, may be extended by written agreement between the petitioner and the special permit granting authority. A copy of such agreement shall be filed in the office of the city or town clerk. A special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board.

Failure by the special permit granting authority to take final action within said ninety days or extended time, if applicable, shall be deemed to be a grant of the special permit. The petitioner who seeks such approval by reason of the failure of the special permit granting authority to act within such time prescribed, shall notify the city or town clerk, in writing within fourteen days from the expiration of said ninety days or extended time, if applicable, of such approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest by mail and each such notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the special permit granting authority failed to act within the time prescribed. After the expiration of twenty days without notice of appeal to the superior court, or, if appeal has been taken, after receipt of certified records of the superior court indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the special permit granting authority failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed

within fourteen days in the office of the city or town clerk and shall be deemed a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each such notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

40A:11. Notice of Public Hearing, Publication; "Parties in Interest" Defined; Review of Special Permit Applications; Certificate of Special Permit or Variance; Failure of Permit Granting Authority to Act.

[Fourth paragraph as amended by 1987, 498, Sec. 2 effective February 15, 1988. For text effective until February 15, 1988, see 1986 Edition.]

Upon the granting of a variance or special permit, or any extension, modification or renewal thereof, the permit granting authority or special permit granting authority shall issue to the owner and to the applicant if other than the owner a copy of its decision, certified by the permit granting authority or special permit granting authority, containing the name and address of the owner, identifying the land affected, setting forth compliance with the statutory requirements for the issuance of such variance or permit and certifying that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk. No variance or special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the city or town clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied, and if it is a variance or special permit which has been approved by reason of the failure of the permit granting authority or special permit granting authority to act thereon within the time prescribed, a copy of the application for the special permit or petition for the variance accompanied by the certification of the city or town clerk stating the fact that the permit granting authority or special permit granting authority failed to act within the time prescribed and no appeal has been filed and that the grant of the application or petition resulting from such failure to act has become final or that if an appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

40A:15. Appellate Procedure.

[Text as amended by 1987, 498, Sec. 3 effective February 15, 1988. For text effective until February 15, 1988, see 1986 Edition.]

Section 15. Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed. The petitioner shall file a notice of appeal specifying the grounds thereof, with the city or town clerk, and a copy of said notice, including the date and time of filing certified by the town clerk, shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed, and to the permit granting authority, specifying in the notice grounds for such appeal. Such officer or board shall forthwith transmit to the board of appeals or zoning administrator all documents and papers constituting the record of the case in which the appeal is taken.

Any appeal to a board of appeals from the order or decision of a zoning administrator, if any, appointed in accordance with section thirteen shall be taken within thirty days of the date of such order or decision or within thirty days from the date on which the appeal, application or petition in question shall have been deemed denied in accordance with said section thirteen, as the case may be, by having the petitioner file a notice of appeal, specifying the grounds thereof with the city or town clerk and a copy of said notice including the date and time of filing certified by the city or town clerk shall be filed forthwith in the office of the zoning administrator and in the case of an appeal under section eight with the officer whose decision was the subject of the initial appeal to said zoning administrator. The zoning administrator shall forthwith transmit to the board of appeals all documents and papers constituting the record of the case in which the appeal is taken. An application for a special permit or petition for variance over which the board of appeals or the zoning administrator as the case may be, exercise original jurisdiction shall be filed by the petitioner with the city or town clerk, and a copy of said appeal, application or petition, including the date and time of filing, certified by the city or town clerk, shall be transmitted forthwith by the petitioner to the board of appeals or to said zoning administrator.

Meetings of the board shall be held at the call of the chairman or when called in such other manner as the board shall determine in its rules. The board of appeals shall hold a hearing on any appeal, application or petition within sixty-five days from the receipt of notice by the board of such appeal, application or petition. The board shall cause notice of such hearing to be published and sent to parties in interest as provided in section eleven. The chairman, or in his absence the acting chairman, may administer oaths, summon witnesses, and call for the production of papers.

The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a

board consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law.

All hearings of the board of appeals shall be open to the public. The decision of the board shall be made within one hundred days after the date of the filing of an appeal, application or petition, except in regard to special permits, as provided for in section nine. The required time limits for a public hearing and said action, may be extended by written agreement between the applicant and the board of appeals. A copy of such agreement shall be filed in the office of the city or town clerk. Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition. The petitioner who seeks such approval by reason of the failure of the board to act within the time prescribed shall notify the city or town clerk, in writing, within fourteen days from the expiration of said one hundred days or extended time, if applicable, of such approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest, by mail and each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the board failed to act within the time prescribed. After the expiration of twenty days without notice of appeal to the superior court, or, if appeal has been taken, after receipt of certified records of the superior court indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the board failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

40A:17. Judicial Review; Requirements of Complaint; Appointment of Counsel; Costs; Posting of Bonds, etc.; Preferences.

[Text through first paragraph as amended by 1987, 498, Sec. 4

effective February 15, 1988. For text effective until February 15, 1988, see 1986 Edition.]

Section 17. Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said superior court department or to the division of the housing court department for said county, or to the land court department, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of the district court department, any party shall have the right to file a claim for trial of said appeal in the superior court department within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

be endorsed thereon by a person authorized by it the words "approval under the subdivision control law not required" or words of similar import with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision. If the board shall determine that in its opinion the plan requires approval, it shall within twenty-one days of such submittal, give written notice of its determination to the clerk of the city or town and the person submitting the plan, and such person may submit his plan for approval as provided by law and the rules and regulations of the board, or he may appeal from the determination of the board in the manner provided in section eighty-one BB. If the board fails to act upon a plan submitted under this section or fails to notify the clerk of the city or town and the person submitting the plan of its action within twenty-one days after its submission, it shall be deemed to have determined that approval under the subdivision control law is not required, and it shall forthwith make such endorsement on said plan, and on its failure to do so forthwith the city or town clerk shall issue a certificate to the same effect. The plan bearing such endorsement or the plan and such certificate, as the case may be, shall be delivered by the planning board, or in case of the certificate, by the city or town clerk, to the person submitting such plan. The planning board of a city or town which has authorized any person, other than a majority of the board, to endorse on a plan the approval of the board or to make any other certificate under the subdivision control law, shall transmit a written statement to the register of deeds and the recorder of the land court, signed by a majority of the board, giving the name of the person so authorized.

SUBDIVISION CONTROL

41:81P. Recording Certain Plans of Land Regulated.

[Text through first paragraph as amended by 1987, 122 effective September 1, 1987. For text effective until September 1, 1987, see 1986 Edition.]

Section 81P. Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to

41:81U. Approval, Modification, Disapproval, etc., of Plan Regulated Security for Construction of Ways, etc.

[Paragraph inserted following penultimate paragraph by 1987, 236 effective October 12, 1987.]

In any town which accepts the provisions of this paragraph, the proceeds of any such bond or deposit shall be made available to the town for expenditure to meet the cost and expenses of the municipality in completing the work as specified in the approved plan. If such proceeds do not exceed twenty-five thousand dollars, the expenditure may be made without specific appropriation under section fifty-three of chapter forty-four; provided, however, that such expenditure is approved by the board of selectmen. The provisions of this paragraph shall not apply to cities or to towns having town councils.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 5, Edition No. 2
February, 1988

CHAPTER 685 AN ACT FURTHER REGULATING CERTAIN ZONING LAWS

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In last month's edition of the Land Use Manager, we highlighted the legislative changes made to the Zoning Act and the Subdivision Control Law that had been approved by the Governor prior to January 1, 1988. However, near the end of the 1987 legislative session, the General Court enacted another law which amended the Zoning Act.

The major emphasis of Chapter 685 is directed at rewriting Section 5 of the Zoning Act to clarify the procedural process for adopting and amending local zoning bylaws and ordinances. There are a few substantive changes that have been made which are noted in the following summary. However, we also have reproduced the entire text of Chapter 685 which should be reviewed by all municipal officials who are involved in the process of amending local zoning bylaws or ordinances. In brief, Chapter 685 makes the following revisions:

- Rewrites Section 1A by making minor and grammatical amendments. There are no substantive changes to this section of the Zoning Act.
- Repeals Section 2 which regulated the conveyance of open space in cluster developments. This conveyance provision has never been necessary as the same requirement has existed in Section 9 since the Legislature rewrote the Zoning Act in late 1975.

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- Rewrites Section 5 by making mostly grammatical and clarification changes. Emphasis was placed on clarifying the adoption and amendment process governing cities. This legislation specifically authorizes separate or joint public hearings by the City Council and Planning Board.

In addition, Chapter 685 makes the following substantive changes:

- Specifically authorizes the Department of Community Affairs, Regional Planning Agencies, Planning Boards of abutting municipalities and certain nonresident property owners to waive rights to notice prior to legislative action on a zoning proposal.
- Certain nonresident property owners must be notified as to proposed density changes as well as zoning district and use changes.
- City Council must vote to adopt a zoning proposal within 90 days after the City Council hearing instead of within 90 days after the Planning Board public hearing on a proposed zoning change.
- A true copy of the zoning bylaw or ordinance must be kept on file and available for inspection in the office of the municipal clerk.
- Legal action arising out of any possible procedural defect in the adoption or amendment process must be commenced within the time period specified in Chapter 40, Section 32 and 32A, MGL. Prior to this change, Section 5 of the Zoning Act required that such legal action had to commence within 120 days after the adoption of the bylaw or ordinance whereas Chapter 40, Section 32 and 32A, MGL, provided that such legal action had to commence within 90 days after posting or publication of the bylaw or ordinance. This change makes the Zoning Act consistent with the Chapter 40 provisions.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Eighty-seven

AN ACT FURTHER REGULATING CERTAIN ZONING LAWS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 40A of the General Laws is hereby amended by striking out section 1A, as appearing in the 1986 Official Edition, and inserting in place thereof the following section:-

Section 1A. As used in this chapter the following words shall have the following meanings:

"Permit granting authority", the board of appeals or zoning administrator.

"Solar access", the access of a solar energy system to direct sunlight.

"Solar energy system", a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating.

"Special permit granting authority", shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by zoning ordinance or by-law for the issuance of special permits.

"Zoning", ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.

"Zoning administrator", a person designated by the board of appeals pursuant to section thirteen to assume certain duties of said board.

SECTION 2. Section two of said chapter forty A is hereby repealed.

SECTION 3. Said chapter 40A is hereby further amended by striking out section 5, as so appearing, and inserting in place thereof the following section:-

Section 5. Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner herein-after provided. Adoption or change of zoning ordinances or by-laws may be

initiated by the submission to the city council or board of selectmen of a proposed zoning ordinance or by-law by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter. The board of selectmen or city council shall within fourteen days of receipt of such zoning ordinance or by-law submit it to the planning board for review.

No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town, and the city council or a committee designated or appointed for the purpose by said council has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. Said public hearing shall be held within sixty-five days after the proposed zoning ordinance or by-law is submitted to the planning board by the city council or selectmen or if there is none, within sixty-five days after the proposed zoning ordinance or by-law is submitted to the city council or selectmen. Notice of the time and place of such public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of community affairs, the regional planning agency, if any, and to the planning board of each abutting cities and towns. The department of community affairs, the regional planning agency, the planning boards of all abutting cities and towns and nonresident property owners who may not have received notice by mail as specified in this section may grant a waiver of notice or submit an affidavit of actual notice to the city or town clerk prior to town meeting or city council action on a proposed zoning ordinance, by-law or change thereto. Zoning ordinances or by-laws may provide that a separate, conspicuous statement shall be included with property tax bills sent to nonresident property owners, stating that notice of such hearings under this chapter shall be sent by mail, postage prepaid, to any

such owner who files an annual request for such notice with the city or town clerk no later than January first, and pays a reasonable fee established by such ordinance or by-law. In cases involving boundary, density or use changes within a district, notice shall be sent to any such nonresident property owner who has filed such a request with the city or town clerk and whose property lies in the district where the change is sought. No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading.

No vote to adopt any such proposed ordinance or by-law or amendment thereto shall be taken until a report with recommendations by a planning board has been submitted to the town meeting or city council, or twenty-one days after said hearing has elapsed without submission of such report. After such notice, hearing and report, or after twenty-one days shall have elapsed after such hearing without submission of such report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law. If a city council fails to vote to adopt any proposed ordinance within ninety days after the city council hearing or if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided.

No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting; provided, however, that if in a city or town with a council of fewer than twenty-five members there is filed with the clerk prior to final action by the council a written protest against such change, stating the reasons duly signed by owners of twenty per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending three hundred feet therefrom, no such change of any such ordinance shall be adopted except by a three-fourths vote of all members.

No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

When zoning by-laws or amendments thereto are submitted to the attorney general for approval as required by section thirty-two of chapter forty, he shall also be furnished with a statement which may be prepared by the planning board explaining the by-laws or amendments proposed, which statement may be accompanied by explanatory maps or plans.

The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty. If, in a town, said by-law is subsequently disapproved, in whole or in part, by the attorney general, the previous zoning by-law, to the extent that such previous zoning by-law was changed by the disapproved by-law or portion thereof, shall be deemed to have been in effect from the date of such vote.

After approval of zoning by-laws by the attorney general, or adoption of zoning ordinances by the city council, a copy of the latest effective zoning ordinances or by-laws shall be sent by the city or town clerk to the department of community affairs. A true copy of the zoning ordinance or by-law with any amendments thereto shall be kept on file available for inspection in the office of the clerk of such city or town.

No claim of invalidity of any zoning ordinance or by-law arising out of any possible defect in the procedure of adoption or amendment shall be made in any legal proceedings and no state, regional, county or municipal officer shall refuse, deny or revoke any permit, approval or certificate because of any such claim of invalidity unless legal action is commenced within the time period specified in sections thirty-two and thirty-two A of chapter forty and notice specifying the court, parties, invalidity claimed, and date of filing is filed together with a copy of the petition with the town or city clerk within seven days after commencement of the action.

AN ACT RELATIVE TO THE MANAGEMENT OF SOLID WASTE AND THE ABATEMENT
OF POLLUTION RESULTING THEREFROM

Chapter 584 of the Acts of 1987 is a comprehensive piece of legislation dealing with the regulating of resource recovery facilities and solid waste disposal facilities. Chapter 584 amends Chapter 40A Section 9 by adding a new paragraph at the end of that section.

Under the new law, facilities for the disposing of refuse such as sanitary landfills, refuse transfer stations, refuse incinerators and resource recovery facilities are now permitted in any area which was zoned for industrial use as of July 1, 1987 unless such uses were specifically prohibited or regulated in such zoning districts as of the same date. However, a community may adopt a special permit review which would allow a special permit granting authority to impose reasonable conditions on the construction of such facilities. A municipality may also adopt a zoning or non-zoning bylaw or ordinance which would prohibit the siting of such facilities in certain environmentally sensitive areas.

Chapter 584 was declared to be an emergency law and took effect on December 17, 1987.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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IMPACT FEE BYLAW DECLARED INVALID

An impact fee is a charge levied against a development in order to provide revenue for funding capital improvements necessitated by that particular development. Through the imposition of an impact fee, developers finance services and facilities which are traditionally funded out of local government tax collections.

Throughout the country, an increasing number of courts have been evaluating the concept of impact fees. There exists a two step procedure in evaluating the validity of an impact fee bylaw. The first step is the classification of the charge as either a fee or a tax. The second step is to determine whether the fee or tax is authorized under state law. A court will pay little attention to a community's label of a charge as an impact fee in determining whether the charge is a fee or a tax. Instead, it will look to the municipal intent in enacting the bylaw and the operative effect of the bylaw.

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. See Article II, Section 7, of the Amendments to the Massachusetts Constitution.

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The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). Emerson involved a required payment by owners of certain types of buildings in Boston that consumed a disproportionate share of the city's firefighting budget. The mandatory payments were to compensate the city for the cost of providing augmented fire service availability. The court concluded that the imposed charge by the city, which produced revenue for allocation to general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of the buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes.

1. They are charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society;
2. They are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and
3. They are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. In Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees which were authorized within the broad grant of authority given the Rent Control Board by the Legislature. Also, in Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a "mooring and slip fee" assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the service provided was primarily for the benefit of the parties required to pay the fee, the fee was voluntary in that it was only imposed on those who chose to utilize a particular government service, and the revenues raised directly compensated the government for the cost of providing the service.

Recently, in Northeast Builders Association of Massachusetts and Gerald Lussier v. Town of Dracut, the Middlesex Superior court held that an impact fee bylaw adopted by the town of Dracut was invalid. Not only is the Dracut decision interesting but it is also the first case we are aware of where a Massachusetts Court has looked at impact fees.

The town of Dracut adopted an impact fee bylaw. Under the bylaw, each unit of new construction was assessed an impact fee of \$2,000. All charges assessed under the bylaw had to be paid to the Town Collector before a building permit could be issued. All monies collected from the impact fees were deposited by the Town Treasurer directly into the stabilization fund.

Gerald Lussier was denied ten building permits because he had not paid \$20,000 in impact fees. The Northeast Builders Association also claimed that other members of its association had been harmed by the bylaw.

NORTHEAST BUILDERS ASSOCIATION OF MASSACHUSETTS AND
GERALD J. LUSSIER V. TOWN OF DRACUT
Middlesex Superior Court No. 87-6222, Dec. 15, 1987.

Excerpts:

Nixon, J. . . .

The parties to this action do not dispute any material fact. The parties agree that the Impact Fee by-law adopted by the town assesses a fee for each unit of new construction. The parties also agree that the monies collected from the Impact Fee by-law are deposited into the town's stabilization fund, which is a general revenue fund.

The parties merely disagree as to whether or not "Impact Fee" is a fee or a tax. If it is a tax, it is unconstitutional under the Amendments to the Massachusetts Constitution, . . . a city or town does not have the power to levy, assess and collect taxes absent legislative approval.

Plaintiffs contend that the Impact Fee required by the by-law is a tax and not a fee and therefore violates . . . the Massachusetts Constitution and is invalid. At present no legislative enactment grants the town the power to collect impact fees for new construction. Legislation which would allow cities and towns to assess certain kinds of impact fees on developers is under consideration by the General Court (House Bills 787, 1016 and 1017). However such legislation has not yet been adopted.

The Court concludes that the Town of Dracut's "Impact Fee" is a tax. Therefore, the by-law is unconstitutional and invalid.

In reviewing the by-law, the court must treat with deference the classification of the charge as a fee. Emerson College v. Boston, 391 Mass. 415, 424 (1984) and cases cited. "Ultimately, however, the nature of a monetary exaction 'must be determined by its operation rather than its specifically descriptive phrase'".

* * * *

In Emerson College v. Boston, 391 Mass. 415, supra, the court held that a "fee for augmented fire services" was in reality a tax, and invalidated the City's Ordinance. The Court discussed the differences between fees and taxes and listed three criteria for distinguishing fees from taxes. Fees are "charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society'; . . . they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, . . . and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."

"Fees, unlike taxes, only cover the agency's reasonably anticipated costs of providing the services for which the fees are charged". . . . In the present case, the "Impact Fee" is not based upon the costs of issuing a building permit.

The Impact Fee was not charged in exchange for a particular governmental service. It is not a charge based upon the governmental service of issuing a building permit. Rather, the fee is assessed according to the use of a building and its' size. Thus, the fee operates as a tax based upon the use and size of any new construction. Moreover, the fee is charged in exchange for general services provided by the Stabilization Fund.

In addition, the Plaintiffs in this action have a limited "choice". If they do not pay the Impact Fees they cannot engage in their occupation and cannot develop any property. Thus, the Impact Fee acts as a mandatory charge on all new construction.

The Services provided by the impact fee do not benefit the builder or developer paying the fee "in a manner not shared by other members of society". . . . The fees are deposited into the Town Stabilization Fund. The Stabilization Fund is a general revenue fund which

benefits all citizens of the town. The fees will provide services which accrue to the public at large. Thus, the fee is collected to raise revenues, and not to provide compensation to a governmental agency for its services. The impact fee is a tax, i.e., "an enforced contribution to provide for the support of government."

• • •

In conclusion, under the criteria established in Emerson College v. Boston, 391 Mass. 415, supra, the "Impact Fee" in question here has the characteristics of a tax rather than a fee. For this reason, the court declares the "Impact Fee" by-law invalid.

The Dracut decision is a good case as it indicates the problems of enacting an impact fee bylaw which will withstand judicial scrutiny. Assuming that a Massachusetts court were to find that monies extracted from a landowner, under the authority of a carefully drafted impact fee bylaw, was a fee and not a tax, the second step would be to determine whether such a fee is authorized under state law. This aspect of the impact fee issue was not considered in the Dracut decision.

Fees imposed by a governmental entity tend to fall into one of two principal categories:

1. User fees which are based on the rights of the entity as proprietor of the instrumentalities used; or
2. Regulatory fees which are founded on the police power to regulate particular businesses or activities.

An impact fee would most likely not be categorized as a user fee as user fees are based on municipal ownership of facilities used to provide services like water or sewer lines. An impact fee could be classified as a regulatory fee provided the fee was based on an authorized exercise of the municipal police power to regulate development. There must exist a general or specific statutory authority. Impact fees might be considered allowable in connection with a community's authority to regulate land use. For example, required dedications, which serve a similar purpose as impact fees, are an acknowledged land use regulation.

The Subdivision Control Law authorizes communities to regulate subdivisions. The Subdivision Control Law is a comprehensive statutory scheme which precludes any local action which would impair the operation of the statute. Constanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971); Del Duca v. Town Administrator of Methuen, 366 Mass. 1 (1975). The Subdivision Control Law must serve at least an implied authority since there exists no expressed authority allowing impact fees. The Subdivision Control Law prohibits mandatory dedications. Without that power, it is hard to presume that there exists implied authority to enact impact fees.

Chapter 40A, MGL, authorizes communities to enact zoning bylaws or ordinances to regulate the use of land, buildings and structures. There exists no expressed authorization in the Zoning Act for the imposition of impact fees. There may be implied power for a community to require impact fees as part of a special permit review especially when considering a density bonus for a particular project. However, even this implied power remains susceptible to legal challenge. Middlesex & Boston Street Railway v. Board of Alderman, 371 Mass. 849 (1977).

The obvious answer to the impact fee question is for the General Court to enact legislation expressly authorizing the imposition of impact fees. An example of legislation whereby the General Court has authorized government to assess charges can be found in Chapter 15 of the Acts of 1988 which allows the Department of Public Works to pass on the cost of certain highway improvements. Without specific legislation, there are many hurdles to overcome in order for an impact fee bylaw to withstand a court challenge.

ON THE LIGHT SIDE

The following short story was submitted by readers of the Land Use Manager. Required reading for all potential zoning enforcement officers.

THE NONCONFORMING USE THAT WOULDN'T DIE
by
Stephen King

Nancy had an uneasy feeling as she walked through the neighborhood of apparent single-family detached dwellings. Something didn't feel right. Years of experience with zoning violators had given her a sixth sense about these things. She couldn't put her finger on it, but she knew something was wrong--very wrong.

It appeared to be a very ordinary R-40 District. But Nancy had no illusions about what sort of people live in places like this. She knew that junk cars and illegal home occupations can crop up anywhere. And there was something evil here. She could feel it.

She pulled out her tape and checked a few setbacks. They were okay. She wandered on down the street past ranch-style homes with neatly-mowed lawns. What was it that was making her flesh crawl? Goats in a backyard? A tool shed constructed without a building permit?

A strange symbol chalked on the sidewalk caught her eye. She stopped to look. It seemed vaguely familiar; she wondered what exactly . . . and then suddenly she knew! It was a Greek letter! Fraternities! That was it; the whole neighborhood was riddled with illegal fraternities, a noxious use that belonged in multi-family and required a special permit.

Nancy knew she couldn't handle this alone. She turned back toward where she had parked the car. But suddenly the street was blocked by three husky young men rolling a beer keg. It's a coincidence, she thought. They can't have spotted me yet.

Trying not to panic, she turned down a side street. She made it almost halfway down the block before a gang of fraternity brothers poured out of an innocent-looking brown house, shouting "PARTY! PARTY! PARTY!" Whirling in desperation, Nancy ran back to the main street, but there were now hundreds of men gathered around the beer keg. Empty plastic cups covered the ground, and satanic rock music split the air.

Nancy was trapped. She clutched her zoning bylaw in both hands and thrust it in front of her, hoping it still retained enough power to ward off the oncoming horde of fraternal evil, but it was too late. Already she could feel cold beer being forced down her throat . . .

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

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ZONING ENFORCEMENT OFFICER

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Despite the criticism it receives, zoning remains the most powerful tool for regulating land use in Massachusetts. Zoning, however, has always presented difficult enforcement problems. As the need for development controls has increased, the enforcement of zoning ordinances and bylaws has become more complex which has created headaches for zoning enforcement officers.

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In Massachusetts, the enforcement of zoning regulations has been traditionally accomplished by requiring the appropriate official or board, when reviewing an application for a building permit, to determine whether the planned activity will comply with local zoning regulations. Many communities had a building code long before they adopted a zoning ordinance or bylaw. When a zoning ordinance or bylaw was adopted, it made sense to place the responsibility for enforcing the zoning regulations with the officer or board who was also administering the local building code. While this system provided an early opportunity to detect and prevent zoning violations, it has not always been effective.

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In Massachusetts, the building official is responsible for issuing building permits. Chapter 143, Section 3, MGL, delegates the responsibility for administering and enforcing the State Building Code to the local building official. Therefore, in most communities, the enforcement of local zoning regulations has remained with the building official.

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Today, a major concern in the traditional system of zoning enforcement is that a part-time local building

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official possesses neither the time nor the expertise to deal with the ever increasing number and complexity of zoning-related issues. Building departments have a reputation for being understaffed and the task of zoning enforcement can become an unwelcomed burden. There are some instances where the time required to enforce the requirements of the State Building Code and other applicable laws severely limits the ability of the local building official to become familiar with the provisions of the State Zoning Act. An alternate approach to the traditional system would be to designate someone other than the building official to enforce the local zoning bylaw or ordinance.

Some communities have petitioned the Legislature requesting the authority to create the position of a Zoning Enforcement Officer. For example, Chapter 51 of the Acts of 1987 specifically authorized the town of Watertown to appoint a Zoning Enforcement Officer. However, it is not necessary to petition the Legislature in order to create such a position at the local level.

Chapter 40A, Section 7, MGL, presently provides that:

The inspector of building, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law

This provision provides a series of alternatives. Designating the building official as the enforcement officer is only applicable if no other person or board has been designated by the local zoning bylaw or ordinance to be the enforcement officer. If there had been no comma placed after the words "board of selectmen," then only the building official could be charged with the enforcement of the zoning bylaw or ordinance. In addition, an "ordinance" is a local law enacted by cities. There would appear to be no reason to include the term "ordinance" in the phrase "or person or board designated by local ordinance or by-law" if it was the intention of the Legislature that such phrase was only to cover the situation where there was no Inspector of Buildings in a town and the town did not want its Board of Selectmen to be responsible for enforcing zoning.

In Morganelli v. Building Inspector of Canton, 7 Mass. App. Ct. 475, 481 (1979), the court noted that "The responsibility for enforcing zoning ordinances or by-laws lies with the municipality and is assigned by statute to the building inspector or other specified municipal officers. G.L., C. 40A,

S.7." In Neuhaus v. Building Inspector of Marlborough, 11 Mass. App. Ct. 230, 231 (1981), the court stated that "General Laws C. 40A, S. 7, provides: 'The inspector of building . . . or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law. . . .'" and noted that in this case the Building Inspector was the person so charged under the Marlborough zoning ordinance. Finally in McDonald's Corporation v. Town of Seekonk, 12 Mass. App. Ct. 351, 353 (1981), citing Morganelli, the court restated that the responsibility for enforcing zoning ordinances or by-laws lies with the municipality and is assigned by statute to the Building Inspector or other specified municipal officer. In all three cases, the court has noted the existence of alternatives in the designation of a Zoning Enforcement Officer.

In 1987, under the authority of Chapter 40A, Section 7, the town of Huntington amended its zoning bylaw and authorized the Board of Selectmen to appoint a Zoning Enforcement Officer. On May 21, 1987, the Attorney General approved the Huntington amendment which read as follows:

B. The Zoning Enforcement Officer (ZEO)

1. The ZEO (who may also be the building inspector) shall be appointed by the Selectboard and shall serve at their pleasure and under their authority and supervision. Enforcement of this By-Law is invested in the ZEO.

Throughout the Commonwealth, many building officials have experience with zoning issues, understand the local regulations and relevant statutes, and have the necessary time to undertake the chores of enforcement. In such situations, designating the building official as the Zoning Enforcement Officer represents the most efficient and logical system of zoning enforcement. It is important, however, that communities are aware of the option of designating a Zoning Enforcement Officer especially when taking into account the ever increasing complexity of zoning provisions as well as the degree of building activity at the local level.

If a community intends to amend its zoning bylaw or ordinance and designate a person or board as Zoning Enforcement Officer, we would suggest that the bylaw or ordinance specify the process to be followed for determining zoning compliance. At a minimum,

the review process should require a zoning permit as a condition precedent to the issuance of a building permit. The bylaw or ordinance should prohibit the issuance of a building permit until the Zoning Enforcement Officer issues a zoning permit certifying compliance with the local zoning bylaw or ordinance. The bylaw or ordinance should also specify a time period in which the Zoning Enforcement Officer must act on an application for a zoning permit.

LANDLAW 1988 MASSACHUSETTS LAND USE CONFERENCE

Landlaw Inc. provides professionals with up-to-date information on local land use regulations. Located in Waltham, Landlaw was started in 1986 and currently maintains information on more than 250 municipalities in Massachusetts.

On June 10, 1988, Landlaw conducted a Land Use Conference which was held at the Westin Hotel. The purpose of the conference was to focus on some of the more important land use issues now facing Massachusetts municipalities and land use professionals. Representing Landlaw, Andre M. Vagliano, Esq. opened the program and provided an overview of the major trends in local land use control. The following are excerpts from Mr. Vagliano's presentation.

Local Regulatory Complexity

Municipalities are adopting increasingly sophisticated local regulations and by-laws which generally supplement uniform state regulations governing particular activities. Under their Home Rule Authority, municipalities are enacting local wetland, aquifer protection, hazardous material and other local land use by-laws which increase local permitting control.

Increased Regulatory Sophistication

Communities are also using much more sophisticated and indirect technical planning techniques to achieve their stated objectives. For example, large lot zoning is viewed in the current climate as a politically risky planning technique in view of its "exclusionary" connotations. Rather than expressly

increase residential lot sizes, communities therefore are generally adopting a variety of technical requirements relating to lot definition which achieve the same result. Many municipalities no longer include wetland and floodplain areas in lot area calculations. This definitional change can vastly increase lot area requirements over their stated minima. In addition, planners are also adopting requirements such as "lot shape factors" and "regularity coefficients" which can also serve to increase lot areas without raising the opposition of local landowners.

De Facto Moratoria and Development Rate Limitations

Many communities are now starting to impose de facto development rate limitations and moratoria without labeling these land use controls with these emotionally charged labels. De facto moratoria may be accomplished in a variety of ways. As highlighted in Martin Healy's discussion of moratoria, a common place technique is increasing the duration of the permitting process and requiring substantial engineering work to be performed at the early stages of a project before feasibility is assured. Also, uses and projects which several years ago might have been restricted by an explicit moratoria are now "allowed" by special permit only and then made subject to an extended site review process.

These techniques seem to have been so successful that The Boston Globe ran a front page story on June 6, 1988 carrying the headline "Local Halt to Growth Now Rare, Towns Say." A brief perusal of Landlaw's recent survey of development rate limitations and moratoria which is included in these materials would lead most observers to a different conclusion.

Local support for explicit building moratoria is still very strong in certain municipalities as witnessed by the recent measures voted at this spring's annual town meetings in the communities of Edgartown and Winthrop--both of which imposed far-reaching building moratoria. Numerous communities have also recently adopted staged growth measures which attempt to spread out development over longer periods of time, both on a town-wide and on a project basis.

Board of Health Regulations as "Zoning" Controls

Communities have increased their reliance on the expansive and swiftly implemented powers of local boards of health to regulate and slow development. In unsewered areas, many municipalities have stopped issuing permits for multi-family projects. Many boards of health have also imposed moratoria on permits for package sewage treatment plants and used their authority to supplement Title V of the State Environmental Code by adopting increasingly stringent requirements for the design of on-site septic systems.

OFFICE OF COMMUNITIES & DEVELOPMENT

Vol. 5, Edition No. 5
July, 1988



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

REQUESTS FOR ZONING ENFORCEMENT

The Zoning Act contains an administrative appeal process for the enforcement of zoning ordinances and bylaws. The first paragraph of Chapter 40A, Section 7 MGL provides a formal procedure by which aggrieved persons seeking enforcement of the local zoning ordinance or bylaw against alleged violators can file a written request for enforcement and receive formal action on such request from the Zoning Enforcement Officer. The second paragraph of Section 7 establishes a six year statute of limitations for actions seeking to remedy zoning violations arising out of alleged unlawful activities conducted pursuant to an original building permit. Section 7 provides as follows:

. . . If the officer or board charged with enforcement of zoning ordinances or by-laws is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefore, within fourteen days of receipt of such request.

. . . if real property has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized to issue such permits, no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation . . . of any ordinance or by-law. . . shall be maintained, unless such action, suit or proceeding is commenced . . . within six years next after the commencement of the alleged violation

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Section 8 of the Zoninng Act provides an administrative review of actions of the local Zoning Enforcement Officer by conferring the right to appeal upon any person aggrieved by reason of his inability to obtain enforcement action or by any person aggrieved by a decision of the Building Inspector or Zoning Enforcement Officer. Section 8 provides as follows:

An appeal to the permit granting authority . . . , may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer . . . , or by any person . . . aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision of this chapter or any ordinance or by-law adopted thereunder.

Section 14 of the Zoning Act gives the power to hear and decide the above noted appeals to the Zoning Board of Appeals and Section 15 establishes a 30 day appeal period for such instances where a person has been aggrieved by an order or decision of the Zoning Enforcement Officer or has been unable to obtain enforcement action.

Considering Sections 7, 8, 14 and 15 of the Zoning Act, test your ability to answer some enforcement questions.

Facts:

Lovell conducted a business pursuant to a variance granted by the Zoning Board of Appeals in 1965 which authorized the operation of a cesspool business and the construction of a garage to store equipment associated with the business. In 1975, the town adopted a new zoning bylaw which made Lovell's cesspool business a nonconforming use.

On June 22, 1981, the Building Inspector issued a building permit to Lovell for the construction of a fifty by fifty-five foot building for the storage of vehicles. The Building Inspector's decision to grant the permit was not appealed to the Zoning Board of Appeals.

On October 19, 1981, Vokes wrote two letters to the Building Inspector requesting enforcement action. The first letter requested the Building Inspector to issue a "stop-order" prohibiting Lovell from operating and maintaining eighteen-wheel gravel trucks and flatbed trailers on the property. In making this request, Vokes claimed that four provisions of the zoning bylaw were being violated by Lovell's use of the vehicles.

The second letter requested that the Building Inspector issue a "stop order" on the building permit granted to Lovell. Vokes claimed that the issuance of the building permit for the construction of a commercial building in a residential zone was in violation of the local zoning bylaw. The letter further pointed out that the variance granted to Lovell in 1965 was for the construction of a six stall garage for the storage and maintenance of commercial vehicles and equipment and did not authorize further construction of commercial buildings or the expansion of the business.

The Building Inspector did not respond to the letters within 14 days. However, the Building Inspector did reply in a letter dated November 18, 1981, in which he declined both requests for enforcement. The Building Inspector noted that the eighteen-wheel trucks had always been involved in Lovell's business and that the trucks were not a zoning problem. As to the issuance of the building permit, the Building Inspector denied the request for a "stop order" because it was his opinion that the construction of the new storage building was not a "substantial extension" of the nonconforming use.

On November 19, 1981, Vokes appealed the Building Inspector's decisions to the Zoning Board of Appeals. The Board decided that they lacked jurisdiction to hear the issue of the building permit as the appeal by Vokes to the Board was untimely. The Board also decided that they lacked jurisdiction to hear the appeal relative to the eighteen-wheel vehicles however, the Board agreed to decide the merits in order that all parties would have the benefit of their decision. The Board upheld both decisions of the Building Inspector.

Questions:

1. Does a Zoning Enforcement Officer's failure to respond to a request for enforcement action within 14 days constitute a constructive denial of the request for enforcement?
2. Must a Zoning Enforcement Officer respond in writing to a request for enforcement within the 14 day time period specified in Section 7?
3. Can a Zoning Board of Appeals entertain an appeal for enforcement action without a written response from the Zoning Enforcement Officer?
4. Must an aggrieved person challenge the issuance of a building permit within 30 days from the date the Building Inspector issued the building permit in order to obtain enforcement action to stop alleged zoning violations?

Answers:

(1) No (2) No (3) No (4) No

Read the following to see why:

VOKES V. LOVELL
18 Mass. App. Ct. 471 (1984)

Excerpts:

Greaney, C.J. . . .

Resolution of the jurisdictional questions requires examination of the pertinent provisions of Sections 7, 8, and 15 of G.L. c. 40A.

Lovell urges a strict construction of these statutes. As to the dispute over the eighteen-wheel vehicles, Lovell argues that the building inspector's failure to respond by July 6, 1981, the fourteenth day following the plaintiffs' June 22 letter, constituted a constructive denial of its request for enforcement and that the thirty-day appeal period specified in Section 15 commenced running on that date and expired on August 5, 1981. As to the dispute over the building permit, Lovell measures the thirty-day appeal period from the date of the permit's issuance (July 10, 1981) making (according to its argument) an appeal from the permit's grant untimely if brought later than August 10, 1981. In Lovell's view, the requests for enforcement initiated by the letters of the plaintiffs' counsel on October 19, 1981 (followed by the building inspector's negative reply to those requests on November 18, 1981, and the plaintiffs' appeal to the board on November 19, 1981), were untimely in all respects.

The plaintiffs, on the other hand, look to the building inspector's written denial, on November 18, 1981, of both their requests for enforcement as the date which started the running of the thirty-day clock under Section 15. In the plaintiffs' view, appeals filed with the board on November 19, 1981, . . . , were timely.

We think that the written decision required of a building inspector by Section 7 should be deemed the operative event for purposes of the plaintiffs' rights of appeal. Section 7 is unambiguous in requiring a response "in writing" with "the reasons therefor" when a building inspector "declines to act" on a request for enforcement. . . . We also think that the language of Section 8, which confers the right to appeal upon a "person aggrieved by reason of his inability to obtain . . . enforcement" contemplates, as a precondition to the right of appeal, the written response declining enforcement described in Section 7.

In support of this interpretation, we consider significant the lack of any indication in either Section 7 or Section 8 that a building inspector's failure to respond within fourteen days to an enforcement request is to be deemed a constructive denial of the request for purposes of setting in motion the thirty-day appeal period provided by Section 15. . . . Not only is an interpretation of Sections 7, 8 and 15 which links the time for an appeal by an aggrieved party to the permit granting authority to the date of the building inspector's written decision under section 7 faithful to the reasonably plain wording of the statutes, but it also provides a means for the fair and practical administration of the provisions of c. 40A governing enforcement of a zoning by-law at the local stage.

We are not persuaded that a more restrictive construction is required by the designation in Section 7 of a fourteen-day period for a response by the building inspector. This period is obviously designed to encourage promptness. In some cases, however, a building inspector may not be able to act on a request within fourteen days for legitimate reasons, such as (for example) the inspector's need to obtain further information from the complaining parties to clarify the nature of the complaint or his need to consult with other municipal boards or officers having an interest in the matter. We leave for another occasion analysis of the concern that a slothful building inspector could prevent complaining parties from exercising their rights by doing nothing upon receipt of an enforcement request and whether, if the inspector refuses to act, the parties seeking enforcement may have an alternative to the time and expense which might accompany resort to a complaint in the nature of mandamus.

In our view, the fourteen day requirement in Section 7 "relates only to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done," . . . therefore it is directory and not mandatory . . . We conclude that the date on which a zoning enforcement officer responds in writing to a Section 7 request for enforcement creates the appealable decision contemplated by Section 8 and becomes the date for measuring the thirty-day appeal period set forth in Section 15. . . .

Applying this reasoning, we conclude that jurisdictional requirements pertinent to the complaint concerning the eighteen-wheel vehicles were met. The failure of the building inspector to respond to the plaintiffs' June 22, 1981, request was of no legal consequence. The plaintiffs' right of appeal to the board thus arose on November 18, 1981, when the inspector first complied with Section 7 by his written response denying enforcement. Appeal to the board from the inspector's refusal of enforcement seasonably followed within thirty days of the inspector's denial

The dispute concerning the building permit involves different considerations. Under . . . the prior c. 40A, a person aggrieved by a decision to issue a building permit could seek direct review of the decision. Until 1963, there was no statutory time limit for pursuing that right of review and the setting of a "reasonable time" limit was left to local zoning by-laws. Failure to appeal within any time period set by the by-law foreclosed the right of direct review

It was recognized, however, in Brady v. Board of Appeals of Westport, 348 Mass. 515 (1965), that the right of direct review was not the exclusive remedy. . . . Brady . . . describes the shortcomings of the prior c. 40A in this area and the reasons necessitating an alternative remedy to correct violations of the zoning by-law made under color of a building permit. The problems arising out of an aggrieved party's being unaware of the issuance of a building permit still exist. The holder of a building permit has up to six months from the date of its issuance to commence work under the permit. . . . There is no public notice of the issuance of a building permit. A permit holder could keep the fact of the permit's issuance secret, refrain from

beginning construction under the permit for the thirty-day period established by Section 15, and thereby foreclose any further direct review of the legality of the permit's issuance. . . . Brady confirmed the existence of the right well-established in Massachusetts jurisprudence, of aggrieved citizens, to obtain, by means of mandamus, strict enforcement of the zoning by-law. . . .

The Brady right appears implicit in the addition to Section 22 of the prior c. 40A. (by means of St. 1970, c. 678, Section 1) of a proviso establishing a six-year limitations period for actions seeking to remedy zoning violations occurring under an "original building permit." The six-year limitations period was inserted in the second paragraph of Section 7 of G.L. 40A, . . . to be read and applied in conjunction with the written response requirement of the first paragraph of Section 7 and the rights conferred by Sections 8, 15 and 17. Thus, with the enactment of the new Zoning Act, the Brady right to mandamus as a remedy for zoning violations committed under color of a building permit became a right to request the officer charged with enforcing local zoning to enforce the by-law under G. L. c. 40A, Section 7, and, if the requesting party is aggrieved by the inspector's decision, a right to seek administrative relief from the board under G.L. c. 40A, Sections 8 and 15,

Here the "original building permit," for purposes of Section 7, was the permit authorizing Lovell to construct the second garage. . . . We view the plaintiffs' written request on October 19, 1981, for enforcement, . . . as an effort to stop allegedly unlawful construction from going forward under color of that permit. The building inspector's written denial of their request made the plaintiffs, under Section 8, "person[s] aggrieved by reason of [their] inability to obtain . . . enforcement action," and they thereafter complied, in a timely manner, with the jurisdictional steps required by c. 40A. . . .

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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CONDITIONING SUBDIVISION PLANS

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The power of a Planning Board to review proposed subdivisions of land is derived from the Subdivision Control Law, Chapter 41, Section 81K-81GG, MGL. Accordingly, the power to impose conditions when approving a subdivision plan must also come from the statute. In Daley Construction Co. Inc. v. Planning Board of Randolph, 340 Mass. 149 (1959), the court discussed in detail the purposes and legislative background of the Subdivision Control Law.

Chapter 41, Section 81-Q requires that a Planning Board adopt reasonable rules and regulations. Among other things, such rules and regulations must contain requirements with respect to the location, construction, width and grades of proposed ways and the installation of municipal services so as to carry out the purposes of the Subdivision Control Law.

The general purposes of the Subdivision Control Law are noted in Section 81-M along with the legislative intent that a subdivision plan filed with a Planning Board shall receive the approval of the Planning Board if the plan conforms to the reasonable rules and regulations of the Board. The general purposes of the law as stated in Section 81-M are to protect the safety, convenience and welfare of the inhabitants of cities and towns by "regulating the laying out and construction of ways . . . providing access to the several lots . . . and ensuring sanitary conditions in subdivisions" The statute lists criteria to be weighed by the Planning Board when adopting rules and regulations. For example, Section 81-M further states that:

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The powers of a planning board . . . under the subdivision control law shall be exercised with due regard for the provision of adequate access . . . by ways that will be safe and convenient for travel; for lessening congestion in such ways . . . for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for ensuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provisions for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in neighboring subdivisions.

In short, the Planning Board is authorized to adopt rules and regulations for the purposes set forth in Section 81-M. The adoption of rules and regulations under Section 81-Q is a mandatory requirement designed to ensure that prospective subdividers will know in advance what will be required of them in the way of street construction and public utilities. As the court pointed out in Pieper v. Planning Board of Southborough, 340 Mass. 157 (1959), the legislative history of Section 81-Q gives no indication that a Planning Board has the freedom to disapprove plans which comply with their rules and regulations merely because the Board feels general public considerations make such action desirable.

The authority of a Planning Board to impose conditions when approving a subdivision plan is the same as the authority of a Planning Board to disapprove a subdivision plan. Such power must be found in either the statutory provisions of the Subdivision Control Law or of the duly adopted regulations of the Planning Board existing at the time the subdivision plan was submitted.

As to the latter, Castle Estates v. Planning Board of Medfield, 344 Mass. 329 (1962), established the standard as to the necessity of a Planning Board to adopt definitive regulations in order to impose conditions based on such regulations. In Castle Estates, the Planning Board had approved a subdivision plan on the condition that a water distribution system be connected to the public water system and that a drainage easement be obtained on land not owned by the subdivider. The Medfield Planning Board had adopted regulations but the regulations did not contain explicit provisions requiring the connection of water systems in subdivisions with town water or for obtaining drainage easements to take off surplus water. The court found

that the Planning Board could not impose such conditions because they had not adopted regulations defining what types of utilities would be required in connection with subdivision plans or what standards would be applied by the Planning Board in deciding whether to withhold approval or impose conditions. The regulations were too vague and general. The Castle Estate standard has also been considered in Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171 (1977) (rejection of subdivision plan on basis of language of Subdivision Control Law improper without precise local rule to same effect); Canter v. Planning Board of Westborough, 4 Mass. App. Ct. 306 (1976) (absent regulations regarding traffic on adjacent ways, board may not disapprove plan on grounds of increased traffic congestion); Chira v. Planning Board of Tisbury, 3 Mass. App. Ct. 433 (1975) (requirements of "attractiveness" and "livability" lack clear and objective standards).

As noted earlier, conditions may also be imposed by the Planning Board based upon the clear statutory language of the Subdivision Control Law. There has been little court activity in this area. However, one case dealing with the statutory authority to impose conditions is a most interesting decision in which all Planning Boards should take special interest. In Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971), the court found that the statutory provisions of the Subdivision Control Law authorizes Planning Boards to approve subdivision plans secured under covenant on the condition that the developer complete all roads and municipal services within a specified period of time or else the Planning Board's approval will be automatically rescinded.

On September 8, 1960, Italo Lucci submitted a definitive plan to the Planning Board. The Board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant executed January 9, 1961, by Lucci. The covenant contained the following:

The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two (2) years from date. Failure to so complete shall automatically rescind approval of the plan.

On March 15, 1962, a second covenant was executed by Lucci containing provisions identical with the earlier covenant. On the basis of the second covenant, the date for completion of the ways and installation of municipal services was extended to March 15, 1964. One week later, Lucci, sold lots shown on the 1960 plan to Costanza.

On April 3, 1969, Costanza submitted a plan to the Planning Board requesting that it be endorsed "Approval Under the Subdivision Control Law is not Required." The Planning Board refused to make the endorsement. The lots shown on the plan were identical to the lots shown on the definitive plan that had been submitted by Lucci back in 1960. Costanza's position was that the prior approval by the Board of the Lucci plan made the way shown on his plan a way that was approved in accordance with the Subdivision Control Law as stated in Chapter 41, Section 81-L, MGL. Costanza argued that he was entitled to an "ANR" endorsement. A superior court judge found that the Planning Board vote not to endorse the plan was null and void and ordered the Board to endorse the plan as requested by Costanza. The Planning Board appealed.

COSTANZA & BERTOLINO, INC. V. PLANNING BOARD OF NORTH READING
360 Mass. 677 (1971)

Excerpts:

Hennessey, J. . . .

The plaintiff does not dispute the fact that it took the land subject to the Lucci covenant requiring the construction of ways and the installation of municipal services. It does claim, however, that the two-year time limitation within which the work must be completed and the provision for the automatic rescission of the approval for failure to so complete within that time are invalid. We do not agree. The Subdivision Control Law requires the local planning board to provide for ways and services.

G.L. c. 41, Section 81U. The execution of a covenant running with the land is specifically authorized. G.L. c. 41, Section 81U. . . . A requirement in a covenant fixing the time within which the work must be completed is, in our view, consonant with the purposes of the law. We believe that the authority for imposing such a time limit contained in the section of the statute concerned with securing performance by bond or deposit is equally applicable to the covenant portion of the statute. A contrary result would impose a potentially greater burden on applicants who secure performance by bond or deposit than on those who execute covenants. The Legislature could not have had this difference in result in mind when it enacted Section

81U. We also believe that a provision for automatic rescission where the initial approval was not final but rather conditional is within the board's authority. In Campanelli, Inc. v. Planning Bd. of Ipswich, 358 Mass. 798, we held that the local planning board could rely on and enforce the provisions of a "conditional approval agreement" which limited the duration of the board's approval to the earliest of three dates. Furthermore, the Campanelli case holds that where a successor in title to the covenantor purchases land which had been conditionally approved with knowledge thereof and where no appeal was taken from the conditional approval, the successor in title will not be heard to question the validity of the conditional approval.

In the case at bar, no evidence was received at the trial which indicated that the provisions of the covenants (the completion of ways and installation of services within two years from the date of the last covenant) were satisfied. That being the case, the conditional approval of the Lucci plan was not in effect at the time that the plaintiff submitted the Costanza plan in 1969. Since the latter plan was a "division of a tract of land into two or more lots," G.L. c. 41, Section 81L, and none of the exceptions is applicable, it constitutes a "subdivision" and the board was within its authority in refusing to endorse it as requested by the plaintiff. The final decree must be reversed.

SUMMARY

The general purposes of the Subdivision Control Law are stated in Chapter 41, Section 81-M and the Planning Board ensures compliance with these stated purposes by adopting rules and regulations as required by Section 81-Q. The adoption of rules and regulations by the Planning Board is a mandatory requirement of the Subdivision Control Law. Such rules and regulations must be sufficiently clear so that a prospective subdivider will understand what is required in order to obtain Planning Board approval. Most conditions imposed by Planning Boards are accomplished under the authority of their rules and regulations. In limited circumstances, the authority to impose certain conditions may be found in the statutory provisions of the Subdivision Control Law.

The Subdivision Control Law indicates that conditions on the approval of definitive plans imposed by Planning Boards, in order to be effective, must be either inscribed on the plan or contained in a separate document referred to on the plan. See M. DeMatteo Construction Co. v. Board of Appeals of Hingham, 3 Mass. App. Ct. 446 (1975).

In some cases, a developer can properly be held to a particular condition on the grounds he acquiesced in it even though the imposed condition may not be authorized by the Subdivision Control Law. See Campanelli v. Planning Board of Ipswich, 358 Mass. 798 (1970); Stoneham v. Savelo, 341 Mass. 456 (1960).

A Planning Board cannot condition its approval on the requirement that a developer make a gift of a lot in a subdivision for the benefit of the town. A Planning Board cannot rescind an approved subdivision plan because a developer fails to make a gift of a lot for the benefit of the town where the Planning Board and developer fully understand that such a gift would be voluntary and not a condition of Planning Board approval. See Young v. Planning Board of Chilmark, 402 Mass. 841 (1988).

If a landowner feels that the Planning Board has imposed a condition which is unreasonable or beyond the authority of the Board, the remedy is by way of an appeal under Chapter 41, Section 81-BB.

Section 81-W provides for rescission of approved subdivision plans in accordance with the same procedures that apply to the submission and approval of the original plan. Any rescission under Section 81-W would also be subject to Section 81-Q which provides that "the rules and regulations governing such plan shall be those in effect . . . at the time of submission of such plan." The submission of a subdivision plan can freeze existing zoning requirements for a period of eight years. For a further explanation of the zoning freeze for subdivision plans see Land Use Manager Vol. 2, Edition No. 3, April, 1985. Under the Costanza decision, an approval of a subdivision plan may be conditional on a completion time in the covenant and the Planning Board approval of the plan automatically ceases to exist if the work is not completed within the specified time limit. The Costanza decision also noted that since the Planning Board approval is conditional, the automatic rescission is not subject to Section 81-W. Therefore, the consent of the mortgagee bank is not required. See Bigham v. Planning Board of North Reading, 362 Mass. 860 (1972).

The end result is that the automatic rescission of Planning Board approval eliminates any protections the previous approved plan may have obtained when submitted to the Planning Board. Any new submission of the plan will be subject to existing Planning Board rules and regulations as well as existing zoning requirements. The automatic rescission provision is a strong tool that Planning Boards can use to limit the life of subdivision plans that have been submitted for purely speculative reasons.

If a developer chooses to secure performance by executing a covenant pursuant to Chapter 41, Section 81-U (clause 3), the following provision, which is modeled on the Costanza decision, can be included in such covenant.

"The construction of all ways and the installation of all municipal services shall be completed in accordance with the applicable rules and regulations of the board within _____ months from date. Failure to so complete shall automatically rescind approval of the plan."

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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PLANNING BOARD REGULATIONS CANNOT EXCEED CONSTRUCTION STANDARDS "COMMONLY APPLIED" BY THE COMMUNITY

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In March of 1979, Governor Edward King announced a five point strategy designed to create an economic climate which he believed would be more conducive to growth and prosperity for the citizens of the Commonwealth. The five points were tax relief, energy management, manpower training, industrial promotion and regulatory reform. Regulatory reform was chosen as one of the five points because Governor King stated that he felt the regulatory process had evolved into a maze of permits and procedures which was inefficient and costly to both private and public interests.

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To address the task of regulatory reform, Governor King established the Commission to Simplify Rules and Regulations. The private sector members of that Commission were Edwin Sidman, Vice President of the Beacon Companies; William Edgerly, President of the State Street Bank and Trust Company; William Leary, Senior Vice President of the Hancock Life Insurance Company; Thomas Flatley, President of the Flatley Company; and Edward Schwartz, Vice President of Digital Equipment Company. The public sector members of that Commission were Governor King's cabinet secretaries.

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The Commission was in existence for thirteen months reviewing those aspects of the regulatory process which involved, among other things, the permit granting process for the construction of new housing. On August 18, 1980, the Commission submitted a report to the Governor entitled the Report of the Governor's

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Commission to Simplify Rules and Regulations. In general, the Commission concluded in its report that the Commonwealth should develop legislation and programs which would streamline the local development process, thereby stimulating the creation of jobs and the production of affordable housing. In the area of affordable housing, the report noted that existing municipal rules and regulations were an inhibiting force to the creation of much needed new housing units.

The Commission made several recommendations to limit local government's authority to regulate development which they felt would help to meet the increasing demand for affordable housing in the Commonwealth. One of the recommendations suggested legislation that would limit the authority of a Planning Board to adopt rules and regulations pursuant to the Subdivision Control Law. Specifically, the Commission recommended that road and service specifications in subdivision control regulations could not exceed those specifications commonly applied by a municipality to the laying out and construction of its own publicly financed ways. The rationale for imposing such a limitation was based on the Commission's findings that Planning Boards were adopting excessive subdivision regulations on developments and the consequence of such regulations was to discourage growth or escalate the cost of housing.

Based upon the Commission's report and Governor King's recommendations, in 1981 the Legislature amended Section 81-Q of the Subdivision Control Law by inserting the following proviso:

. . . in no case shall a city or town establish rules or regulations regarding the laying out, construction, alteration, or maintenance of ways within a particular subdivision which exceed the standards and criteria commonly applied by that city or town to the laying out, construction, alteration, or maintenance of its publicly financed ways located in similarly zoned districts within such city or town.

St. 1981, c. 459.

Since cities and towns throughout the Commonwealth rarely construct roadways to serve future residential developments, it was unclear when reading the new proviso as to how one would determine what standards were commonly applied by a municipality. Recently, the Massachusetts Appeals Court took a look at the "commonly applied" standard.

Benjamin and Jean Miles owned a six-acre parcel which they proposed to develop for residential purposes. They submitted a subdivision plan to the Millbury Planning Board which was approved by the Board subject to the following conditions:

1. utility lines (electric, telephone, cable) be underground;
2. a concrete sidewalk be constructed on one side of the street; and
3. sloped granite curbing be installed on both sides of the road and around a cul-de-sac.

The Mileses challenged the conditions imposed by the Planning Board.

MILES V. PLANNING BOARD OF MILLBURY
26 Mass. App. Ct. 317 (1988)

Excerpts:

Armstrong, J. . . .

The highway surveyor of Millbury testified that, in his seventeen years in that position (he had been with the town's highway department since 1943), the town's own construction and up-keep of ways had never involved the installation of underground utilities or of granite curbs or concrete sidewalks. All sidewalks and curbs installed by his department, apparently regardless of zoning district, were of asphalt --- a less durable but cheaper method of construction. Examples of recent new construction were few in number, because the town itself (as opposed to developers of subdivisions) has done little such work since the 1970's. The examples of reconstruction that were offered in evidence were largely discounted by the judge: Grafton Street, because it was a project constructed under G.L. c. 90, financed fifty percent by the Commonwealth and built to Commonwealth specifications, Holman Road and Farnsworth Court because they were not parts of new residential subdivisions; Gagliardi Way, because it was constructed by the Commonwealth rather than the town. Certain other examples were abandoned after objection because construction work was done before the proviso took effect. Other examples were thought irrelevant because the work had been done before the witness's tenure as highway surveyor. The lack of what seemed to be regarded at the trial as perfect examples -- post-1981 new construction by the town, with its own money exclusively, in residential subdivisions -- was permitted

to obscure the fact that developers were being asked to adhere to a standard of construction that the town itself had not followed in its own construction or reconstruction projects for at least the tenure of the highway surveyor (seventeen years) and apparently for some time before that. The most that could be said was that other subdivision developers were being required to and did adhere to the standards being imposed on the Mileses.

There is no suggestion in this case that the conditions put by the board on the Mileses' subdivision approval were either imposed in discriminatory fashion or lacked rational justification. The proviso, however, was intended by the Legislature to limit the authority of a planning board to require more of the developer than the town requires of itself. The standard is not what the town through its boards and officers recognizes as the ideal; rather, it is the standard "commonly applied" by the town in its own construction work. There is nothing in the "commonly applied" standard that makes pre-proviso construction irrelevant, where, as here, there is no evidence that the town imposed the regulations on its own construction. There is nothing in the standard that makes one-hundred percent funding by the town a condition precedent to relevancy. It is true, as the judge emphasized, that the proviso should not be read to constrain the town from upgrading construction standards applicable to ways. The proviso, however, requires that the town must itself be applying the higher standards. Here, it was clear from the testimony of the highway surveyor that the town had not upgraded construction standards applicable to its own work in the five years since the effective date of the proviso. Indeed, in work that was in progress even at the time of trial, the town was continuing to adhere to the lower standards to which the highway surveyor testified.

What has been said applies clearly to the conditions imposed by the board relative to the sidewalk and the curbing. It is less clear that it applies to the condition requiring underground utility lines. . . .

While the question is close, we think the proviso can be read and, in view of the clear intent, should be read to encompass utilities constructed within the ways of subdivisions. In new construction utilities typically follow the routes of ways . . . The installation of utilities is, in practice, an integral part of the construction of ways. Of the several functions of planning boards, the most central is ensuring the subdivisions are not constructed without adequate and safe provision for vehicular access, services (including utilities), water, drainage, and sewerage. . . . The close connection between ways and utilities, coupled with a planning board's preeminent role in determining the standards for adequacy of each, persuades us that legislation restricting a planning board's power with respect to the construction of ways should be read to restrict its powers with respect to the installation of utilities within the ways, if that is, as here, the manifest intent of the Legislature.

. . .

A new judgment must be entered declaring that the three conditions were in excess of the authority of the planning board.

The Miles decision hinged on the fact that enough testimony was presented to show that developers were required to adhere to higher construction standards than what the town followed in its own construction or reconstruction projects. However, the court noted that the "commonly applied" standard enacted by the Legislature in 1981 does not restrict a municipality from upgrading construction standards. If your community has not developed standards, it would be advisable to consider adopting standards which the town will follow for the construction or reconstruction of roadways. The Planning Board should review their subdivision control regulations for consistency with the town standards.

The Town of Millbury has petitioned the Massachusetts Supreme Judicial Court for further review of this case.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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ATTORNEY GENERAL APPROVES 5 ACRE ZONING

Earlier this year, the Office of the Attorney General approved two separate bylaws which imposed large lot zoning requirements.

The town of Sudbury adopted a Wayside Inn Historic Preservation Residential Zone on April 27, 1988 at their annual town meeting. The new zoning district established a minimum lot area requirement of 5 acres in the general vicinity of the historic Wayside Inn. Many parcels within the new Wayside Inn Zone were already subject to deed restrictions providing for a minimum lot size of 5 acres. Such deed restrictions were imposed by the Ford Foundation and are due to expire on December 31, 1996.

The Sudbury Planning Board made a presentation at the town meeting supporting the creation of the Wayside Inn Zone. The Planning Board recommended adoption of the Wayside Inn Zone because it believed the new regulations would maintain the integrity of the historic district and would protect against the potential loss of the "historic atmosphere" that was so much a part of the Wayside Inn. The petitioners' report to the town meeting also noted that the Wayside Inn Zone would have the prolonged effect of "preserving the rural and historic character so prized in the Wayside Inn neighborhood."

E MANAGER

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On April 25, 1988, the town of Chilmark adopted an overlay zoning district entitled "Tea Lane District." The new zoning district was created for the purpose of preserving the bounds, stone walls and the historic character of Tea Lane which was an unimproved road. It was also enacted for the stated purpose of protecting the safety of the public using the road.

The Tea Lane District is an area containing approximately 614 acres which are accessed by the single-lane, dirt road. Tea Lane dates back to 1767, is 1.68 miles long and derived some historic value from an incident during the tea embargo prior to the American Revolution. In order to limit the number of vehicles dependent on Tea Lane and protect the historic character of the lane, the town amended its zoning bylaw to require a minimum lot area of 5 acres in the Tea Lane District.

Any zoning change adopted by town meeting must be submitted to the Attorney General for his approval pursuant to Chapter 40, Section 32, MGL. The Attorney General's power to disapprove a zoning bylaw is limited; he may only disapprove a bylaw if he is of the opinion that the bylaw violates State substantive or procedural law. The Attorney General does not have the authority to disapprove a bylaw because he disagrees with the legislative policy nor can he comment on the wisdom of the zoning bylaw adopted by the town.

The Chilmark and Sudbury bylaws centered on the issue of protecting an historic area of a community by imposing a minimum lot area requirement of 5 acres. In approving the bylaws, the Attorney General sent similar letters to both communities.

The Attorney General's review of the bylaws is interesting because he notes the Massachusetts court cases which have dealt with the issue of large lot zoning. The Attorney General also points out the limit of his review and alludes to some of the issues facing a community in the event of a large lot challenge by a property owner. The following is the Attorney General's response to the town of Chilmark.



THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF THE ATTORNEY GENERAL

JOHN W. McCORMACK STATE OFFICE BUILDING
ONE ASHBURTON PLACE, BOSTON 02108-1698

JAMES M. SHANNON
ATTORNEY GENERAL

July 29, 1988

Carol W. Skydell
Town Clerk
Town Hall
Chilmark, MA 02535

Dear Ms. Skydell:

I enclose the amendments to the general by-laws adopted under articles 16, 17, 31 and 32, and the amendments to the zoning by-laws adopted under articles 35, 37 and 38 of the warrant for the Chilmark Annual Town Meeting held April 25, 1988, with the approval of the Attorney General endorsed thereon, and on the zoning map pertaining to article 35.

Article 35 creates a zoning district denoted as the "Tea Lane District" wherein dimensional regulations for single family homes include a minimum lot size requirement of five acres.

It appears from review of Massachusetts case law that there is no fixed rule about maximum permissible lot size. The cases of Simon v. Needham, 311 Mass. 560 (1942) upholding one acre zoning, Aronson v. Sharon, 346 Mass. 598 (1964) invalidating (as to plaintiff's land only) 100,000 square foot zoning and Wilson v. Sherborn, 3 Mass. App. Ct. 237 (1975) upholding two acre zoning are not dispositive. Other jurisdictions have held zoning requirements of five or more acres to be valid under appropriate circumstances. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983); Kurzius v. Upper Brookville, 51 N.Y. 2d 388 (1980); Queen Anne's County v. Miles, 246 Md. 355 (1967); Honeck v. Cook, 12 Ill. 2d 257 (1957); and Demars v. Zoning Commission, 142 Conn. 580 (1955).

Whether the five acre requirement is valid here, is a matter to be decided by the courts, and if its reasonableness "is fairly debatable, the judgment of the local legislative body must be sustained." Caires v. Building Commissioner of Hingham, 323 Mass. 589, 594-595 (1949). A determination as to whether, on the facts, this by-law has a real or substantial

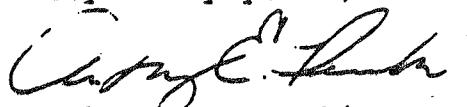
Carol W. Skydell
Town Clerk
Page Two

relation to the public health, safety or welfare, Aronson v. Sharon, 364 Mass. 598 (1964) or whether the by-law reaches the point of deprivation of private property without compensation is beyond the scope of authorized review by the Attorney General. See Concord v. Attorney General, 336 Mass. 17 (1958) and Amherst v. Attorney General, 398 Mass. 793 (1986).

Opponents of this by-law have objected that the boundaries of the "Tea Lane District" as described in the article are ambiguous. Whether there may be some ambiguity as to exactly what land is included within the zone is of course a serious issue, but in reviewing by-laws the Attorney General must be guided by the same principles as the Courts, Amherst v. Attorney General, 398 Mass. 793, 795 (1986), which have stated that "zoning is entitled to a strong presumption of constitutional validity . . . and courts should be wary of declaring zoning fatally indefinite." Jenkins v. Pepperell, 18 Mass. App. Ct. 265, 270 (1984).

In summary, because the Attorney General is unable to say as a matter of substantive law that five acre zoning is unwarranted in the Chilmark "Tea Lane District" area or that the boundary delineation is fatally ambiguous, article 35 is approved.

Very truly yours,



Anthony E. Penski
Assistant Attorney General
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AEP/mfm

In Simon v. Town of Needham, 311 Mass. 560 (1942), the Massachusetts Supreme Court upheld a minimum one acre lot requirement for a single-family dwelling. In reviewing the provisions of the Needham bylaw, the Court noted the amenities which the town could reasonably believe would occur from the one acre requirement, and the advancement of such amenities was, in this case, sufficient justification for the one acre restriction. However, the court warned that in reviewing large lot zoning regulations, the strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large. In such cases, the interests of the municipality would not be allowed to stand in the way.

In the case of Aronson v. Town of Sharon, 346 Mass. 598 (1964), the Massachusetts Supreme Court made good on its earlier warning by striking down a bylaw which required a minimum lot area of 100,000 square feet. The only justification the town put forth for enacting such a large lot requirement was that the community wished to encourage that the land be left in its natural or more rural state to provide living and recreational amenities for its inhabitants and visitors. The court found that such a large lot requirement bore no rational relation to the objectives of zoning even if such a restriction would further the preservation of land in its natural state for recreational and conservation purposes.

In Wilson v. Sherborn, 3 Mass. App. Ct. (1975), the court took a close look at the zoning bylaw of the town of Sherborn which required a two acre (87,120 sq. ft.) minimum lot size. When the Massachusetts Appeals Court decided Sherborn, it acknowledged that Needham and Sharon were the parameters for its decision. The town did not have a public water supply or town sewerage which necessitated wells and on-site septic systems. The Appeals Court upheld the validity of the bylaw as the town was able to show a reasonable relationship between the two acre requirement and the sewage and water conditions of the town.

Chilmark's Tea Lane District has been challenged in the Land Court. The plaintiffs claim, among other things, that the 5 acre lot size bears no rational relationship to a valid zoning purpose and exceeds the Town's zoning authority. The plaintiffs are asking the Land Court to invalidate the Tea Lane bylaw and award damages in an amount which compensates them for the deprivation of the value of their land caused by the Tea Lane District regulations. However, the plaintiffs are also claiming certain procedural deficiencies in the process followed by the Town in adopting the zoning amendment. If they prevail on such issues, the court may not reach the more important issue of large lot zoning and the preservation of historic areas.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 5, Edition No. 9
November, 1988

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SPLIT LOTS

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When zoning regulations are imposed, which vary from one district to another, the result is the application of different restrictions to abutting lands. The boundaries of the different zoning districts must be fixed with sufficient certainty so that a property owner will know the types of restrictions that have been imposed upon his property. Any uncertainty as to where the boundary line is located will be resolved in favor of the landowner. See Jenkins v. Town of Pepperell, 18 Mass. App. Ct. 265 (1984). It is common to find zoning district boundary lines that follow topographical features or public improvements such as rivers, highways or streets. However, in some instances, a zoning district or municipal boundary line will divide a lot to leave part of a lot subject to one set of restrictions, and the other part of the lot subject to a different set of restrictions. What zoning regulations will apply?

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Through the years, both the Massachusetts Supreme Judicial Court and Appeals Court have looked at the split lot question. In determining what type of activity can occur on a particular portion of a split lot, an important distinction has evolved between an abstract use of land versus an active use of land. In a nutshell, when the use of land in the more restricted zoning district is to supply space for a yard requirement or a similar dimensional requirement, such abstract use of land has been considered consistent with the zoning regulations for the more restricted district.

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MANAGER

When the use of land in the more restricted zoning district is for an active use, such as parking or an access roadway, such active use of the land has been found to be prohibited in the more restrictive zone.

The first case dealing with the abstract use versus the active use theory was Brookline v. Co-Ray Realty Co., 326 Mass. 206 (1950). Co-Ray Realty owned a parcel of land of which approximately 15,000 square feet was situated in Boston and 5,000 square feet was in Brookline. The Brookline land was zoned for single-family development and the Boston land was zoned general residence where multi-family use was permitted. Co-Ray Realty proposed to build a 28 unit apartment building on the Boston land and use the Brookline land as a rear yard and service entrance for the apartment building. The Brookline land had to be included in the proposal in order for Co-Ray to meet the rear yard requirements of the Boston zoning regulations. A concrete walk three feet in width and approximately 100 feet in length was to be located on the Brookline land which would give access to the boiler room entrance and service entrance of the apartment building. Any person leaving by either entrance would be on the Brookline land after taking a step or two. The main issue was whether the use of the Brookline land as a service entrance for an apartment building located on the Boston land violated the Brookline zoning bylaw. Brookline did not attack the use of the Brookline land in order to meet the yard requirements of the Boston zoning regulations but rather the active uses to which the yards were to be put. Brookline pointed out that the Brookline land was zoned solely for single-family use and apartment use was not permitted. In deciding in Brookline's favor, the court noted:

Brookline is seeking neither to enforce the Boston zoning regulations nor to deny the use of the Brookline land. It is not objecting to the mere presence of concrete walks on the ground. What the town seeks to enforce is its own zoning by-law and the ban therein against the use of the Brookline land as a locus for carrying on the numerous inevitable service activities accompanying the occupancy of an apartment house.

An access roadway has been considered an active use of land which must conform to the zoning regulations in the district where it is located. This issue first came to light in Harrison v. Building Inspector of Braintree, 350 Mass. 559 (1966).

Textron Industries owned a split lot in which the major portion was located in an industrial zoning district. Textron constructed a factory on the industrial portion of the lot and also constructed an access roadway in order to reach the factory. However, the access roadway passed through a residential zoning district. An abutter sought enforcement action concerning the access roadway and requested that it be relocated. Textron argued that the access over residential land was necessarily implicit in a zoning scheme which completely surrounds an industrial area with residentially zoned land. The court found that since the residential zone did not expressly authorize industrial use, then the (active) use of the land in the residential zone as an access roadway for an industrial use violated the requirements of the residential zone.

Other cases have also looked at access roadways located on split lots. Richardson v. Zoning Board of Appeals of Framingham, 351 Mass. 375 (1966), dealt with an access way for a forty-four unit apartment house. The access roadway was located on land zoned for single family. An apartment house was not listed as a permitted use in a single-family zone. The Zoning Board had determined that the implied intent of the zoning bylaw was to allow access roadways in single-family zones. The court overturned the board's decision reasoning that access roadways should be expressly dealt with in the bylaw. The court also noted that other access was available to the apartment building.

In Building Inspector of Dennis v. Harney, 2 Mass. App. Ct. 584 (1974), the court found that the use of land lying within a residential zone as an access roadway for a commercial use located in an unrestricted zone was not authorized by the bylaw. As was the case in Richardson, other access was available to the property.

As mentioned earlier, sometimes a tract of land will be divided by a municipal boundary. Town of Chelmsford v. Byrne, 6 Mass. App. Ct. 848 (1978), involved access to property located in the city of Lowell and zoned for industry by means of an access road which was located in a residential zone in the town of Chelmsford. The court held that the principle established in the Harrison case that an owner of land in an industrial district may not use land in an adjacent residential zone as access roadways for its industrial use is also controlling when districts zoned for different uses lie in different municipalities. However, the access roadway was the only means of access to the industrial land. The court remanded the case to the Superior Court for a determination as to whether the effect of the Chelmsford bylaw was to bar any access to the land located in Lowell for a lawful use.

Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967), also shows the concern of the court concerning the availability of access to a lot split by a municipal boundary when it noted that to construe a bylaw so as to bar any access to land for a lawful use would be arbitrary and invalid. In Lapenas, the court faced a situation where a tract of land consisting of a strip from 14-23 feet wide was located in an area of the city of Brockton which was zoned residential, and the remainder of the parcel was located in the town of Abington and zoned for business. The only access to the business portion of the land was through the residentially zoned strip located in Brockton. Lapenas sought a variance under the Brockton ordinance for access to a gasoline station for which the Building Inspector of Abington had issued a permit. The variance was denied by the Zoning Board of Appeals. The court held that the Zoning Board of Appeals' interpretation of the Brockton ordinance was in error and could not be construed as prohibiting access to the land located in Abington. Even though a variance was not considered necessary, the court found that since the land in the residential zone was too narrow to be useable for any permitted purpose, and the commercially zoned land in Abington was without other access, Lapenas was entitled to relief from the literal operation of the Brockton zoning ordinance.

In Tambone v. Board of Appeal of Stoneham, 348 Mass. 359 (1965), the court considered an abstract use of land in a situation where a landowner was using a certain portion of his lot in order to satisfy a minimum dimensional requirement. Tambone owned a split lot which was divided by a single-family and multi-family zone. Tambone proposed to construct an apartment building to be located entirely within the multi-family zone. The apartment building would have been placed on the lot 62 feet from the lot line but only 12 feet from the zoning district boundary line. The zoning bylaw required that all apartment buildings have a minimum side yard of 30 feet. The Zoning Board of Appeals contended that the 30 foot side yard requirement should be measured from the zoning district boundary line and not from the lot line. The term "yard" was not defined in the bylaw but the court noted that, in general, setback requirements in the bylaw referred to distances from setback lines, lot lines, or existing structures rather than from zoning boundaries. Absent a requirement in the zoning bylaw requiring that apartment buildings be constructed at least 30 feet from a single-family zone, the court found that the minimum yard requirements could be measured from the lot line rather than the zoning district boundary line. In Tofias v. Butler 26 Mass. App. Ct. 89 (1988), it was noted that the Tambone court, in explaining the meaning of yard, was saying implicitly that there was nothing wrong with the "abstract" use of the land located in the single-family zone to meet the yard requirements of the bylaw.

The concept of abstract use was significant in Byrne v. Perry, 12 Mass. App. Ct. 883 (1981). Byrne contended that Perry had violated an agreement when he formed a building lot by using land designated in an agreement as a Green Belt. One of the stipulations in the agreement was that the Green Belt was to be "forever left as an open area in its natural state and no structures or buildings . . . shall be erected or placed thereon" Perry constructed a dwelling on the lot in question but only on the unrestricted portion of the lot. The court found that the agreement prohibited construction on or other physical alterations of the Green Belt but did not prohibit "such abstract uses of Green Belt land as incorporating portions of it to meet the dimensional requirements of the zoning by-law."

Tofias v. Butler, *supra*, also dealt with the abstract use of land in order to meet a dimensional requirement. Tofias owned a split lot in Waltham which was located partly in a residential district and partly in a commercial district. He proposed to construct a commercial structure entirely within the commercially zoned portion of the lot. The zoning ordinance contained a 20% maximum lot coverage provision which was applicable in both the commercial and residential district. Butler, an abutter, argued that only the portion of the lot located in the commercial district could be taken into account when computing the 20% maximum lot coverage. The court disagreed and concluded that the land in the residential zone could be included when calculating lot coverage. As to the future use of the residentially zoned land that was used in determining maximum lot coverage for the commercial building, the court noted the principle that "to the extent required to satisfy the dimensional requirements, such residential land cannot be subsequently built on or counted towards the lot coverage requirement of another structure, but rather must be left as open space"

The Waltham zoning ordinance also contained the following provision relative to split lots.

Where a district boundary line divides a lot in single or joint ownership of record into different districts at the time such line is adopted, the regulations for the less restricted portion of such lot shall extend not more than thirty (30) feet into the more restricted portion, provided that the lot is still owned by the owner of record of such lot when such line was established, and provided further that the lot has frontage in the less restricted district.

The court did not read the above provision as an exclusive rule but rather a grandfathering type provision which was static and narrow in scope. The court noted, however, that the City Council could deal with the split lot issue if they so desired by amending the zoning ordinance. Absent specific regulation, the court will remit to general considerations and pursue case law. As noted in Tofias, when dealing with the application of a dimensional requirement of a local zoning bylaw, the court will make an effort, at "a compromise between the ordinance's apparent recognition of the value of regular zone boundaries and a desire to permit land owners to enjoy the use of their entire properties as single units."

A few months after the Tofias decision, the court, in Moore v. Town of Swampscott, 26 Mass. App. Ct. 1008 (1988), again faced the split lot issue. This case dealt with two adjacent undersized lots which were located in different residential zoning districts. One lot (referred to as Lot 2) was located in a Residence A-1 District. In the A-1 district, a single-family residence was permitted as a matter of right on a lot having a minimum area of 30,000 square feet and 125 feet of frontage. The other lot (referred to as Lot 3B) was located in a Residence A-3 District. In the A-3 district, a single-family or a two-family residence was permitted as a matter of right on a lot having a minimum area of 10,000 square feet and 80 feet of frontage. Lot 2 had an area 8,730 square feet and Lot 3B had an area of approximately 11,500 square feet. Both lots fronted on the same street with Lot 2 having 117 feet of frontage and Lot 3B having only 8 feet of frontage.

Neither lot met the requirements of the zoning district where they were located. However, combined to form a single lot, there was sufficient frontage to meet the minimum frontage requirement of either district and sufficient lot size to comply with the minimum lot area requirement of the A-3 district where single and two family residences were permitted. The Land Court judge ruled that the 117 feet of frontage in the A-1 district could be used to meet the frontage requirement for a single-family residence in the less restrictive A-3 district but not for a two-family residence. On appeal, the Massachusetts Appeals Court decided that the frontage in the A-1 district could be used to satisfy the frontage requirements for a two-family residence which the owners proposed to build on the land located in the A-3 district.

MOORE V. TOWN OF SWAMPSCOTT
26 Mass. App. Ct. 1008 (1988)

Excerpts:

The Land Court judge's decision must be modified in one respect because on June 3, 1988, this court decided Tofias v. Butler, ante 89, 94-97 (1988). That case held that, for a use permitted in a less restricted zoning district, land in a more restricted zone could "supply space for a yard or the like, . . . a use not inconsistent with the requirements of such a (more restrictive) district." It was pointed out (at 95-97), however, that the use of the land in the more restricted district must be merely "abstract," i.e., to satisfy the by-law, rather than "an active, prohibited use of" the land in the more restricted district.

Under the authority of the Tofias case, the owners of this locus could use the land in the more restricted A-1 part of the combined area for an "abstract" or passive use to satisfy the by-law space and frontage requirement for a two-family residence the owners proposed to erect in the less restricted A-3 part of the locus. The Tofias case thus established that structures in an A-3 district were not confined only to those types allowed in the more restricted A-1 district.

The judgment is to be modified to permit the construction of either a one-family or a two-family residence entirely within Lot 3B, when Lot 3B is combined with the passive or abstract use of Lot 2. The case is remanded to the Land Court for further proceedings consistent with this opinion.

An issue which was not directly addressed in the Moore decision was whether a driveway could be constructed for access to a two-family use over land which was zoned strictly for single-family use. Considering the results of the Co-Ray Realty and Harrison decisions, it would appear that construction of a driveway would have to comply with the zoning regulations of the district where it is located. However, if no other practical access exists, the rationale of the court in the Lapenas decision would most likely be applicable.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 5, Edition No. 10
December 1988

SELECTED MASSACHUSETTS GENERAL LAWS DEALING WITH LAND USE ISSUES

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Through the years we have received numerous inquiries from municipal officials and other interested persons pertaining to land use regulations. Most of the questions have centered on the application of the Zoning Act and the Subdivision Control Law. However, many times we have had to hunt down other statutes which relate to the broad issue of local land use regulation. To save some future frustration, the following is a potpourri of municipal subjects which some day you may have to research. In the notations below, there is a short description of the issue followed by the relevant chapter and section numbers of the Massachusetts General Laws. The following information should not be used as a substitute for your reading of the statute.

SELECTED MASSACHUSETTS GENERAL LAWS

When the last day to take certain actions falls on a Sunday or legal holiday, time period is extended to the next business day. Chapter 4, Section 9.

Rights of abutting property owners to install public utilities in private ways. Chapter 187, Section 5.

Subpoena powers of local boards and public officials. Chapter 233, Section 8.

In certain cases, abutting property owners own to the middle of the right-of-way. Chapter 183, Section 58.

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To be consistent with discrimination laws, retirement communities constructed soley for the elderly must be limited to people who are 55 years of age or older and be located on a tract of land at least 20 acres in size.
Chapter 151B, Section 4..

Procedure for increasing or decreasing the membership of a municipal board. Chapter 41, Section 2.

Procedure for filling a vacancy in a municipal board.
Chapter 41, Section 11.

Procedure and limitations for the establishment of user fees. Chapter 44, Section 53E.

Procedure for closing public offices in municipality on Saturdays. In certain cases, Saturday will be treated as a legal holiday when municipal offices are closed.
Chapter 41, Section 110A.

Unless otherwise provided by general or special law, a person does not have to be a resident of a community in order to accept an appointment to a public office.
Chapter 41, Section 109.

Procedure to be followed when there has been a resignation of a town officer. Chapter 41, Section 109.

The low and moderate income housing law (Snob Zoning). The process of granting a comprehensive permit for low and moderate income housing by a Zoning Board of Appeals. Chapter 40B, Sections 20-23.

Town Hall must be closed on all legal holidays. Chapter 136, Section 12.

Listing of legal holidays. Chapter 4, Section 7 (18).

Siting of refuse treatment and disposal facilities.
Chapter 111, Section 150A.

Siting of hazardous waste facilities. Chapter 111, Section 150B.

Procedure for the establishment of an historic district.
Chapter 40C.

The acceptance and expenditure of gifts and grants by a municipal officer or department. Chapter 44, Section 53A.

The establishment of building lines no more than 40 feet from the exterior line of a town way. When established, no structures may be constructed between the building line and such way. Chapter 82, Section 37.

The conduct of public officials and employees (the conflict of interest law). Chapter 268A.

Authority to enact a municipal bylaw or ordinance to regulate condominium conversions. Chapter 257, Acts of 1983.

The open meeting law which governs all municipal boards, commissions, committees and sub-committees. Meetings for the purposes of the open meeting law do not include any on-site inspections of any project or program. Chapter 39, Sections 23A-24.

Procedure for the removal of unsafe buildings. Chapter 143, Sections 6-14; Chapter 139, Sections 1-3B.

A restriction on the issuance of a building permit unless there is an available supply of water. Chapter 40, Section 54.

Consent of state before building permit can be issued on an abandoned railroad right-of-way. Chapter 40, Section 54A.

Regulating billboards and other advertising devices within public view. Chapter 93, Section 29-33.

The definition of a public record. Chapter 66, Section 3.

The process of eminent domain. Chapter 79.

The process for the assessment of betterments. Chapter 80

An alternate method of taking property by eminent domain and assessment of betterments. Chapter 80A.

The establishment of a way as a town way. Chapter 82, Sections 21-24.

Approval of town bylaws by the Attorney General. Chapter 40, Section 32.

Town bylaw for regulating the covering of an active or abandoned well. Chapter 40, Section 21 (20).

Town bylaw for regulating the numbering of buildings on or near a way. Chapter 40, Section 21 (10).

Town bylaw (not a zoning bylaw) for regulating earth removal. Chapter 40, Section 21 (17).

Town bylaw authorizing temporary repairs on private ways. Chapter 40, Section 6N.

The publication of compilations of zoning ordinances and bylaws. Chapter 40, Section 32B.

Courts having jurisdiction relative to town bylaw violations. Chapter 218, Section 26.

Non-criminal disposition of town bylaw violations. Chapter 40, Section 210.

Establishing improvement districts. Chapter 40, Section 44.

Removing snow and ice from certain private ways. Chapter 40, Section 6C.

Naming and renaming unaccepted ways. Chapter 85, Section 3B.

Restriction on erection of barbed wire fences. Chapter 86, Section 6.

Spite fences which unnecessarily exceed six feet in height. Chapter 49, Section 21.

Revocation of local licenses and permits for failure to pay taxes. Chapter 40, Section 57.

The protection and planting of public shade trees. Chapter 87.

The designation and maintenance of scenic roads. Chapter 40, Section 15C.

Scenic and recreational rivers. Chapter 21, Section 17B.

Mobile Homes and Mobile Home Parks. Chapter 140, Sections 32A-32R.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 6, Edition No. 1
January, 1989

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OPEN SPACE ZONING

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Many communities throughout the Commonwealth have expressed concern about maintaining or protecting their rural character. Large lot zoning is an approach that communities have considered as a way of preserving open space. However, such a zoning tactic is subject to the judicial dicta in Aronson v. Sharon, 346 Mass. 598 (1964), that zoning may not be used as a substitute by a municipality for acquiring land under eminent domain with just compensation to the landowner.

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One of the stated purposes for enacting the State Zoning Act was to facilitate the adequate provision of parks, open space and other public improvements. To further this purpose, Chapter 40A, Section 9, MGL, encourages communities to enact cluster development (open space) bylaws. There is little information readily available to municipalities regarding the cluster development concept. The following article, written by Randall Arendt, discusses the central issues surrounding cluster development (open space) zoning. We feel this article will be useful to local officials who are or may consider this land use management tool.

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Mr. Arendt is the Associate Director for the Center for Rural Massachusetts which is located at the University of Massachusetts at Amherst. The Center was established by the Legislature in 1984 to conduct research into special problems facing rural communities, and to act as an information clearinghouse serving municipalities and state officials dealing with those issues.

E

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"OPEN SPACE" ZONING: AN EFFECTIVE WAY TO RETAIN RURAL CHARACTER

by Randall Arendt, Associate Director
Center for Rural Massachusetts
University of Massachusetts, Amherst, MA

Most rural residents probably consider their towns to be fairly well "protected" if they have adopted zoning regulations. Few of them realize that conventional zoning is essentially a blueprint for development, and development alone. Of course, these bylaws usually separate incompatible uses, and they typically establish certain standards (e.g., maximum densities, minimum setbacks, etc.), but they generally do nothing at all to protect open space or to conserve rural character.

"Planned Sprawl"

Conventional zoning assigns a development designation to every acre of land in your town, generally residential, commercial, or industrial. The only lands which are not designated for development under conventional zoning are wetlands and floodplains. Conventional zoning has been accurately described as "planned sprawl", because every square foot of each development parcel is converted to front yards, back yards, streets, sidewalks, or driveways. Period. Nothing is left over to become open space, in this land-consumptive process.

A Better Solution

Local officials and residents who are interested in ensuring that their towns will not ultimately become a seamless web of subdivisions, shopping centers and office or industrial parks now have a practical and effective alternative: open space zoning. This technique can take either of two basic forms, "permissive" or "compulsory". About one-third of the towns in Massachusetts (but very few of the rural ones) offer "permissive cluster" as an option for developers, in their bylaws. The idea of "compulsory cluster" has been used by a number of rural towns in southern Maine and in upstate New York for many years, but it has only recently been introduced in Massachusetts (Granby was the first to adopt it, as an effective tool to help preserve farmland).

In order to avoid disturbing the equity held by existing landowners, open space zoning allows the same overall amount of development which is already permitted. However, the outstanding difference is that this technique requires that all new construction be limited to (typically) half the parcel. The remaining open space is permanently protected under a conservation easement, commonly co-signed by the Conservation Commission, and recorded in the County Registry of Deeds.

As "open space zoning" is based upon the technique of "clustering", these two terms are used interchangeably throughout the rest of this article. At this point, it

should also be noted that the cluster concept can be restricted to detached, single-family homes, each on its own down-sized houselot, in communities or in specific zoning districts where this is politically desirable. In other words, cluster housing is by no means limited to townhouses, apartments, or condominiums. Neither is it limited to any particular income group or family type. In fact, the classic New England village settlement pattern is a superb example of clustered single-family homes, with the central green constituting the permanently preserved open space.

Cluster Design

Although the basic concept of clustering is fairly simple (and fairly old), it is viewed as a "new" form of development by those who haven't recognized its basic similarity with traditional townscapes. Because it is quite different from the conventional, standardized subdivision pattern with which most of us are very familiar, it has raised concerns among some rural residents. Interestingly, the conventional suburban model, commonplace in many metropolitanizing towns, is actually an alien pattern in the otherwise traditional New England landscape. It really looks "at home" only in places such as central New Jersey, where, after 70 years of implementing conventional zoning, it has become the predominant building pattern.

The purpose of this brief article is to explain the major differences between conventional and clustered (open space) development, and to address the principal concerns typically expressed at local meetings where the open space planning concept has been discussed.

Ultimately, of course, the question of this technique's appropriateness in rural or suburbanizing municipalities will be answered by its residents and their official representatives, taking action to amend local zoning bylaws on a town-by-town basis. The following paragraphs have been prepared to provide pertinent information to town officials and residents, so that these local decision-making processes may be conducted on a more informed basis.

The Open Space (Cluster) Concept, in Practice

The basic principle of cluster development is to group new homes onto part of the development parcel, so that the remainder can be preserved as unbuilt open space. The degree to which this accomplishes a significant saving of land, while providing an attractive and comfortable living environment, depends largely on the quality of the zoning regulations and upon the expertise of the development designer (preferably someone experienced in landscape architecture).

Open Space: What Size and Shape?

For example, unless local regulations require the resultant open space to be at least a certain size with specific minimum dimensions, the "open space" can end up being a long narrow fringe abutting rear lot lines and the parcel's outer perimeter. This can be easily avoided by clarifying, in the bylaw, that lots and roads shall not cover more than, say, 50% of the parcel, and that at least half of this open space must be shaped so as to be usable for active recreation or agriculture, for example.

Counting Only Truly Usable Land

In order to avoid another possible problem, many towns also specify that housing density be based upon "net buildable area", which typically prevents all (or a certain percentage of) unbuildable land (such as wetlands or extremely steep slopes) from being counted when calculating the number of homes that may be permitted. Otherwise, the cluster approach could be used to propose a greater number of dwellings than would be buildable under conventional subdivision methods. Some towns address this issue by requiring the developer to demonstrate that his cluster plan would not produce a greater number of new homes than would be possible with a standard layout. (This often means that two conceptual plans are submitted, for comparison.)

Will it Harmonize with its Surroundings?

Another concern I have often heard is that cluster housing will not blend in with a town's rural character. It is true that some cluster developments done in the past have failed to harmonize with their surroundings. Recognizing this potential problem, a few towns are now requiring that new cluster plans consist of only detached, single-family homes, each set on its own, down-sized individual lot, roughly resembling a traditional village pattern. This also ensures that every family will have its own separate yardspace, in addition to the larger "open space" which the cluster approach creates.

Architectural Design Issues

In order not to completely prohibit other forms of housing some towns have adopted special permit procedures which enable their Planning Boards to approve attached units, under exceptional circumstances, when they are carefully designed to reflect traditional architectural values. Typically, such regulations set an upper limit on the number of dwellings per building (e.g., four), and contain standards relating to features such as roof pitch, siding material, and roofline breaks, thus giving developers an incentive to hire architects sensitive to traditional building forms that will blend in with the town's character.

"Open Space" Maintenance

Another issue which concerns people is the maintenance of the open space that is created by clustering. If the open space is recreational (playing fields, jogging trails, tennis courts, etc.), upkeep is typically handled by a homeowners' association, to which everyone is contractually obligated to contribute when they purchase their home. (At Echo Hill in Amherst, MA, for example, homebuyers sign a legally binding agreement which enables the homeowners' association to collect any unpaid dues, with accrued interest, from the party involved at the time he eventually re-sells the house. Unpaid dues cloud the title and effectively prevent re-sales.) If the open space is agricultural, there are several options.

The agricultural open space could be sold "in fee" to the homeowners' association, which could in turn lease it to local farmers. Alternatively, the original farmer could retain ownership of it and sell only his "development rights". I favor the latter option, even if the farmer is planning to retire, because he could still sell the field to a younger farmer in the neighborhood at an affordable price reflecting the land's agricultural value (not its potential building-lot value), thus strengthening the local farming economy. This is essentially a private-sector version of the state's "APR" program, which is limited in its funds.

"Locking In" the Open Space

This leads into another commonly-felt concern, involving the prevention of future development on the open space. Although cluster bylaws typically prohibit further subdivision of the parcel, an added safeguard is to require that the local Conservation Commission be a signatory party to a conservation easement permanently restricting development on the open space. Alternatively, a local, regional or state-wide land trust could also be a co-signer and enforcer.

Buffering Farm Operations

In order to reduce potential conflicts between new residents and agricultural practices, towns are beginning to require that cluster lots be separated from the protected farmland by a "buffer" strip, typically 75 to 100 feet wide. Where the development can be so designed, existing woodland should be used. When this is not possible, towns can require new buffer areas to be thickly planted with a variety of rapidly growing native trees and shrubs (white pine, birch, poplar, american viburnum, honeysuckle, wild rose, etc.). A similar requirement should also be placed on conventional subdivisions when they abut working fields, but this is rarely done.

Adjacent Property Values

The issue of "impact upon surrounding property values" has often been raised. Along any part of the parcel perimeter where down-sized lots would adjoin standard-sized lots, towns can require buffer strips, similar to the ones described above. Along other edges, this may not be desirable or logical, as lots which border permanently protected open space almost always enjoy enhanced property values. (This enhancement is also true for cluster lots within the development.)

Private Streets, Different Standards?

When cluster developments are designed with privately-maintained road systems, Planning Boards are often asked to reduce their normal street construction standards. This has, in the past, sometimes created sub-standard conditions, and is a practice which towns would be well-advised to resist. If subdivision street construction standards are excessive (as they often are, particularly in width of pavement), they should be revised for all types of new development, so that rural character is not further compromised by new streets which look like they were engineered for metropolitan suburbs. It is useful to note here that most town roads, outside new subdivisions, have an 18-foot wide paved surface, much more in scale with New England than the 22' to 30' paved travel surfaces commonly required by "modern" subdivision regulations.

Sewerage and Septic Systems

Because of the shorter road system needed to serve village-sized lots in a cluster development (as contrasted with large lots in conventional subdivisions), substantial savings are possible with respect to the construction of roads, sewers,

and water lines. Where sewer service is unavailable, however, people have expressed concerns about siting septic systems on the smaller cluster lots. Recognizing this factor, towns are requiring that such houselots be located on the section of the parcel where soils are most favorable for leaching fields. The flexibility of cluster design allows this to happen; in a conventional subdivision, septic systems are located wherever the soils manage to pass minimum health requirements, even on marginal soils whose long-term suitability is questionable. In addition, it should be noted that septic systems can be located beyond one's lot lines, on an easement within the protected open space.

Why Require Open Space (Cluster) Design?

Perhaps the most controversial issue surrounding the cluster concept is the suggestion that this open space approach could be made "mandatory", in the bylaws. The rationale behind this suggestion is that there are certain types of irreplaceable natural resources which are extremely important to protect. Among these may be listed aquifers, riverfront land, fields and pastures. In addition, clustering provides the flexibility in layout so that a developer can avoid impacting important wildlife habitat areas, such as deeryards, or scenic features of the rural landscape, such as large rock formations, hillcrests, and mature tree-stands. It is a local decision whether to require the cluster approach when development is proposed on any or all of these resource lands.

Legal Points

Towns considering "compulsory open space zoning" are strongly encouraged to work closely with legal counsel, to ensure that their wording will not be inconsistent with statutory or case law. In particular, two points should be remembered. First, this technique should be used to protect identifiable and important resource lands (and not be a "blanket" over all rural properties). Second, it must leave an "escape valve" for a limited amount of conventional (non-cluster) development (say, 2 or 3 lots in any 5-year period), so that the applicant has some other options that do not require him to go through the Special Permit process. A copy of Granby's compulsory open space bylaw (for farmland protection) is included in the "Growth Management Workbook", prepared by the Pioneer Valley Planning Commission, under a grant from EOCO. Another example may be found in the award-winning rural design manual "Dealing with Change in the Connecticut River Valley", prepared by the Center for Rural Massachusetts, with a grant from DEM.

Degrees of "Mandating" Open Space

Readers should bear in mind that it is possible to limit the cluster requirement to certain zoning districts. It is also possible to authorize the Planning Board to require it only when the developer's conventional plan would destroy or remove more than a specified percentage of certain listed resources, leaving determination on a case-by-case basis. Proponents of "compulsory open space" zoning (in any of its various forms) argue that any other approach pays only lip service to resource protection, because any developer would remain free to ignore cluster "recommendations" from town officials. They argue that protection of these resources is far too important to be left to the whim of a speculative developer, who might prefer to build a conventional suburban subdivision because that is what he happens to be most

familiar with. In my view, towns which choose not to exercise their potential local regulatory authority to require open space development design are essentially engaged in a game of chance, in which they simply hope that developers will voluntarily opt to follow the open space approach. This method of "planning" does not put the town in true control of its own destiny, and has not resulted in significant open space preservation in the communities which have simply "permitted" cluster over the past 20 years. When this important choice is left to developers, most will opt for standard, land-consumptive, suburban subdivision, because they can do that "by right", avoiding the Special Permit process with its additional rules and uncertain outcome. I would argue that towns which wish to become "open space communities" in the future need to require significant open space set-asides in every new subdivision. Since the concept of "compulsory open space zoning" was introduced to Massachusetts last year, the towns of Granby, Warwick, and Amherst have adopted it, and it is currently under active consideration by the towns of Hadley, West Stockbridge, Lanesboro, New Ashford, Wendell, and Heath.

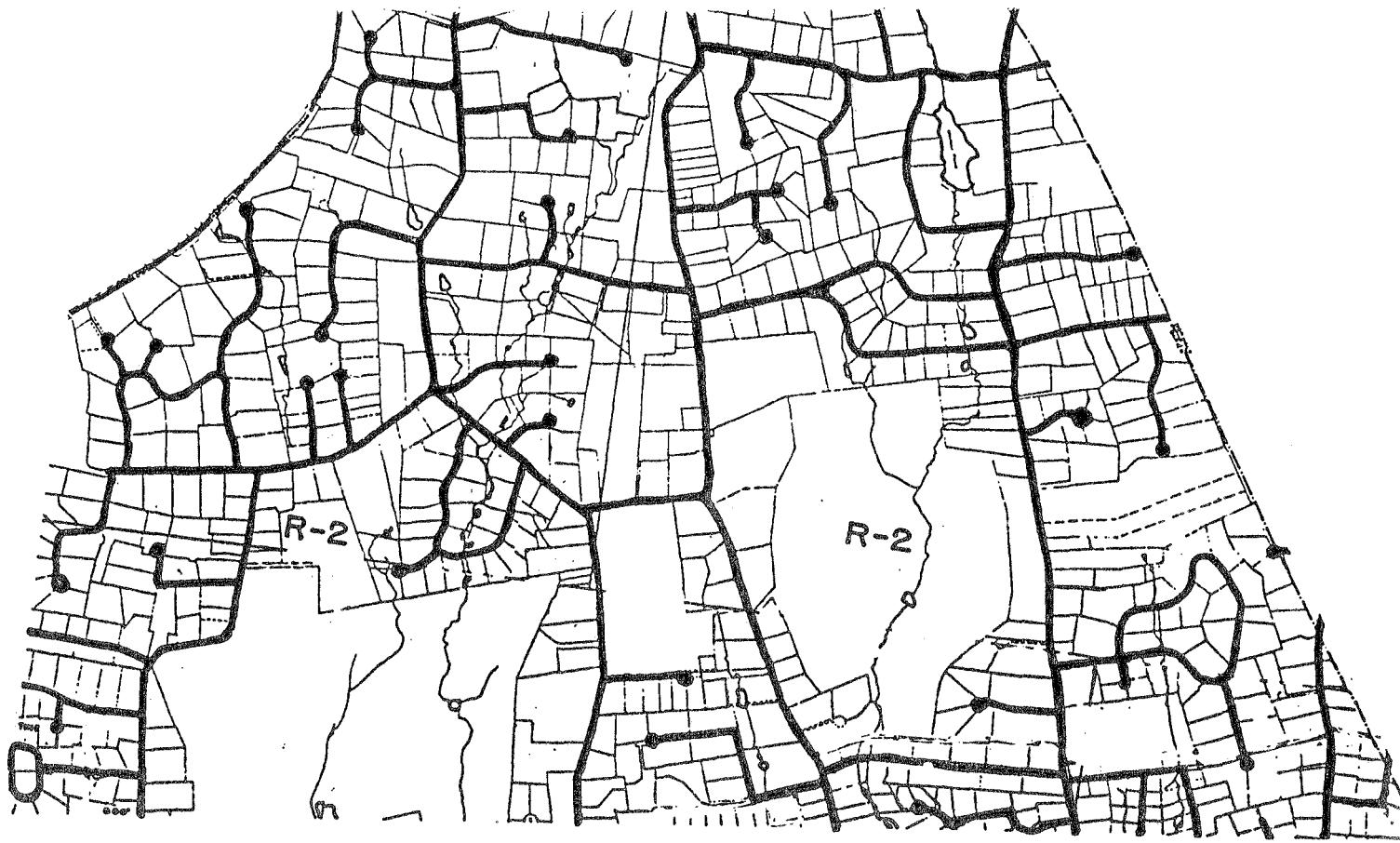
Cluster Design and Rural Character

Last but certainly not least is the issue of whether cluster development is "appropriate" in a rural setting. Without proper regulatory safeguards and design criteria, it is clear that clustering can produce results which would be incompatible with its surroundings. However, many rural residents are beginning to recognize the advantages that well-designed cluster development can offer. It is the only development approach which sets aside land for permanent open space.

The conventional approach covers the entire development parcel with houselots and subdivision streets. Towns which have had a lot of experience with this type of development ultimately realize that, as one parcel after another is eventually developed, their formerly rural landscape evolves into a network of "wall-to-wall" subdivisions.

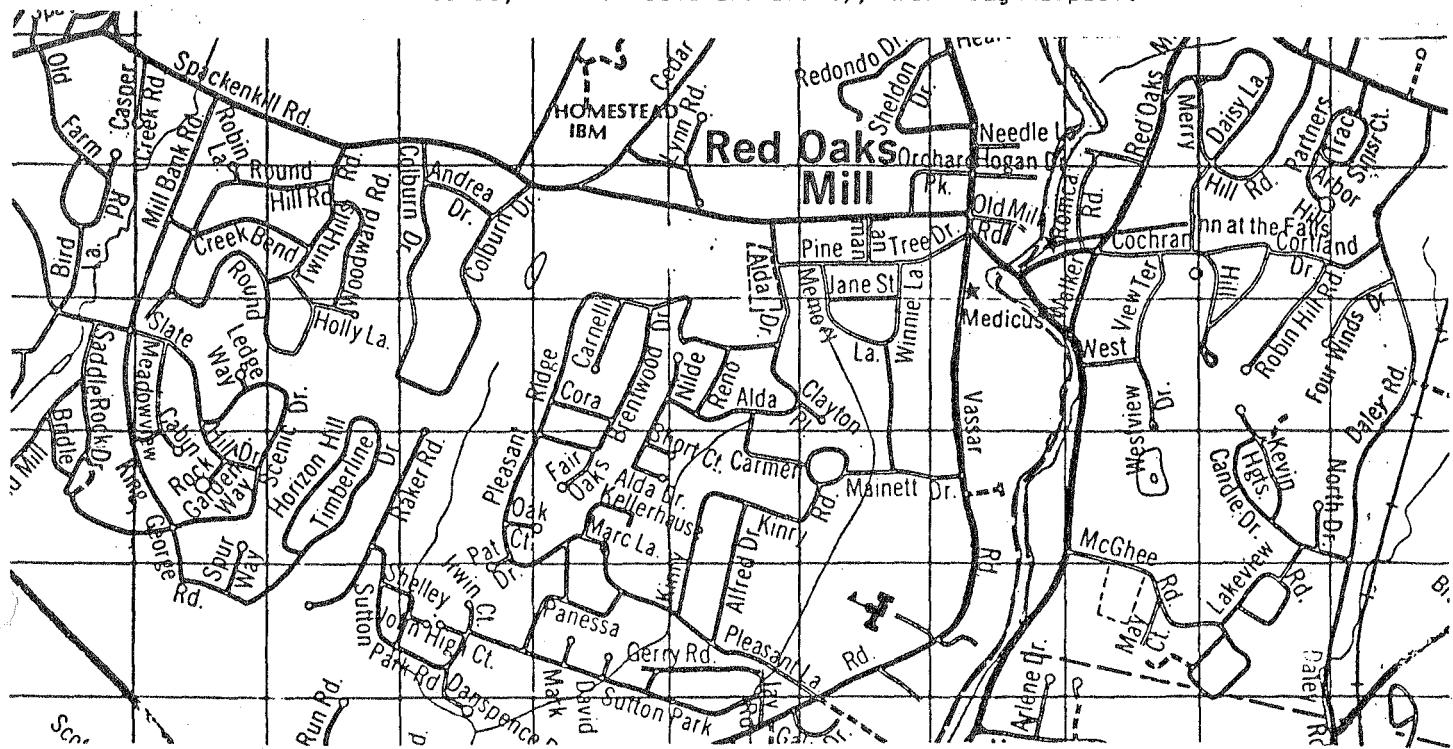
Here in New England, we have much to be thankful for. Had the Pilgrims not run out of ink or parchment after finishing the Mayflower Compact, and had they had the time and "foresight" to draft a modern (1989) zoning and subdivision rulebook, all of our attractive New England towns would have a thoroughly suburban character. It is a sobering thought, but New England would be virtually indistinguishable from most parts of New Jersey and Long Island, had we experienced 368 years of conventional suburban development along the lines which many towns are requiring today in their bylaws and regulations. Those areas epitomise "planned sprawl".

As we re-shape the traditional New England landscape with our standardized, suburban-style municipal regulations, we must ask ourselves whether continuous coverage by large-lot subdivisions will be more rural than a mixture of village-sized cluster lots surrounded by permanently protected farm fields and woodland. This is a question for residents and officials in each town to decide. As long as everyone is clear about the ultimate consequences of the various development types which are available to them, these decisions can be made on an informed basis. It is the role of rural planners, such as myself, to explain the choices that exist, and to help people foresee the probable long-term results of each choice. The decision is ultimately theirs.



CONVENTIONAL ZONING PRODUCES A PATTERN OF "PLANNED SPRAWL"

When zoning has been fully implemented, towns discover (too late) that all of its open space has been converted to an assemblage of subdivisions, shopping centers, and office parks. The failure of conventional two-acre zoning to protect open space and rural character is illustrated above, where the only undeveloped land in this Connecticut town lies within the Hunt Club and the Country Club. A similarly total transformation from rural to suburban is shown below, in a once-lovely area of Dutchess County, near Poughkeepsie.



RETURN TO CLUSTERING

Fig. 1 TYPICAL RURAL HIGHWAY PRIOR TO SUBURBAN DEVELOPMENT

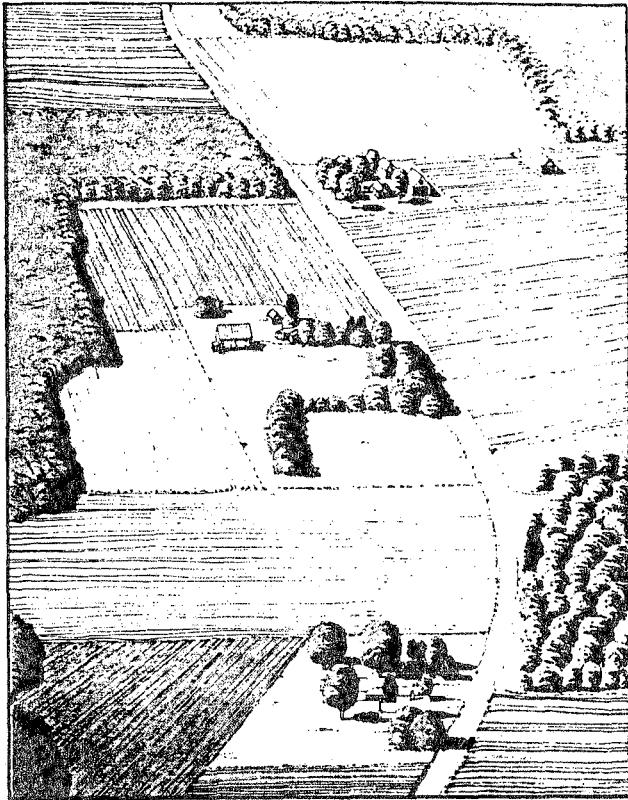


Fig. 2 DEVELOPED ACCORDING TO CONVENTIONAL SUBURBAN ZONING

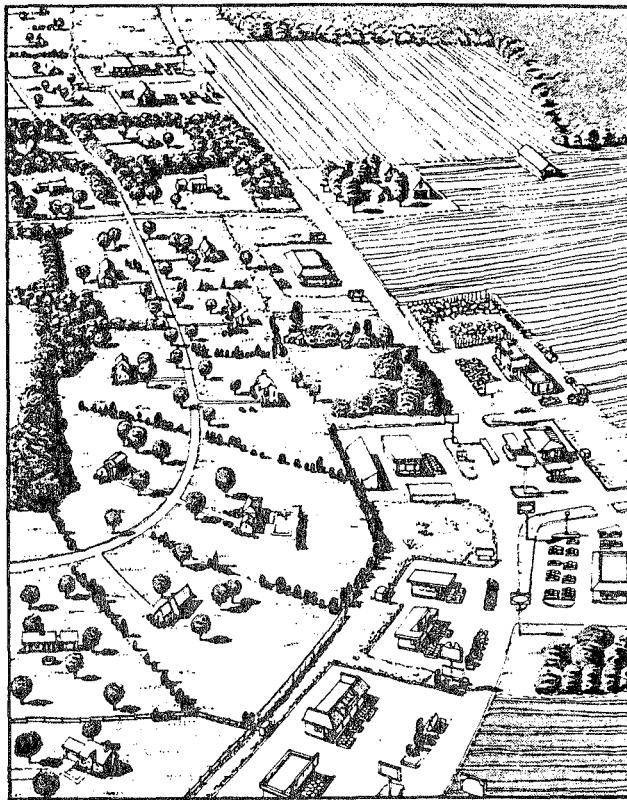


Fig. 3 DEVELOPED ACCORDING TO ALTERNATIVE RURAL DESIGN PRINCIPLES

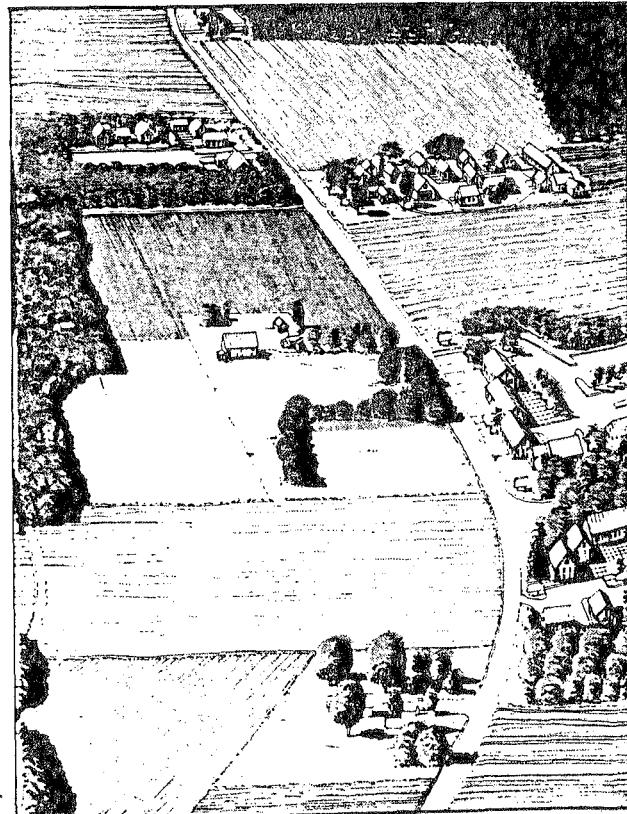


Figure 1 shows a typical rural highway crossing through a mixture of open fields and woodlands. In this "pre-development" scene, three farmsteads dot the rural landscape. Together with the surrounding cropland, these buildings define the agricultural character of this part of the community.

In Figure 2, the town's zoning (its "blueprint for development") has dictated a large-lot suburban approach to residential construction. Land fronting on the state highway was developed exactly as called for in the zoning ordinance, resulting in the creation of a linear commercial "strip." No one realized that the town's "protective" zoning, which segregated commercial and residential uses, and which required one-acre house lots, would transform this area into a characterless sprawl.

Figure 3 illustrates a viable alternative to the "strip." Retail and office development are concentrated around the intersection, where the commercial zone is located (and to which it is limited). The town's "maximum setback" concept requires that these buildings maintain a traditional close relationship with the road. Parking is nicely screened from view; shops face onto the parking area but also have additional display windows facing the road. Elsewhere in the neighborhood, most of the open fields have been preserved by grouping new homes within two tightly-knit hamlets. Overall, the same development density is accommodated. In this plan, public water and sewer are available, and the "forever open" status of the adjacent farmland boosts surrounding property values, while retaining rural views.

These drawings were produced by the Center for Rural Massachusetts in Amherst, Massachusetts, and illustrate the concept of clustering in a rural context.

Fig. 4 TRADITIONAL RURAL VILLAGE PRIOR TO SUBURBAN DEVELOPMENT

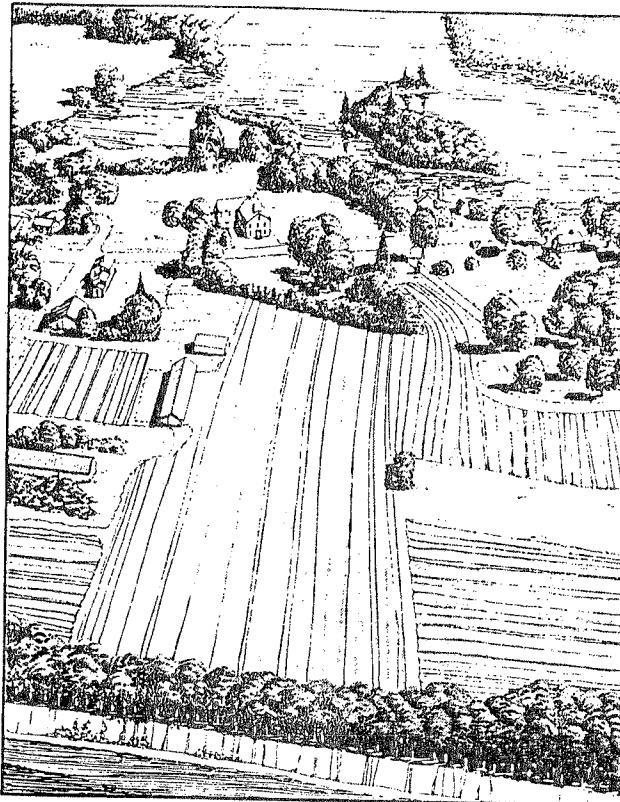


Fig. 5 DEVELOPED ACCORDING TO CONVENTIONAL SUBURBAN ZONING

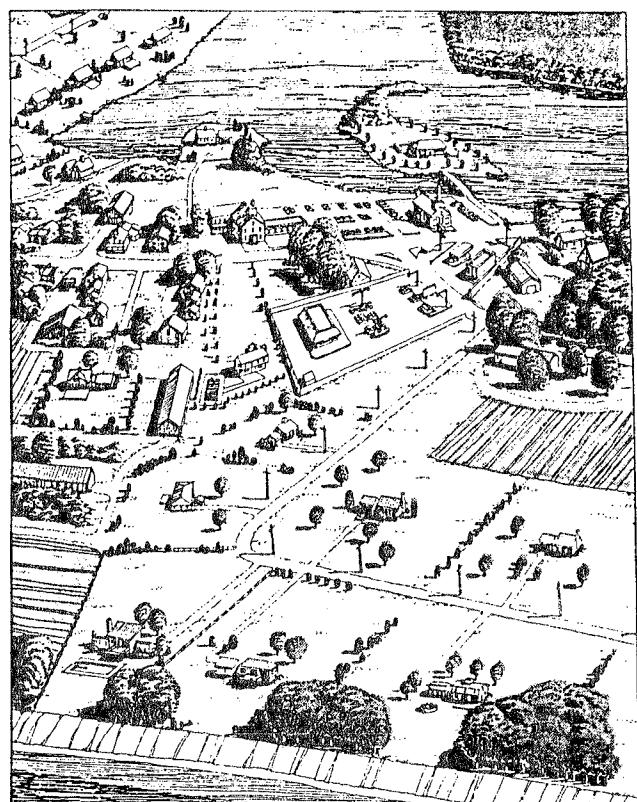


Fig. 6 DEVELOPED ACCORDING TO TRADITIONAL VILLAGE DESIGN PRINCIPLES

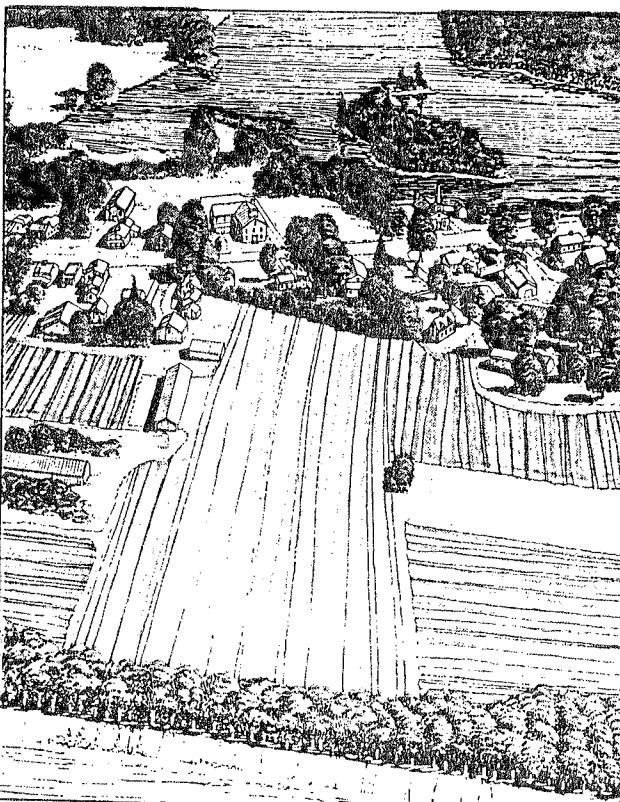


Figure 4 illustrates a typical pre-development situation, in which a rural village is organically grouped around a small nucleus of buildings including a farmstead, a church, and the town hall. The rural character is defined by large open fields providing a feeling of spaciousness and attractive long views down to the river.

Figure 5 shows the future of the same village as it would ultimately appear under the standard design requirements built into the zoning and subdivision regulations existing in nearly every town. Few people realize that their local zoning mandates a suburban approach, in which all open space (except wetlands and floodplains) is divided into house lots. This drawing shows typical one-acre lots.

Figure 6 shows a more creative approach, reinforcing the traditional tightly-knit character of small towns and villages through an "infill" strategy that places units close together on vacant land in the village center. Even more important, the agricultural open space which gives the rural landscape its special beauty is permanently protected. This is accomplished within the same overall density as shown in Figure 5; for every half-acre house lot in the village infill, there is half an acre of farmland in the field. In both situations the developer buys one acre of land; the difference is in the way in which the homes are grouped: village versus suburb.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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L

"ANR" AND THE VITAL ACCESS STANDARD

A

(Part I)

N

In most states, subdivision control laws were enacted to address two problems. Most of the early subdivision control statutes were primarily concerned with insuring that plots of subdivisions be technically accurate and in good form for recording and tax assessment purposes. Shortly thereafter, a concern for the impact of subdivisions on street development within the community emerged and many statutes were accordingly amended to provide for the regulation of the layout of ways when a subdivision of land occurred.

D

Subdivision control laws in Massachusetts originated from a concern over the effect of subdivisions and the sale of private land on the planning and development of streets both public and private within a community. The first comprehensive subdivision control statute was enacted exclusively for the city of Boston in 1891. It provided that no person might open a public way until the layout and specifications were approved by the street commissioners. By 1916, similar powers were conferred on Boards of Survey in many cities and towns throughout the Commonwealth. With the revision of the state statute in 1936 (see St. 1936 c. 211), the subdivision control powers were expanded and conferred on Planning Boards.

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M A N A G E R

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The Subdivision Control Law, Chapter 41, Sections 81-K through 81-GG, MGL, essentially in the form we now know it, was enacted in 1953 (see St. 1953 c. 674). This legislation made two significant changes to subdivision control by stating for the first time the purposes of subdivision control which are found within Section 81-M of Chapter 41 and by providing for the recording of approval not required plans. The provisions for an endorsement that approval is not required are found in Section 81-P of Chapter 41.

Prior to the 1953 statute, a plan showing lots and ways could be recorded without the approval of the Planning Board if such ways were existing ways and not proposed ways. The purpose of providing for an approval not required process was to alleviate the difficulty encountered by Registers of Deeds in deciding whether a plan showing ways and lots could lawfully be recorded. As explained by Mr. Philip Nichols on behalf of the sponsors of the 1953 legislation, "it seemed best to require the person . . . who contends that (his plan) is not a subdivision within the meaning of the law, because all of the ways shown on the plan are already existing ways, to submit it to the planning board, and if the board agrees with his contention, it can endorse on the plan a statement that approval is not required, and the plan can be recorded without more ado." (See 1953 House Doc. No. 2249, at 55.)

As the Court summarized in Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the enactment of the approval not required process by the Legislature was not intended to enlarge the substantive powers of a Planning Board but rather to provide a simple method to inform the Register of Deeds that the Planning Board was not concerned with a plan "because the vital access is reasonably guaranteed."

We are frequently asked for advice as to whether a Planning Board should endorse a plan "approval under the Subdivision Control Law is not required." Chapter 41, Section 81-P, MGL, requires that such an endorsement cannot be withheld unless a plan shows a subdivision. Therefore, whether a plan requires approval or not rests with the definition of "subdivision" as found in Chapter 41, Section 81-L, MGL. A "subdivision" is defined in Section 81-L as "the division of a tract land into two or more lots" but there is an exception to this definition. A division of land will not constitute a "subdivision" if, at the time it is made, every lot within the tract so divided has frontage on a certain type of way. Section 81-L also requires that the frontage shall be at least a distance as required by the zoning bylaw, and if no distance is required, the frontage must be at least twenty feet.

Basically, the court has interpreted the Subdivision Control Law to impose three standards that must be met in order for lots shown on a plan to be entitled to an endorsement by the Planning Board that "approval under the Subdivision Control Law is not required."

1. The lots shown on such plan must front on one of the three types of ways specified in Chapter 41, Section 81-L MGL;
2. The lots shown on such plan must meet the minimum frontage requirements as specified in Chapter 41, Section 81-L, MGL; and,
3. A Planning Board's determination that the vital access to such lots as contemplated by Chapter 41, Section 81-M, MGL, otherwise exists.

One of the more interesting aspects of the "ANR" process, if not the Subdivision Control Law, is the vital access standard. The necessity that the Planning Board determine that vital access exists to the lots shown a plan before endorsing an "ANR" plan is not expressly stated in the Subdivision Control Law. The vital access standard has evolved from court decisions. The decisions have been concerned as to whether proposed building lots have practical access and have focused on the following two issues:

1. Adequacy of the way on which the proposed lots front; and
2. Adequacy of the access from the lot onto the way.

ADEQUACY OF THE WAY

The first case dealing with the question of the adequacy of a way as applied to an approval not required plan was Rettig v. Planning Board of Rowley, 322 Mass. 476 (1955). A plan was presented to the Planning Board showing 15 lots abutting three ways which were created long before the Subdivision Control Law became effective in the Town of Rowley. Two of the roadways shown on the plan were between ten and fourteen feet wide, contained severe ruts and were impassable at times due to heavy rains. The Planning Board determined that the plan constituted a subdivision which required their approval.

The Subdivision Control Law in effect at that time defined "subdivision" as the "division of a tract of land into two or more lots in such manner as to require provision for one or more new ways, not in existence when the Subdivision Control Law became effective in the . . . town . . . to furnish access for vehicular traffic to one or more of such lots"

The court found that the ways shown on the plan did not provide adequate access for vehicular traffic. Because of the inadequacy of the ways serving the proposed lots, the court found that the Planning Board did not exceed its authority when they denied to endorse the plan.

RETTIG V. PLANNING BOARD OF ROWLEY
332 Mass. 476 (1955)

Excerpts

Wilkins, J. . . .

The plan must be judged as a whole. Irrespective of the meaning of "way" in Section 81L, and for present purposes taking "way" in the sense of a physical way on the ground, as ruled by the judge, it is plain that Orchard Drive on the ground is not a way "adequate for access for vehicular traffic" to ten of the lots shown on the plan. As recently as 1951, when the subdivision control law became effective in Rowley, it could not in any practical sense have been in existence as a way. All that appeared at the view were outlines of a ten foot roadway, once used by a vehicle or vehicles of unknown character, and ruts and a condition of impassibility due to rain. Orchard Drive clearly does not rise even to the dignity of a rough country road, broken and sunken in spots, as is Bowlery Drive off which it leads. Obviously, the plaintiffs propose to make "division of a tract of land into two or more lots in such manner as to require provision for one or more new ways . . . to furnish access for vehicular traffic to one or more of such lots."

The decree is reversed and a decree is to be entered stating that the planning board of Rowley did not exceed its authority, and that no modification of its decision is required.

The authority of a Planning Board to make a determination as to the adequacy of a way before endorsing a plan "approval not required" was again noted in Malaguti v. Planning Board of Wellesley, 3 Mass. App. Ct. 797 (1975). The Planning Board had denied endorsement because the proposed building lots did not have frontage on an "adequate way." The trial judge found that not every lot had frontage on a public way and that the way in question was inadequate for vehicular traffic. The court agreed and in citing Rettig found that the Planning Board did not exceed its authority in refusing to endorse the plan because the plan showed a subdivision.

A statutory private way is a way laid out and accepted by a town, for the use of one or more inhabitants, pursuant to Chapter 82, MGL. In Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), it was argued that a statutory private way was a public way for the purposes of determining whether a plan was entitled to be endorsed "approval not required." The court found that such a way was not as a matter of law a public way for the purposes of subdivision control and that development on a statutory private way would require Planning Board approval unless it could be proven that such a way was both maintained and used as a public way. In Spalke v. Board of Appeals of Plymouth, 7 Mass App. Ct. 683 (1979), the court rejected the argument that the Atlantic Ocean was a public way for access purposes. The close reading by the court as to a qualified public way for the purposes of access is important. However, even if a proposed division of land abuts a public way, the Planning Board must consider the adequacy of the way.

With this historical and background information in mind, in next month's issue of the Land Use Manager, we will continue our look at the vital access standard. We will review key cases which have established parameters for determining the adequacy of a way for the purposes of access.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 6, Edition No. 3
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ANR AND THE VITAL ACCESS STANDARD

(Part II)

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In the last issue of the Land Use Manager, Vol. 6, Edition No. 2, February, 1989, we gave an historical perspective of the ANR process and looked at some of the earlier cases that dealt with the adequacy of a way for the purposes of an ANR endorsement. In this edition of the Land Use Manager, we will continue our review of the vital access standard as it relates to the adequacy of the way.

As we previously noted, lots shown on an ANR plan must front one of the following types of ways:

1. A public way or a way which the municipal clerk certifies is maintained and used as a public way;
2. A way shown on a plan which has been previously approved in accordance with the Subdivision Control Law, and;
3. A way in existence when the Subdivision Control Law took effect in the municipality which in the opinion of the Planning Board is suitable for the proposed use of the lots.

In the last edition of the Land Use Manager, we reviewed Rettig v. Planning Board of Rowley, 322 Mass. 476 (1955), which looked at the adequacy of ways that were in existence when the Subdivision Control Law took effect in the community. In Rettig, the court decided that such ways must exist on the ground and be safe and convenient for vehicular traffic.

MANAGER

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The vital access standard which requires that ways must be safe and convenient for travel was again considered in Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980). In this case, the court looked at ways which had been approved previously in accordance with the Subdivision Control Law. In 1960, the Board of Selectmen, acting as an interim Planning Board, approved a 26 lot subdivision. The Selectmen did not specify any construction standards for the proposed ways nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee as required in Chapter 41, Section 81U, MGL.

Eighteen years after the approval of the subdivision plan by the Board of Selectmen, Richard submitted an ANR plan to the Planning Board. During the 18 year period, the locus shown on the ANR plan had been the site of gravel excavation so that it was now located 25 feet below the grade of surrounding land. The Planning Board refused to endorse the plan. The central issue before the court was whether the lots shown on the ANR plan had sufficient frontage on ways which had been previously approved in accordance with the Subdivision Control Law. The court found that to be entitled to the ANR endorsement when a plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards.

RICHARD V. PLANNING BOARD OF ACUSHNET

10 Mass. App. Ct. 216 (1980)

Excerpts:

Kass, J. . . .

As stated by the parties, the fundamental question is whether a plan showing lots of sufficient frontage and area to comply with then applicable zoning requirements, fronting on ways shown on a plan previously approved and endorsed in accordance with the Subdivision Control Law, is exempt from further subdivision control . . . , even though those ways have never been built and exist on paper only. Put in that fashion, the question is not susceptible to an answer of uniform application because it fails to take into account significant factual variables.

For example, if the new plan showed lots of lawful dimensions abutting ways on an earlier approved plan, but the earlier approved plan contained conditions which had not been met, then the new plan would not be exempt from subdivision control and would not be entitled to an "approval not required" endorsement under Section 81P. Costanza & Bertolino,

Inc. v. Planning Bd. of North Reading, 360 Mass. 677, 678-681 (1971). In that case, a covenant entered into by the developer pursuant to G.L. c. 41, Section 81U, required him to complete the construction of ways and installation of the municipal services within two years from the date of the execution of the covenant. The developer had not done so, and the court held that the planning board had properly declined to make a Section 81P endorsement.

It follows that in a case where the landowner has filed a bond, or deposited money or negotiable securities, or entered into a covenant to secure the construction of ways and installation of municipal services, and a new plan is presented which merely alters the number, shape and size of the lots, such a plan is entitled to endorsement under Section 81P, "provided every lot so changed still has frontage on a public way . . . of at least such distance, if any, as is then required by . . . by-law . . ." G.L. c. 41, Section 81O; and provided, of course, that conditions for execution of the plan have not already been violated, as was the case in Costanza & Bertolino.

Indeed, the provisions of the fifth paragraph of Section 81U concerning securing of completion of the ways and municipal services of a subdivision plan are mandatory. For all that appears, the Acushnet selectmen, acting as the interim planning board, did not articulate the manner in which the ways were to be constructed, what municipal services were to be furnished or the standards to which that work was to be done. . . . We are of the opinion that exception (b) of the definition of "Subdivision" in Section 81L requires either that the approved ways have been built, or that there exists the assurance required by Section 81U that they will be built. Otherwise, the essential design of the Subdivision Control Law - that ways and municipal services shall be installed in accordance with specific municipal standards - may be circumvented. . . . In the instant case, where the locus is twenty-five feet below the surrounding land, the municipal concern about the safety of the grades of the roads giving access to the lots and about adequate drainage facilities is particularly compelling.

In Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), the court applied the adequacy of way standard to an existing public way. Perry submitted a two lot ANR plan to the Planning Board. Both lots had the required zoning frontage on Oakland Street which was a way that had appeared on town plans since 1927. The County Commissioners of Nantucket, by an order of taking registered with the Land Court in 1962, took an easement for the purposes of a public highway. Oakland Street, a public way, had never been constructed.

The Planning Board decided that the plan constituted a subdivision because the lots did not front on a public way as defined in the Subdivision Control Law. The court agreed.

PERRY V. PLANNING BOARD OF NANTUCKET
15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

A "subdivision" for purposes of the Subdivision Control Law, is defined as "the division of a tract of land into two or more lots . . ." A division is excluded from the definition of a subdivision . . . if "at the time when [the division] is made, every lot within the tract so divided has frontage on . . . a public way" The question for decision is what is intended by the term "public way" in this exclusion.

The Legislature provided, in G.L. c. 82 Sections 1-16, for the layout and establishment of highways within municipalities by county commissioners. . . . When the way is completed, the municipality is required, among other things, to repair and maintain it, and the municipality becomes liable for damages caused by defects. See G.L. c. 84 Sections 1, 15 and 22. . . .

The Legislature presumably knew of the existing body of statutory law pertaining to public ways when it enacted the exemption from subdivision control . . . The exemptions from subdivision control . . . are important components of the Subdivision Control Law which itself creates a "comprehensive statutory scheme," . . . and which includes among its express purposes the protection of the "safety, convenience and welfare of the inhabitants of the cities and towns" by means of regulation of "the laying out and construction of ways in subdivisions providing access to the several lots therein . . ." We note that the Legislature has provided, consistent with these goals, that planning boards are to administer the law "with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; . . . [and] for securing adequate provision for . . . fire, police, and other similar municipal equipment"

We note further that the exclusions set out in Section 81L, . . . which excuse a plan from subdivision approval, thereby providing a basis for an 81P endorsement, do so with reference to specific objective criteria apparently chosen by the Legislature for the quality of access they normally provide. . . . We conclude that whatever status might be acquired by ways as "public ways" for purposes of other statutes by virtue of their having been "laid out," . . . such ways will not satisfy the requirements of the "public way" exemption in Section 81L, . . . of the Subdivision Control Law, unless they in fact exist on the ground in a form which satisfies the previously quoted goals of Section 81M.

. . . In our view, . . . a board can properly deny an 81P endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in Section 81M. . . . We also recognize that Section 81M, insofar as it treats the sufficiency of access, is couched primarily in terms of the adequacy of subdivision ways rather than the adequacy of the public ways relied upon by an owner seeking exemption from subdivision control. We do not view these considerations as affecting the soundness of our reasoning. The board's power in these circumstances arises out of the provisions of the subdivision control law itself, read in light of the statutes pertaining to public ways and relevant decisions. The statutory and decisional framework provides for orderly land development through the assurance that proper access to all lots within a subdivision will be reasonably guaranteed. Because no way exists on the ground to serve [the] lots. . . . the board was right to require the plan's antecedent approval under the Subdivision Control Law, and its action should not have been annulled.

Relying on the Perry decision, among others, the Hingham Planning Board denied endorsement of a plan where all the proposed lots abutted an existing public way. In Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), the court found that the existing public way provided adequate access and that the Planning Board had exceeded its authority in refusing to endorse the plan.

Hutchinson proposed to divide a 17.74 acre parcel on Lazell Street in Hingham into 5 lots. Lazell Street was a public way which was used by the public and maintained by the Town of Hingham. Each lot met the Hingham zoning bylaw requirements. The Planning Board contended that the plan was not entitled to an endorsement for the following reasons:

1. Lazell Street did not have sufficient width; suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land.
2. The frontage did not provide safe and adequate access to a public way.

HUTCHINSON V. PLANNING BOARD OF HINGHAM
23 Mass. App. Ct. 416 (1987)

Excerpts

Dreben, J. . . .

Citing Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144 (1983), and Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979), the board argues that, even if a way falls within the definition of Section 81L, that is not enough. "[I]t is also necessary that a planning board determine that the way in question . . . satisf[ies] the requirements of G.L. c. 41, Section 81M, which . . . include the requirement that the way be safe for motor vehicle travel."

The board misapprehends the Perry and Hrenchuk decisions. Those cases rest on the reasoning of Gifford v. Planning Bd. of Nantucket, 376 Mass. 801 (1978), which held that as an aid in interpreting the exclusions of Sections 81L and 81P the court may look to Section 81M as elucidating the purposes of those exclusions. . . . Thus, even though a statutory exemption (e.g., frontage on a public way) of Section 81L is technically or formally satisfied, if, in fact, there is no practical access to the lots, Section 81L will not apply.

In sum, where there is the access that a public way normally provides, that is, where the "street [is] of sufficient width and suitable to accommodate motor vehicle traffic and to provide access for fire-fighting equipment and other emergency vehicles," . . . the goal of access under 81M is satisfied, and an 81P endorsement is required.

We turn now to the findings of the judge. He found that Lazell Street is a paved public way, that, except for a portion which is one-way, it is twenty to twenty-one feet wide, about the same width as the other streets in the area, and that it can "provide adequate access to all the proposed lots for the owners, their guests, police, fire, and other emergency vehicles." The judge also found that the road "is as safe to travel upon as any of the hundreds of comparable rural roads that criss-cross the entire Commonwealth." We do not reach the board's

arguments on traffic safety as we do not deem them relevant. We note that even if those arguments were to be considered, the judge's findings on traffic safety are not clearly erroneous and are dispositive. The board's contentions to the contrary are without merit. These findings bring Lazell Street within the "specific objective criteria . . . chosen by the Legislature for the quality of access," . . . which entitle a landowner to an 81P endorsement.

The Perry and Hutchinson decisions presently represent the parameters for determining the adequacy of a public way for the purposes of an "ANR" endorsement. If proposed lots abut an unconstructed way (paper street), the landowner is not entitled to an "ANR" endorsement. However, if an existing public way is (1) paved, (2) comparable to other ways in the area, and (3) provides adequate access, the court will likely find that the way meets the vital access standard.

In the next issue of the Land Use Manager, we will begin reviewing the vital access standard as it relates to the adequacy of the access from the lot onto the way.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 6, Edition No. 4
May-June, 1989

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"ANR" AND THE VITAL ACCESS STANDARD

(Part III)

In the last edition of the Land Use Manager, Vol. 6, Edition No. 3, March-April 1989, we completed our review of the vital access standard as it relates to the issue of the adequacy of the way on which the proposed lots front. In this edition, we will begin our review of the vital access standard as it relates to the adequacy of the access from the lot onto the way.

The court was first confronted with the issue of the adequacy of access from the lot to the way in Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973). Certain lots shown on a plan were connected to a public way by a long, narrow strip of land which flared out at the street to satisfy the frontage requirement of the zoning bylaw. The Planning Board had originally endorsed the plan "Approval Not Required" (ANR) but at a later date rescinded their endorsement. Cassani argued that the Planning Board was required as a matter of law to endorse the plan "ANR". The Planning Board took the position that the lots were merely connected to the way but did not front on the public way to comply with the frontage requirement of the zoning bylaw. Since meaningful, adequate frontage did not exist, the Planning Board argued that the plan constituted a subdivision which required their approval under the Subdivision Control Law.

Because the court found that a Planning Board cannot rescind an "ANR" endorsement, they did not reach the substantive issue of whether the Planning Board acted

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erroneously in originally endorsing the plan "ANR". However, the court did express a certain degree of sympathy towards the Planning Board on the question of adequate access when it noted:

We do not disagree with the contention of the planning board that it ought to have the power to rescind a determination under Section 81P that approval is not required in order better to protect the public interest in preventing subdivisions without adequate provision for access, sanitation and utilities. But if such a power is to be found, it must be found in the Subdivision Control Law, which is a "comprehensive statutory scheme" . . . and not in our personal notations of sound policy. As the statute is clear, we are not at liberty to interpose such notions, but must apply the statute as the Legislature wrote it.

It was not until 1978 that the court would again have the opportunity to consider the adequacy of access to the buildable portion of a lot. Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978), dealt with a most unusual plan which technically complied with the requirements of the Subdivision Control Law so as to be entitled to an "ANR" endorsement.

The Nantucket zoning bylaw required a minimum lot frontage of 75 feet. An owner of a 49 acre parcel of land submitted a plan to the Planning Board showing 46 lots and requested an "ANR" endorsement from the Planning Board. Each of the 46 lots abutted a public way for not less than the required 75 feet of frontage. However, the connection of a number of the lots to the public way was by a long, narrow neck turning at acute angles in order to comply with the 75 foot frontage requirement.

One lot had a neck which was 1,185 feet long having seven changes of direction before it reached Madaket Road which was a paved road and in good condition. The neck narrowed at one stage to seven feet. Another lot had a neck which was 1,160 feet long having six changes of direction before it reached Cambridge Street at a twelve degree angle. Cambridge Street was unpaved and in relatively poor condition. Of all the lots shown on the plan, the necks ranged from forty to 1,185 feet in length. Twenty-nine necks were over 300 feet, sixteen were over 500 feet, and five were over 1,000 feet. Thirty-two necks changed direction twice or more while nine changed three times, one four times, five five times, one six times, and two seven times. Three necks narrowed to ten feet or less and six to not more than twelve feet.

The Planning Board endorsed the plan "ANR", and fifteen residents commenced an action in Superior Court to annul the Board's endorsement on the grounds that the plan constituted a subdivision.

A judgment was entered in favor of the residents, and the landowner appealed to the Appeals Court. The Massachusetts Supreme Court, on its own initiative, ordered direct appellate review.

In deciding the case, the court looked at the purposes of the Subdivision Control Law as stated in Section 81-M and noted that "a principal object of the law is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." In reviewing the plan, it was found that it would be most difficult, if not impossible, to use a number of the necks so that there was no practical vehicular access to the main or buildable parts of the lots. The court concluded that the plan was an obvious attempt to circumvent the purpose and intent of the Subdivision Control Law and that the lots shown on the plan did not have sufficient frontage as contemplated by the Subdivision Control Law.

GIFFORD V. PLANNING BOARD OF NANTUCKET
376 Mass. 801 (1978)

Excerpts

Kaplan, J. . . .

Where our statute relieves certain divisions of land of regulation and approval by a planning board ("approval . . . not required"), it is because the vital access is reasonably guaranteed in another manner. The guaranty is expressed in Sections 81L and 81P of the statute in terms of a requirement of sufficient frontage for each lot on a public way. In the ordinary case, lots having such a frontage are fully accessible, and as the developer does not contemplate the construction of additional access routes, there is no need for supervision by the planning board on that score.

Conversely, where the lots shown on a plan bordered on a road "not in any practical sense . . . in existence as a way," and thus incapable of affording suitable access to the lots, we insisted that the relevant plan was a subdivision under the then current law.

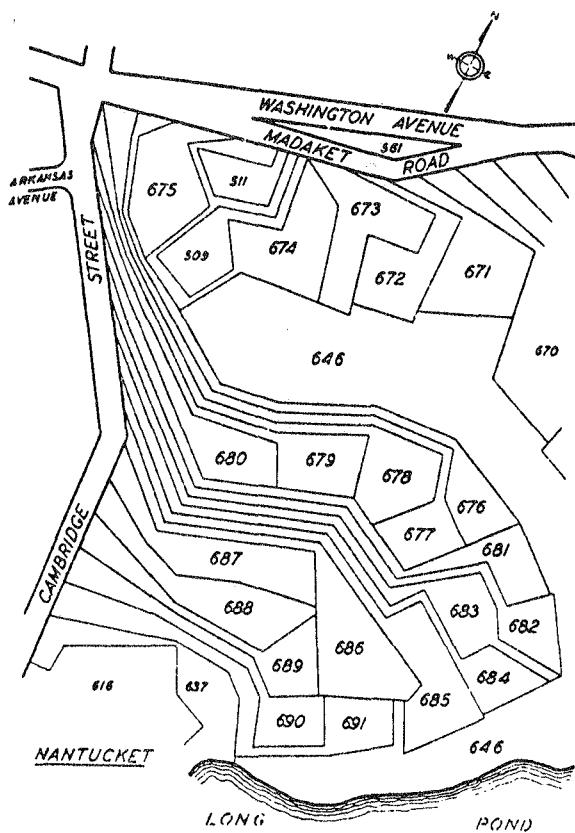
Rettig v. Planning Bd. of Rowley, 332 Mass. 476, 481 (1955).

If the purpose of a frontage requirement is to make certain that each lot "may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare"

. . . , then in the plan at bar frontage fails conspicuously to perform its intended purpose, and the master and the judge were right to see the plan as an attempted evasion of the duty to comply with the regulations of the planning board. The measure of the case was indicated by the master (and by counsel at argument before us) in the observation that the developer would ultimately have to join some of the necks to provide ways from lots to the public way: but that is an indication that we have here a subdivision requiring antecedent approval.

We stress that we are concerned here with a quite exceptional case: a plan so delineated that within its provisions the main portions of some of the lots are practically inaccessible from their respective borders on a public way. To hold that such a plan needs approval is not to interfere with the sound application of the "approval not required" technique.

Gifford v. Planning Board of Nantucket.



The Gifford decision was a bellwhether case as it established the necessity for a landowner to show accessibility to the buildable portion of a lot. Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979) was the first case decided after the Gifford decision which dealt with the accessibility issue. Hrenchuk submitted a plan to the Planning Board requesting an "ANR" endorsement. All the lots shown on the plan abutted Interstate 95, a limited access highway. There was no means of vehicular passage between the highway and any of the lots. The lots could only be reached by use of a 30 foot wide private way which lead to another public way upon which one of the nine lots shown on the plan fronted. The court determined that Hrenchuck was not entitled to an "ANR" endorsement, and his plan required approval under the Subdivision Control Law. The court also noted the following elements must be met before a plan can receive an "ANR" endorsement from the Planning Board.

1. The lots shown on the plan front on one of the three types of ways specified in Chapter 41, Section 81-L, MGL; and,
2. The Planning Board determines that adequate access, as contemplated by Chapter 41, Section 81-M, MGL, otherwise exists.

In the next issue of the Land Use Manager, we will continue our review of the vital access standard concerning the accessibility of proposed building lots.

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EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 6, Edition No. 5
July, 1989

L

"ANR" AND THE VITAL ACCESS STANDARD (Part IV)

A

In the last edition of the Land Use Manager, Vol. 6, Edition No. 4, May-June 1989, we began our review of the vital access standard as it relates to the adequacy of the access from the lot onto the way. In this edition, we continue our review of the accessibility issue.

N

One of the more interesting cases which dealt with the question of whether proposed building lots could actually use the frontage as shown on a plan was McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980). McCarthy submitted a plan to the Planning Board for an "ANR" endorsement. The lots shown on the plan had at least a hundred feet of frontage on a public way which was the minimum frontage requirement of the Edgartown zoning bylaw. However, the Martha's Vineyard Commission (MVC) had adopted certain road access requirements which affected the town of Edgartown. The pertinent MVC access regulation required that "any additional vehicular access to a public road must be at least 1,000 feet measured on the same side of the road from any other vehicular access." The Planning Board voted to deny the requested endorsement and McCarthy appealed.

U

McCarthy claimed that the plan did not show a subdivision because every lot had a 100 feet of frontage on a public way as required by the Edgartown zoning bylaw. The Planning Board contended that the MVC requirement deprived McCarthy's lots of vehicular access to the public way so the lots did not have frontage

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for the purposes of the Subdivision Control Law. Citing the Gifford and Hrenchuck decisions, the court agreed with the Planning Board.

We agree. Whatever the meaning of "frontage" in a particular town by-law, we have read the definition of "subdivision" to refer to "frontage" in terms of the statutory purpose, expressed in Section 81M, to provide "adequate access to all of the lots in subdivision by ways that will be safe and convenient for travel."

Shortly after the McCarthy decision, the Appeals Court had an opportunity to further define the vital access standard in Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980). The Gallitanos submitted a plan to the Planning Board requesting an "ANR" endorsement. The plan showed four lots, each meeting the requirements of the Waltham zoning ordinance for a buildable lot in the zoning district where the proposed lots were located. In that particular district, the zoning ordinance did not specify any minimum frontage requirement. In such cases where a zoning ordinance does not specify any frontage requirement, Chapter 41, Section 81-L of the Subdivision Control Law requires that proposed lots must have a minimum of 20 feet of frontage in order to be entitled to an "ANR" endorsement. Each of the lots shown on the plan had frontage on Beaver Street, an accepted public way, for a distance of not less than 20 feet. One lot had 20 feet of frontage and was no wider (or narrower) than 20 feet for a distance of 76 feet where it widened to permit compliance with the width and yard requirements for a buildable lot. This was the lot that raised the most concern with the Planning Board. The Planning Board denied endorsement of the plan apparently inspired by the analysis in the Gifford case.

The Planning Board sought to establish that despite literal compliance with the lot area and frontage requirements of the zoning ordinance, the lots would be left without access (or without easy access) to utility and municipal services. The Planning Board supported its arguments with affidavits from city officials responsible for fire and police protection, traffic control, and public works. The affidavits claimed that certain lots intersected the public way at so acute an angle as to make entrance by vehicle difficult or impossible. The access was said to be "blind to oncoming traffic" thus creating a traffic hazard. The affidavits asserted that houses built on the lots would most likely be invisible from the way and would jeopardize fire and police protection in cases of emergencies. In deciding against the Planning Board, the court established a general rule to guide Planning Boards in determining whether access exists to the buildable portion of the lot.

GALLITANO V. BOARD OF SURVEY & PLANNING OF WALTHAM
10 Mass. App. Ct 269 (1980)

Excerpts

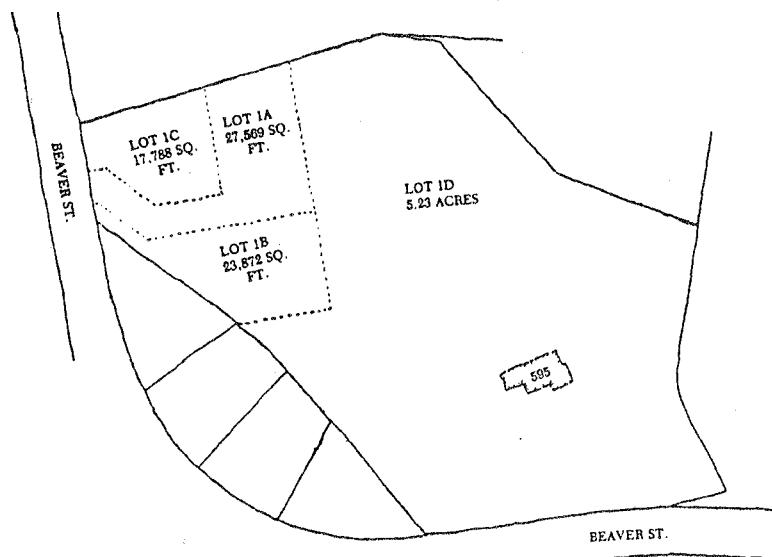
Armstrong, J. . . .

It is obvious that all of the difficulties complained of are possible even in municipalities which require minimum frontage but which do not regulate the widths or angles of driveways and do not limit the setbacks of dwellings or require that they be visible from the street. It is equally obvious that a zoning ordinance which, like Waltham's, requires building lots to be one hundred feet wide but allows them to have as little as twenty feet of frontage contemplates that some degree of development will be permissible on back lots exempt from planning board control. Such is the choice made by a municipality which fails to expand the twenty-foot minimum frontage requirement of G. L. c. 41, Section 81L. If not a conscious choice, but merely an omission, it is probably one beyond the power of a planning board to rectify: for a planning board controls development principally through its regulations, . . . is powerless to pass regulations governing "the size, shape, width, [or] frontage . . . of lots." G. L. c. 41, Section 81Q, as amended through St. 1969, c. 884, Section 3.

Gifford v. Planning Bd. of Nantucket, on which the board relies, involved a plan showing a division of a parcel into forty-six lots, each meeting the frontage and area requirements of Nantucket's zoning by-law, but only by means of long, narrow connector strips, some over a thousand feet long, some narrowing to as little as seven feet in places, some containing changes of direction at angles as sharp as twelve degrees. Holding that such a plan was "an attempted evasion" and should be treated as one showing a subdivision, the court stated: "We stress that we are concerned here with a quite exceptional case: a plan so delineated that within its provisions the main portions of some of the lots are practically inaccessible from their respective borders on a public way." The plan before us is qualitatively different: access is not impossible or particularly difficult for ordinary

vehicles, and such difficulty as there is seems implicit in a zoning scheme which allows frontage as narrow as twenty feet. To permit the board to treat such a plan as subject to their approval would be to confer on the board the power to control, without regulation, the frontage, width, and shape of lots. The Gifford case, if we read it correctly, was not intended thus to broaden the powers of planning boards. The Gifford case does preclude mere technical compliance with frontage requirements in a manner that renders impossible the vehicular access which frontage requirements are intended in part to ensure; it does not create a material issue of fact whenever municipal officials are of the opinion that vehicular access could be better provided for. As a rule of thumb, we would suggest that the Gifford case should not be read as applying to a plan, such as the one before us, in which the buildable portion of each lot is connected to the required frontage by a strip of land not narrower than the required frontage at any point, measured from that point to the nearest point of the opposite sideline.

Callitano v. Board of Survey & Planning of Waltham.



None of the previous cases dealt with a situation where the question of access centered on a topographical situation which prevented practical access to a lot. In DiCarlo v. Planning Board of Wayland, 10 Mass. App. Ct. 911 (1984), the court considered whether a steep slope which prevented practical access onto a public way was an appropriate matter for the Planning Board to consider.

In 1980, DiCarlo submitted a subdivision plan showing eight lots, numbered 1 through 8, which was rejected by the Planning Board. One reason given by the Planning Board for such denial was that the proposed grading plan would create a steep slope onto a public way which would prevent adequate access to two lots (lots 1 and 2) fronting on River Road, a public way. DiCarlo decided to create the same lots by filing two separate plans. The first plan, filed in 1981, showed lots 1,2,3, and 8. These lots all had the required frontage on River Road. No grading plan was required and the Planning Board endorsed the plan "ANR". The second plan, filed in 1982, showed lots 4,5,6, and 7 as well as the lots that were shown on the "ANR" plan. It was noted on the plan, however, that the "ANR" lots were not part of the subdivision but were shown on the plan only for area identification purposes. This plan included a grading plan which would change the grade of lots 1 and 2 to deny those lots practical access to River Road. Unlike the original subdivision plan filed in 1980, this plan showed a 24 foot easement over lots 4 and 5 in favor of lots 1 and 2 to a proposed subdivision road.

A Superior Court judge, in examining the history of the development, considered all eight lots as one basic plan and found that the evidence presented and the 24 foot easement provided lots 1 and 2 with adequate access out of the subdivision. In deciding against DiCarlo, the Appeals Court expressed that Planning Boards must have the opportunity and are responsible for ensuring that adequate access exists.

DICARLO V. PLANNING BOARD OF WAYLAND
19 Mass. App. Ct. 911 (1984)

Excerpts

. . . We need not determine, however, whether the judge's finding was warranted, as we hold that in any event the question of access should, in the first instance, be determined by the board. . . . the submissions and the board's 1982 decision show that the question of access to lots 1 and 2 under the easement was never considered by the board.

While the judge could easily conclude that the board looked at all eight lots in considering the proposed changes in grade, no similar inference can be drawn on the question of access. The 1980 plan did not contain the easements, and, in considering the plan . . . , there was no occasion for the board to look at access to lots 1 and 2. In light of G.L. c. 41, Section 81M, and the evidence, it is not a foregone conclusion that the board will find that the easement provides adequate access to lots 1 and 2. . . .

The plaintiff argues that a remand to the board is inappropriate as matter of law since lots 1 and 2 front on a public way. He claims that the stipulation that "the proposed grades of Lots 1 and 2 . . . would prevent practical access from Lots 1 and 2 to River Road" is irrelevant under Section 81L. Our cases, however, are to the contrary. "[A] principal object of the law [G. L. c. 41, Section 81M] is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." . . . We hold, therefore, that the plaintiff cannot rely on the River Road frontage to preclude a remand on the question of access.

AUTHOR'S NOTE

This Land Use Manager is the fourth of a five-part series dealing with review of "ANR" plans and the vital access standard. In the next edition, we will focus our review on the Planning Board's authority to consider topographical situations which may prevent practical access from the lot onto the public way.

AN ACT PROHIBITING HOUSING DISCRIMINATION AGAINST DISABLED PERSONS

Chapter 106 of the Acts of 1989 amends Chapter 40A, Section 3, MGL by inserting after the second paragraph the following:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination.

This law was approved on June 5, 1989 and will take effect on September 3, 1989.

AN ACT RELATIVE TO PLANNING BOARDS DESIGNATED AS SPECIAL PERMIT GRANTING AUTHORITIES.

Chapter 239 of the Acts of 1989 amends Chapter 40A, Section 9, MGL by inserting after the eighth paragraph the following paragraph which authorizes the position of an associate member when the Planning Board is acting as a Special Permit Granting Authority.

Zoning ordinances or by-laws may provide for associate members of a planning board when a planning board has been designated as a special permit granting authority. One associate member may be authorized when the planning board consists of five members, and two associates may be authorized when the planning board consists of more than five members. A city or town which establishes the position of associate member shall determine the procedure for filling such position. If provision for filling the position of associate member has been made, the chairman of the planning board may designate an associate member to sit on the board for the purposes of acting on a special permit application, in the case of absence, inability to act, or conflict of interest, on the part of any member of the planning board or in the event of a vacancy on the board.

This law was approved on July 12, 1989 and will take effect on October 10, 1989.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 6, Edition No. 6
August, 1989

L

"ANR" AND THE VITAL ACCESS STANDARD (Part V)

A

In the last edition of the Land Use Manager, Vol. 6, Edition No. 5, July 1989, we reviewed the vital access standard and noted the DiCarlo decision which dealt with the question of a topographical impediment which prevented practical access to a public way. In this edition, we continue our review of this aspect of the accessibility issue.

N

Since the DiCarlo decision revolved around the submission of a subdivision plan, there was still no court case on point as to what extent a Planning Board could consider topographical issues when reviewing approval not required plans (ANR). In Corcoran v. Planning Board of Sudbury, 26 Mass. App. Ct. 1000 (1988), the Appeals Court addressed the question and decided that a Planning Board's inquiry on the existence of practical access from the buildable portion of a lot to a public way can include topographical considerations.

D

Corcoran submitted a six lot ANR plan to the Planning Board. Each lot had the required frontage on Powder Mill Road, a public way. The ANR plan showed wetland areas which prevented practical access from the buildable portion of some of the lots to the public way. The plan also showed a 25 foot wide common driveway. The proposed driveway would provide access to those lots which could not directly access onto the public way. The Planning Board refused to endorse the plan and Corcoran appealed.

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MANAGER

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Relying on Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1984), (see Land Use Manager, Vol. 4, Edition No. 7, December 1987), a Land Court judge ruled that Corcoran was entitled to an ANR endorsement. The Planning Board appealed the Land Court judgment and the Appeals Court reversed.

CORCORAN V. PLANNING BOARD OF SUDBURY
26 Mass. App. Ct. 1000 (1988)

Excerpts

The judge decided that the plaintiffs were entitled to an "ANR" endorsement For her conclusion, she relied upon broad language in Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572 (1987). That decision said (at 574-575), "The proposed common driveway is not relevant to determining whether . . . [the submitted] plan shows a subdivision. If all the lots have the requisite frontage on a public way, and the availability of access implied by that frontage is not shown to be illusory in fact, it is of no concern to a planning board that the developer may propose a common driveway, rather than individual driveways, perhaps for aesthetic reasons or reasons of cost. The Subdivision Control Law is concerned with access to the lot, not to the house; there is nothing in it that prevents owners from choosing, if they are so inclined, to build their houses far from the road, with no provision for vehicular access, so long as their lots have the frontage that makes such access possible." (Emphasis supplied.)
• • •

The Fox decision dealt with a situation where in fact there could be direct access by vehicles from a public motor parkway to all buildable parts of each lot shown on the plan there submitted. That access could have been accomplished by a separate driveway crossing the frontage line of each proposed separate lot without encountering any major obstacles to any buildable area within that lot. The Fox opinion recognized that a common driveway was permissible (and likely to be adopted).

Here for three lots (Lots 1, 2, and 3), a driveway crossing the frontage line of each such lot would give direct access to a significant solid area of land in that lot (immediately adjacent to Powder Mill Road) but would not give direct access through that lot to the substantial buildable area in the rear of that lot. The indicated twenty-five-foot-wide common driveway, however, if constructed, as a practical matter probably would provide access.

No common driveway of the type proposed for the locus and no application under G. L. c. 131, Section 40, for permission to cross any wetland area on the locus has been approved by any State or local public board or official with authority to give such approval. In the Fox case, the access of the lot owners to buildable areas did not depend upon any proposed common driveway. Here, however, for three of the lots proposed, no direct access across the public way frontages of the lots to the main buildable part of those lots, respectively, is now possible in the absence of appropriate official approval. We thus treat the present proposal as a "subdivision" within the meaning of G. L. c. 41, Section 81P, as amended.

It seems likely that the owners of the locus can obtain planning board approval of what on this record appears to be a reasonable proposal for development of six fairly large rural lots. We cannot predict, of course, what problems may be raised by that board and other boards and officials.

The judgment of the Land Court is reversed. Judgment is to be entered for the defendant. No party is to have costs of this appeal.

The Corcoran decision is one of the more important cases decided by the court which has dealt with the question of adequate access. It strengthens the Planning Board's role in the ANR process as it authorizes Planning Boards to consider natural impediments between the street and the buildable portion of the lot.

The Massachusetts Supreme Court has granted further appellate review of the Appeals Court's decision in Corcoran. How the Supreme Court decides this issue should be of interest to both Planning Boards and the development community.

This concludes our review of the vital access standard. Congratulations if you have read all five editions dealing with this issue. To summarize, when reviewing an ANR plan, a Planning Board should ask the following questions:

1. Do the proposed lots shown on the plan front on one of the following types of ways?
 - a. A public way or a way which the municipal clerk certifies is maintained and used as a public way;
 - b. A way shown on a plan which has been previously approved in accordance with the Subdivision Control Law, or;
 - c. A way in existence when the Subdivision Control Law took effect in the municipality which in the opinion of the Planning Board is suitable for the proposed use of the lots.
2. Do the proposed lots shown on the plan meet the minimum frontage requirements of the local zoning ordinance or bylaw?

Note: If the local zoning ordinance or bylaw does not specify any minimum frontage requirement then the proposed lots must have a minimum of 20 feet of frontage in order to be entitled to the ANR endorsement.

3. Do the lots have practical access?

Note: In determining whether the proposed lots have practical access, the Planning Board should examine the following:

- a. The adequacy of the way on which the proposed lots front, and;
- b. The adequacy of the access from the way to the buildable portion of the lot.

MILES DECISION REVERSED

The Massachusetts Supreme Court reversed the Appeals Court decision in Miles v. Planning Board of Millbury, 26 Mass. App. Ct. 317 (1988). The Appeals Court ruled that the Planning Board had exceeded its authority by imposing certain conditions on a subdivision plan (See Land Use Manager, Vol 5, Edition No. 7, September 1988).

The Miles decision dealt with the requirement in the Subdivision Control Law that specifies that Planning Boards cannot adopt a rule or regulation regarding the construction of ways which would exceed standards "commonly applied" by the municipality when constructing similar publicly financed ways. In Miles v. Planning Board of Millbury, 404 Mass. 489 (1989), the court determined that the Legislature's intention was to give Planning Board's discretion to compare particular types of town building to corresponding types of private building. The court ruled that such flexibility was necessary as a practical matter, because Planning Boards may be guided by different policy considerations in imposing different standards on the laying out of new streets as opposed to the reconstruction of already existing streets. In deciding in favor of the Planning Board, the court noted:

In sum, what the proviso requires is that the board compare like town building to like private building A town board is not forced to compare the standards of old town construction to new private construction; or the standards of town reconstruction to the private laying out of new streets; or the standards of town building in commercially zoned areas to private building in residential areas. The town may wish to vary its own standards between reconstruction and new construction, or between commercially zoned neighborhoods and residential neighborhoods.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 6, Edition No. 7
December, 1989

DIMENSIONAL SPECIAL PERMITS

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Prior to the enactment of the Zoning Act in 1975 (see St. 1975, c.808, s. 3), the Zoning Enabling Act, Chapter 40A, Section 4, MGL (inserted by St. 1954, c. 368, s.2) authorized the granting of special permits in the following manner:

A zoning ordinance or by-law may provide that exceptions may be allowed to the regulations and restrictions contained therein, which shall be applicable to all of the districts of a particular class and of a character set forth in such ordinance or by-law. Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained. The board of appeals . . . of such city or town, or the city council of such city or the selectmen of such town, as such ordinance or by-law may provide, may, in appropriate cases and subject to appropriate conditions and safeguards, grant to an applicant a special permit to make use of his land or to erect and maintain buildings or other structures thereon in accordance with such an exception.

E MANAGER

Under this language it was held that communities could properly provide for special permits authorizing deviations from the dimensional requirements of a local zoning bylaw. In Woods v. Newton, 351 Mass. 98 (1966), the city of Newton had adopted a zoning provision authorizing the Board of Alderman to grant a special permit allowing an increase to the maximum height requirement of the ordinance. The ordinance also contained guidelines for granting such a special permit including a gross floor area ratio which could not exceed one. Therefore, the total area of all the buildings on a lot, whatever the height, could not exceed the total area of the lot. The essential scheme of the ordinance was to maintain a relationship between lot area and the bulk of buildings while at the same time providing a special permit process which would allow flexibility to adapt buildings to particular sites. The court found that such a process was a proper exercise of power under the Zoning Enabling Act, and that the discretionary authority of the Board of Alderman was exercised properly when they authorized an increase in height for a motel. The court further noted that such a deviation from the dimensional requirements of the ordinance could not have been given as a variance.

In Haynes v. Grasso, 353 Mass. 731 (1968), the court reviewed a zoning bylaw provision which had been adopted by the town of Needham. The bylaw empowered the Board of Appeals to grant special permits authorizing a reduction from the minimum lot area and lot frontage requirements of the bylaw. Before granting such special permits, the Board of Appeals had to make one of the following findings:

- a. Adjoining areas have been previously developed by the construction of buildings or structures on lots generally smaller than is prescribed by (the bylaw) and the standard of the neighborhood so established does not reasonably require a subdivision of the applicant's land into lots as large as (required by the bylaw).
- b. Lots as large as (required by the bylaw) would not be readily saleable and could not be economically or advantageously used for building purposes because of the proximity of the land to through ways bearing heavy traffic, or to a railroad, or because of other physical conditions or characteristics affecting it but not affecting generally the zoning district.

The Board of Appeals granted a special permit which authorized the creation of two lots having less lot area and frontage than normally required by the bylaw. On appeal, it was argued that another provision of the bylaw specifically prohibited lot size reduction so that the special permit process was a nullity. The court ruled that the bylaw gave the authority to the Board of Appeals to grant such reductions, and that the bylaw must be construed reasonably with regard to both the objectives sought and to the structure of the bylaw as a whole.

The court reached the same conclusion in Adams v. Board of Appeals of Concord, 356 Mass. 709 (1970), where the Concord zoning bylaw authorized the Board of Appeals to approve garden apartment developments having less than the minimum frontage requirement of the bylaw. Again, when reviewing the applicable provisions of the bylaw, the court found that the special permit process authorizing reductions in lot frontage was consistent with the Zoning Enabling Act. The court further noted that such a process was obviously instituted to afford greater flexibility in planning garden apartment developments.

In Emond v. Board of Appeals of Uxbridge, 27 Mass. App. Ct. 630 (1989), the court reviewed a zoning bylaw provision which authorized the Board of Appeals to grant special permits for reductions in the minimum lot area and frontage requirements of the bylaw in the following manner:

. . . wherever, after a public hearing, it shall find that adjoining areas have been previously developed by the construction of buildings or structures on lots generally smaller than is prescribed by this section and the standard of the neighborhood so established does not reasonably require a subdivision of the applicant's land into lots as large as is hereby prescribed.

Pursuant to the above noted provisions of the bylaw, the Board of Appeals granted a special permit authorizing the construction of a house on a lot containing 1.44 acres and having 125 feet of frontage. The normal lot area and frontage requirements for the zoning district was one acre and 200 feet respectively. On appeal, abutters presented two arguments as to why the special permit process was invalid.

The first argument was that such a process gave the Board of Appeals unbridled discretionary authority to deviate from the dimensional requirements of the zoning bylaw. In considering cases that were previously decided relative to this issue, the court concluded that such an argument was without merit.

The by-law does not give the board unlimited discretion. It only authorizes a deviation from the area or frontage requirements of the by-law in neighborhoods where there is a general pattern of house lots that deviate similarly from newly adopted, higher zoning standards. Implicit is a requirement that the reduced area and frontage authorized by the special permit not be less than those in general use. Certainly a zoning scheme properly takes account of "the nature and use of adjoining land and other land in the general vicinity," and it is not unreasonable for a zoning by-law to adjust the impact of broadly drawn standards in neighborhoods where their enforcement would exceed what is necessary to preserve the character of, and protect property values in, the neighborhood. These broad purposes of zoning are not normally frustrated by uses wholly in character with the general pattern of development in the neighborhood and conforming to the dimensional standards previously and generally employed.

Adjustments to conform zoning standards to the circumstances of particular fact situations need not, we think, be made exclusively by establishing zoning districts on a neighborhood by neighborhood basis.

Authorizing adjustments by special permit, subject to clear and uniform standards, does not violate the uniformity requirement

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However, the more interesting issue decided in Emond, was whether the Legislature, when it adopted the Zoning Act in 1975, intended to restrict the scope of special permits so that they could no longer be used, as they had previously, for fine tuning dimensional standards in particular situations. Presently, Chapter 40A, Section 9, MGL, states that:

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

The second argument raised by the abutters was that the above noted provision of Section 9 of the Zoning Act only authorized special permits for uses and did not authorize special permits for dimensional variations. The court reviewed the legislative history of the Section 9 provision and found nothing to suggest an intent by the Legislature to curtail the scope of special permits as authorized under the previous zoning statute.

We are reluctant at this late date, fourteen years after passage of the new act, to find in the ambiguous language of the first paragraph of Section 9 a significant restriction on the historic use of the special permit power, a restriction that, so far as we can ascertain, has not hitherto been noticed in scholarly commentary or in the decisional law, and one which would introduce a new rigidity into municipal land-use control of a type that serves no appropriate zoning purposes. We hold, therefore, that the special permit provision . . . of the Uxbridge zoning by-law is not in conflict with Section 9 of the Zoning Act.

In Woods, the court found that the Board of Alderman had acted properly when granting a dimensional special permit while at the same time noting that such a deviation from the dimensional requirements of the ordinance could not have been given as a variance. The terms variance and special permit are not interchangeable. Each has a specific technical meaning.

A variance is a safety valve to protect property owners from those rare situations where the provisions of a zoning bylaw amount to a taking of property without just compensation. The harsh criteria that must be met before a variance can be granted by the Zoning Board of Appeals are found in Section 10 of Chapter 40A, MGL.

A Special Permit is primarily a device to protect the community from the adverse effects of specific developments which may be made acceptable in their surroundings if properly controlled. The standards for granting special permits should be spelled out in the local zoning regulations. Such standards are essential as a Special Permit Granting Authority cannot have unbridled discretionary authority. The special permit process is encouraged in the Zoning Act as it provides flexibility in the planning process. The use of special permits as a device to authorize dimensional, bulk or parking deviations is a concept that deserves consideration at the local level.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition No. 1
January, 1990

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SJC DECISION HAS LIMITED IMPACT ON "ANR" REVIEW

The Massachusetts Supreme Judicial Court has reversed the Appeals Court decision in Corcoran v. Planning Board of Sudbury, 26 Mass. App. Ct. 1000 (1988). In that case, the Appeals Court ruled that a Planning Board could consider the presence of wetlands, which are subject to the Wetlands Protection Act, when reviewing an approval not required plan (See Land Use Manager, Vol. 6, Edition No. 6, August, 1989).

Corcoran submitted a six lot "ANR" plan to the Planning Board. Each lot had the required frontage on a public way. The "ANR" plan showed wetland areas which prevented practical access from the buildable portion of some of the lots to the public way. The plan also showed a 25 foot wide common driveway. Presumably, the proposed driveway would provide access to those lots which could not directly access onto the public way. The Planning Board refused to endorse the plan and Corcoran appealed.

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A Land Court judge ruled that Corcoran was entitled to an "ANR" endorsement. The Planning Board appealed the Land Court judgment and the Appeals Court reversed. The Massachusetts Supreme Court granted further appellate review and affirmed the judgment of the Land Court.

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The Planning Board argued that even though Corcoran's plan met the statutory requirements for an "ANR" endorsement, such technical compliance alone was not enough. The Planning Board claimed that Corcoran was not entitled to an endorsement because the presence of wetlands on the lots prevented practical access to buildable sites in the rear of several of the lots. The Planning Board also noted the judge's finding that not all of the lots could accommodate both a house and its accompanying septic system on dry areas between the road and the wetland.

The Planning Board maintained that this case was governed by Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978) and other decisions which have held that technical compliance with the frontage requirement of the Subdivision Control Law does not in itself entitle a plan to an "ANR" endorsement. (See Land Use Manager, Vol. 6, Editions 2,3,4, and 5, 1989). The SJC disagreed that the rationale contained in Gifford and subsequent cases was applicable to Corcoran's plan.

CORCORAN V. PLANNING BOARD OF SUDBURY
406 Mass. 248 (1989)

Excerpts:

Lynch, J. . . .

Here, by contrast, there is no question that the frontage provides adequate vehicular access to the lots. The presence of wetlands on the lots does not raise a question of access from the public way, but rather the extent to which interior wetlands can be used in connection with structures to be built on the lots. Wetlands use is a subject within the jurisdiction of two other public agencies, the conservation commission of Sudbury and the DEQE. The conservation commission and the DEQE are also authorized to determine the threshold question whether the wet areas are in fact wetlands subject to regulation. This determination involves questions of fact concerning the kind of vegetation in the area in question and whether the wetlands are significant.

Gifford was not intended to broaden significantly the powers of planning boards. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269, 273 (1980). The guiding principle of Gifford and its progeny is that planning boards are authorized to withhold "ANR" endorsements in those unusual situations where the "access implied by [the] frontage is . . . illusory in fact." Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). We conclude that the existence of interior wetlands, that do not render access illusory, is unlike the presence of distinct physical impediments to threshold access or extreme lot configurations that do. That the use of the wetlands is, or must be, subject to the approval of other public agencies (G. L. c. 131, section 40) does not broaden the scope of the board's powers.

The judgment of the Land Court is affirmed. The plaintiffs' plan should be endorsed "approval under the subdivision control law not required."

Right after the Corcoran case, the Massachusetts Supreme Judicial Court decided Long Pond Estates Ltd. v. Planning Board of Sturbridge, 406 Mass. 253 (1989). In Long Pond, the plaintiff had submitted a plan to the Planning Board for "ANR" endorsement. The plan showed three lots, each of which had adequate frontage on Champeaux Road, a public way. However, a portion of the way between the proposed lots was within a flood easement held by the United States Army Corps of Engineers, and was periodically closed due to flooding. Between 1980 and 1988, the Corps of Engineers closed the affected portion of the public way on an average of 33 1/2 days a year.

In refusing to endorse the plan, the Planning Board stated that (1) the existence of the flood easement meant that the public way did not provide adequate access for emergency vehicles to the proposed lots and (2) alternative access to the proposed lots through an abutting town would involve excessive response time. A Superior Court judge decided that the plaintiff was entitled to an "ANR" endorsement. The Planning Board appealed and on its own motion, the SJC transferred the appeal to the High Court from the Appeals Court.

LONG POND ESTATES LTD V. PLANNING BOARD
OF STURBRIDGE
406 Mass. 253 (1989)

Excerpts:

Lynch, J. . . .

. . . As authority for its inquiry into the adequacy of Champeaux Road as a public way, the planning board cites cases upholding denials of ANR endorsements based on restrictions on access to the public roads leading to the proposed developments. See McCarthy v. Planning Bd. of Edgartown, 381 Mass. 86 (1980) (limited access highway); Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144 (1983) (planned yet unconstructed highway); Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979) (limited access highway).

The periodic flooding of a portion of the public way that exists here does not bring this case within the ambit of McCarthy, Perry, or Hrenchuk. "[P]lanning boards are authorized to withhold 'ANR' endorsements in those unusual situations where the 'access implied by [the] frontage is . . . illusory in fact.'" Corcoran v. Planning Bd. of Sudbury, ante 248, 251 (1989), quoting Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). Here, adequate access to the proposed lots is available via ways in a neighboring town during the time when a portion of Champeaux Road is closed due to flooding. Moreover, the distance that Sturbridge emergency vehicles must travel to reach the proposed lots using the alternative route is no greater than the distance they must travel to reach numerous other points within Sturbridge. Thus the undisputed facts disclose that the lots meet the literal requirements for an ANR endorsement and that access is available at all times, albeit occasionally on ways of a neighboring town. For these reasons, we find that the planning board exceeded its authority . . . in refusing to endorse the plaintiff's plan "approval under the subdivision control law not required."

In Corcoran, the court decided that a Planning Board cannot deny an "ANR" endorsement in those instances where other permitting approvals may be necessary before practical access from the lot onto the way will exist. Therefore, the necessity of obtaining wetlands approval under G.L. 131, Section 40, a Title 5 permit, or insuring the availability of water pursuant to G.L. 40, Section 54 are not relevant considerations when reviewing an "ANR" plan. However, a Planning Board review can consider extreme topographical conditions as the Court qualified its decision when it noted that the existence of wetlands, that do not render access illusory, is a different situation than when there exists a distinct physical impediment or unusual lot configuration which would bar practical access.

The Long Pond decision added a variation to the practical access theory in that the principal access to a lot can be temporarily unavailable provided that adequate access for emergency vehicles exists on another way. The interesting aspect of the Long Point case is that, except for the temporary closure of the way due to flooding, the way provided adequate access. Therefore, in order to be eligible for this variation, the landowner must show that the principal access meets the vital access standard and that the second means of access is also adequate for the purposes of the Subdivision Control Law.

An issue not addressed in the Corcoran decision was the existence of a common driveway. A Planning Board should review Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987) for guidance in this area (See Land Use Manager, Volume 4, Edition No. 7, December, 1987). The Fox decision provides valuable insight concerning common driveways and the vital access standard. For the purposes of an "ANR" endorsement, if it can be determined that each lot can comply with the vital access standard, then the existence of a common driveway is of no concern to the Planning Board. However, common driveways must comply with local zoning regulations. If problems exists relative to the use of common driveways, communities should consider zoning regulations to deal with the issue.

As a minimum, a zoning bylaw should require that access to a lot be over the required frontage or across the front lot line. Absent a common driveway regulation, such a provision would clarify zoning enforcement.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition No. 2
February, 1990

RECENT LEGISLATION REGARDING FARM STANDS AND REVIEW FEES

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Late in the 1989 legislative session, the General Court enacted two laws that are relevant to local land use boards. The following is a brief summary of the new legislation. We have reproduced the laws which we urge you to read. Please do not rely on our summary as the sole basis of your interpretation.

CHAPTER 590

AN ACT PROTECTING MASSACHUSETTS FARMING OPERATIONS

This Act amended Chapter 40A, Section 3, MGL, to prohibit the regulation of protected agricultural uses by special permit. The Act also gives greater protection to the operation of a farm stand. Except for the months of June, July, August and September, a majority of the products for sale do not have to be produced by the owner of the land on which the stand is located. During the above noted months, what constitutes a majority of the products for sale will be determined by either gross sales dollars or volume. The effective date of this Act is March 8, 1990.

CHAPTER 593

AN ACT RELATIVE TO THE ESTABLISHMENT OF SPECIAL ACCOUNTS FOR CERTAIN MUNICIPAL BOARDS

This Act amended Chapter 44 of the General Laws by inserting a new section 53 which authorizes the establishment of special accounts for the collection and expenditure of consultant fees.

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Planning Boards, Zoning Boards of Appeals, Boards of Health and Special Permit Granting Authorities may adopt rules requiring fees to be placed into a special account to be used for the employment of outside consultants. Such special accounts are similar to revolving funds as the fees are not deposited into the general fund. Therefore, the review board can make payments to the consultant without the need of an appropriation by the legislative body. Any unused fees, including accrued interest, must be returned to the applicant. The legislation also provides that the rules of the review board contain an administrative appeal to the Board of Selectmen or the City Council as described in the law.

Chapter 593 establishes a process for the creation of special accounts for the collection and disbursement of review fees for outside consultants. However, communities may still charge review fees without taking advantage of this process. The effective date of this Act was December 8, 1989.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Eighty-nine

AN ACT PROTECTING MASSACHUSETTS FARMING OPERATIONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 3 of chapter 40A of the General Laws, as appearing in the 1988 Official Edition, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:-

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

House of Representatives, November 29, 1989.

Passed to be enacted,



Acting
Speaker.

In Senate, November 30, 1989.

Passed to be enacted,

William M. Bulger, President.

December 8, 1989.

Approved,

Michael P. Dukakis, Governor.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Eighty-nine

AN ACT RELATIVE TO THE ESTABLISHMENT OF SPECIAL ACCOUNTS FOR CERTAIN MUNICIPAL BOARDS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 21 of chapter 40B of the General Laws, as appearing in the 1988 Official Edition, is hereby amended by inserting after the fourth sentence the following sentence:- The board of appeals shall adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk.

SECTION 2. Chapter 44 of the General Laws is hereby amended by inserting after section 53F the following section:-

Section 53G. Notwithstanding the provisions of section fifty-three, any city or town that provides by rules promulgated under section nine or twelve of chapter forty A or section eighty-one Q of chapter forty-one, section twenty-one of chapter forty B or section thirty-one of chapter one hundred and eleven for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account. Such rules shall provide for an administrative appeal from the selection of the outside consultant to the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications. The minimum qualifications shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field. The required time limits for action upon an application by a municipal permit granting board shall be extended by the duration of the administrative appeal. In the event that no decision is made by the city council or the town board of selectmen within one month following the filing of the appeal, the selection made by the municipal permit granting authority shall stand. Such an administrative appeal shall not preclude further judi-

cial review, if otherwise permitted by law, on the grounds provided for in this section. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. The special account, including accrued interest, if any, shall be expended at the direction of the authorized board or authority without further appropriations; provided, however, that such funds are to be expended by it only in connection with carrying out its responsibilities under the law. Any excess amount in the account attributable to a specific project, including any accrued interest, at the completion of said project shall be repaid to the applicant or to the applicant's successor in interest and a final report of said account shall be made available to the applicant or to the applicant's successor in interest. The municipal accountant shall submit annually a report of said special account to the chief elected body and chief administrative official of the municipality for their review. Said report shall be published in the city or town annual report. The municipal accountant shall submit annually a copy of said report to the director of the bureau of accounts.

House of Representatives, November 29, 1989.

Passed to be enacted,

Robert Conner, Acting Speaker.

In Senate, November 30, 1989.

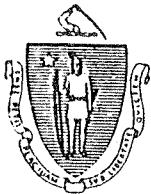
Passed to be enacted,

Hilary M. Ballou, President.

December 8, 1989.

Approved,

John G. Bliley, Governor.



MICHAEL S. DUKAKIS
GOVERNOR

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

December 20, 1989

The Honorable Michael Joseph Connolly
Secretary of the Commonwealth
State House, Room 340
Boston, MA 02133

Dear Secretary Connolly:

I, Michael S. Dukakis, pursuant to the provisions of Article XLVIII of the Amendments to the Constitution of the Commonwealth of Massachusetts, the Referendum II, Emergency Measures, hereby declare that, in my opinion, the immediate preservation of the public peace, health, safety or convenience requires that the attached Act, Chapter 593 of the Acts of 1989, entitled "An Act Relative to the Establishment of Special Accounts for Certain Municipal Boards", the enactment of which received my approval on December 8, 1989, should take effect forthwith.

I further declare that, in my opinion, it is in the public interest that this Act take effect immediately in order to enable cities and towns to come into timely compliance with federal law.

Sincerely,

Michael S. Dukakis
Governor

OFFICE OF THE SECRETARY,

Boston, Ma

December 20, 1989

I, Michael Joseph Connolly, Secretary of State, hereby certify that the accompanying statement was filed in this Office by His Excellency the Governor of the Commonwealth of Massachusetts at five o'clock and four minutes, P.M., on the above date, and in accordance with Article Forty-eight of the Amendments to the Constitution said Chapter takes effect forthwith, being chapter five hundred and ninety-three of the Acts of nineteen hundred and eighty-nine.

Michael Joseph Connolly

Michael Joseph Connolly
Secretary of State.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Vol. 7, Edition No. 3
April, 1990

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81-L EXEMPTION

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Whether a plan is entitled to be endorsed as "approval under the Subdivision Control Law not required" is determined by the definition of "subdivision" found in Chapter 41, Section 81-L, MGL. Included in this definition is the following exemption:

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. . .the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

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The original versions of the Subdivision Control Law, as appearing in St. 1936, c. 211, and St. 1947, c. 340, did not contain this exemption. It was added in a 1953 general revision of the law by St. 1953, c. 674, s.7. The purpose of the exemption is not clear but the Report of the Special Commission on Planning and Zoning, 1953, House Doc. No. 2249, at 54, shows that the drafters were aware of what they were doing, although it does not explain their reasons.

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The main issue dealing with the 81-L exemption has been the interpretation of the term "buildings." The legislation is unclear as to what types of structures had to be in existence prior to the Subdivision Control Law taking effect in a community in order to qualify for the exemption. There were no reported cases dealing with this exclusion until Citgo Petroleum Corporation v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987).

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M A N A G E R

Citgo owned a parcel of some 68 acres of land which contained several buildings. Clean Harbors leased eleven acres of the parcel for a hazardous waste terminal but reached an agreement with Citgo to buy the property. Citgo prepared a plan dividing the parcel into two lots. Citgo's contention was that the buildings existed before the Subdivision Control Law went into effect in Braintree, and thus the plan was not a subdivision because of the 81-L exemption. The Planning Board denied the ANR endorsement because the lot to be sold to Clean Harbors lacked adequate frontage and argued that a literal reading of the term "building" would be contradictory to the purposes of the Subdivision Control Law.

CITGO PETROLEUM V. PLANNING BOARD OF BRAINTREE
24 Mass. App. Ct. 425 (1987)

Excerpts:

Armstrong, J. . . .

The defendants argue that a literal reading of this exception would completely undercut the purposes of the Subdivision Control Law, as set out in G.L. c. 41, Section 81M, by allowing a homeowner to use any detached garage, shed, or other outbuilding as a basis for unrestricted backland development. There are several replies. First, this language in Section 81L is not the result of legislative oversight. . . . Second, just because a lot can be divided under this exception does not mean that the resulting lot will be buildable under the zoning ordinance. Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599, 603 (1980). Third, the lots in this case are being used for distinct, independent business operations, and the preexisting buildings relied upon - the main office, the underwriter's pump house/machine shop, the wax plant building, the earth burner building, and the new yard office - are substantial buildings. A claim that a detached garage or a chicken house or a woodshed qualifies under this exception might present a different case. Finally, a building, to qualify under this provision, must have been in existence when the Subdivision Control Law went into effect in the town. It is too late for speculators to buy tracts of back land, cover them with shacks, and divide them into lots accordingly. In short, we see no sufficient reason to refuse application of the plain language of the exclusion in this case.

What constitutes a "substantial building" is still unclear. However, a landowner may have a problem arguing that a garage, woodshed or chicken house are buildings that would qualify under the 81-L exemption. The most interesting aspect of the Citgo case is the notation by the court that the 81-L exemption does not relieve a property owner from complying with local zoning requirements. This exemption is only for the purposes of the Subdivision Control Law. In Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the court noted that the recording of an ANR plan showing a zoning violation does not preclude enforcement of the local zoning bylaw.

**NOTICE OF PUBLIC HEARING ON
PROPOSED ZONING AMENDMENTS:**

As you are aware, Chapter 40A, Section 5, MGL, requires that the Department of Community Affairs must be notified as to any public hearing scheduled by the planning board relative to a proposed amendment to the local zoning bylaw or ordinance. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the scheduled hearing by the planning board.

In order to be assured that our records will reflect proper notice, please mail such public hearing notices to the following address:

Donald J. Schmidt
Executive Office of Communities
and Development
100 Cambridge Street - Room 1803
Boston, Massachusetts 02202

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor

Amy S. Anthony, Secretary

Vol. 7, Edition 4
May, 1990

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PERIMETER PLANS

A perimeter plan is a plan of land showing existing property lines, with no new lines drawn indicating a division of land. Such plans are usually filed so that the property owner can obtain a three year zoning protection for the land shown on such plan. There has been case law that has looked at the question as to whether a perimeter plan is entitled to an ANR endorsement from the Planning Board.

The Subdivision Control Law is a comprehensive scheme for regulating the creation of new lots and for the recording of plans showing such new lots. There are three sections of the Subdivision Control Law which are relevant to the perimeter plan issue.

1. Section 81-L which defines the term "subdivision" as well as divisions of land that will not be considered a subdivision.
2. Section 81-P which sets out the procedure for endorsement of plans not requiring subdivision approval.
3. Section 81-X which provides a procedure for recording plans which show no new lot lines.

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MANAGER

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The first paragraph of Section 81-X states:

Notwithstanding the foregoing provisions of this section, the register of deeds shall accept for recording and the land court shall accept with a petition for registration or confirmation of title any plan bearing a certificate by a registered land surveyor that the property lines shown are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownerships or for new ways are shown.

Should a perimeter plan be recorded only with a certificate of a registered land surveyor under Section 81-X or is a perimeter plan entitled to an ANR endorsement from the Planning Board pursuant to Section 81-L and 81-P?

In Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.), a landowner obtained an ANR endorsement to protect his property from a zoning change. The Planning Board had endorsed the plan which depicted one lot with the exact dimensions and bounds shown on an earlier plan registered with the land court. In finding that the Planning Board had mistakenly endorsed the plan, the court noted:

As a matter of law, the plaintiffs cannot file their April, 1985, plan in the Land Court. The plan is not a subdivision nor is it a division of land with "approval not required". Lot No. 91 was created in 1960 and registered as noted. As far as the Land Court would be concerned, its status has not changed since 1960. As a matter of law, the Planning Board should not have endorsed the April, 1985, plan. Nevertheless, the action of the Planning Board was not appealed and the legality of its action is not before this Court for review. Once a plan has been endorsed 'approval not required', the Court cannot go behind that endorsement unless the action of the board is before the Court for review. As a matter of law, the plaintiffs are entitled to the three-year protection despite the method by which same was derived. In an exercise of judicial constraint, I make no comment on the methods utilized and with judicial reluctance enter this judgment.

In Horne, the landowner succeeded in protecting his property from the zoning change because the Court could not revoke the Planning Board's endorsement since the issue was not properly before the Court. However, in Malden Trust Company v. Twomey, Middlesex Superior Court C.A No. 6574, September 28, 1989 (McDaniel, J), the Planning Commission declined to endorse a plan ANR which showed no new property lines. In upholding the Commission's decision not to endorse the plan, the court noted:

. . . , it should be clear that the purpose of section 81P is to relieve certain divisions of land of regulation and approval by a planning board when a proposed plan indicates that newly created lots will be guaranteed access to the outside world by preexisting ways or roads. In sum, section 81P facilitates the recording process, and was "not intended to enlarge the substantive powers of a (planning) board." Thus, when section 81P states that "an endorsement shall not be withheld unless such plan shows a subdivision," it is clear from the above discussion that the Legislature intended to expedite the recording of 'non-subdivision' plans, and not to encourage the filing under section 81P of plans showing no subdivision of lots whatsoever. . . .

Plaintiff's plan shows no division of land and hence there is no need for the verification process of section 81P. Moreover, plaintiff's plan may have easily been filed under section 81X. It is clear that plaintiff instead sought section 81P endorsement to achieve the advantage of the zoning protection provided under G.L. c. 40A, section 6 to those plans endorsed ANR under section 81P. Withholding comment on this tactic, the Court simply states that plaintiff's perimeter plan is properly filed under section 81X, not section 81P. Consequently, the defendant was never under an obligation to endorse plaintiff's plan under section 81P.

The Massachusetts Appeals Court, in Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), noted the need to show a

division of land when submitting an ANR plan. In Perry, the landowner submitted a perimeter plan showing a triangular shaped lot abutted on all three sides by existing ways. The main issue in the case dealt with the adequacy of the ways, but it was also argued whether there was a need to show a division of land in order to be entitled to an ANR endorsement.

Perry argued that his plan was entitled to an ANR endorsement based upon the rationale found in Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963). The Bloom decision involved the division of a tract of land into two parcels. One parcel did not meet the minimum frontage requirement of the zoning bylaw for a building lot. However, the landowner placed a notation on the plan that the parcel didn't conform to the zoning bylaw.

The Supreme Judicial Court held that since the plan showed that the lot with inadequate frontage would be unusable for building, it was not a plan subject to subdivision control. The court observed that by the definition in the Subdivision Control Law, a "lot" is "an area of land . . . used, or available for use, as the site of one or more buildings," and a "subdivision" is "the division of a tract of land into two or more lots . . ." The court reasoned that a division of land into two parcels, one of which clearly could not be used for building under the zoning law, was therefore not a division into two "lots" and, therefore, not a subdivision.

PERRY V. PLANNING BOARD OF NANTUCKET
15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

In Bloom, the petitioner's plan disclosed the residual lot's inadequacy for building purposes. It was thus clear that the parcel with inadequate frontage was not a section 81L "lot." In the present case, the plan of lot 750 contains no information at all concerning the dimensions or boundaries of the tract from which lot 750 is proposed to be severed. The remaining land may or may not be "available for use . . . as the site of one or more buildings." Unlike the situation in Bloom, Perry's plan is not one "which disavows any claim of existing right to use [the remaining land] as a zoning by-law lot."

. . . Although an 81P endorsement carries no implication that the subject lots comply with zoning ordinances in all respects, it is expected to address "the fact of adequate frontage of the newly created lots." Where the plan shows on its face that the endorsement was occasioned by the fact that inadequate frontage brought a parcel outside the definition of a section 81L "lot," the danger that the public might be misled into believing the plan showed only buildable lots is dissipated. The Bloom opinion suggests that such noncompliance could be shown by depicting the inadequate frontage on the plan or by an endorsement that the subject lot could not be used for building, but preferably by both methods. Were an 81P endorsement to be granted . . . on the plan as submitted, the public would have no way of ascertaining the basis of the decision from the recorded plan and could be misled as to the adequacy of frontage on a public way. On remand, Perry may amend the plan of lot 750 to show the boundaries and dimensions of the tract from which it is to be severed, and the board need not grant an 81P endorsement unless he does so. If appropriate, assuming the requirements for an 81P endorsement are otherwise met, the board may require a further endorsement of noncompliance with the zoning code on the plan as a condition of approval.

Perimeter plans can be recorded pursuant to Chapter 41, Section 81X, MGL. Such plans, however, are not entitled to the three year zoning protection found in Chapter 40A, Section 6, MGL. Chapter 41 is only concerned with the recordation of plans and what plans require Planning Board approval or endorsement. Chapter 41 does not deal with zoning protection.

Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.) and Malden Trust Company v. Timothy Twomey, Middlesex Superior Court C.A. No. 87-6574, September 27, 1989 (McDaniel J.) support the position that as a matter of law, perimeter plans are not entitled to an ANR endorsement. Although Perry states the need to show a division of land in order to obtain an ANR endorsement, under the Bloom rationale, an arbitrary line could be drawn but not necessarily show two lots.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition 5
July, 1990

A VARIANCE IS A VARIANCE

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It has long been recognized that rights acquired by an existing use or by the construction of a building should continue to be allowed. For many years in Massachusetts, uses which are inconsistent with the zoning bylaw but which predate its adoption or amendment have been exempted from the operation of the new zoning bylaw. In Commonwealth v. Alger, 7 Cush. 53 (1851), the court noted:

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...all persons who built on their own soil before these [land use] laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts lawful at the time they were done, would be ex post facto, contrary to the constitution and to the plainest principles of justice, and of course inoperative and void.

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The key section of the General Laws dealing with the issue of nonconforming structures and uses is Chapter 40A, Section 6, MGL. In recognition of the rationale stated in Alger, the first paragraph of Section 6 provides the following protection:

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Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first

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publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.

If any change to an existing structure or use is not protected by the above provision, Section 6 also provides the following method whereby a pre-existing nonconforming structure or use may be extended, altered or changed.

Pre-existing non-conforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.

This particular provision has been cause for concern at the local level. For example, it does not provide what types of procedures apply to the "finding", whether a town can apply standards beyond the required "finding" in evaluating an application, what type of permit must be issued by the finding authority when approving the requested relief, whether a majority or a super majority is required to approve an application or what time limitation is applicable to the finding authority.

Many cities and towns have attempted to deal with the procedural ambiguities by providing in their zoning bylaws a special permit review for applicants wishing to change, extend or alter a pre-existing nonconforming structure or use. See e.g. Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987); Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985).

Rather than establishing their own special permit requirements, many communities have inserted in their zoning bylaws the Section 6 "finding" provision of the Zoning Act. In Walker v. Board of Appeals of Harwich, 388 Mass. 42 (1983), the Massachusetts Supreme Court noted that the Section 6 "finding" provision "authorizes the granting of special permits for changes in existing structures...". The Massachusetts Appeals Court, in Sullivan v. Board of Appeals of Harwich, 15 Mass. App. Ct. 286 (1983) also noted that the power of a municipality to regulate changes in nonconforming uses appeared more clearly under the previous state zoning statute but suggested that it is quite possible that the Section 6 "finding" provision could be read "as authorizing municipalities to provide for extensions or alterations of non-conforming uses by special permit while not requiring them so to provide." If the courts are construing Section 6 as entitling an applicant to the issuance of a special permit when the appropriate board makes the necessary "finding," then it would appear reasonable to assume that the procedural requirements for the issuance of a special permit would apply in the case of a Section 6 special permit finding.

In order for a structure or use to be considered nonconforming for the purposes of the Zoning Act, Section 6 requires that the structure or use be "lawfully in existence or lawfully begun." Depending upon the requirements of the local bylaw, any structure or use that obtains nonconforming status becomes eligible for the Section 6 special permit "finding" or other local special permit process.

Can a structure or use which was authorized by virtue of the granting of a variance be considered a structure or use "lawfully in existence" so as to be treated in the future as nonconforming? This is an important question as the criteria for granting a special permit or a Section 6 special permit is far more liberal than the statutory criteria for the granting of a variance or any extension, modification or renewal thereof.

In Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527 (1990), the owners of a certain parcel of land were granted use variances to erect a construction building and to operate a storage yard for construction materials. The parcel was located in a residential zone where such uses were not permitted. After the variances were granted, the town of Barnstable amended its zoning bylaw to prohibit use variances in certain areas of the community. The construction building and storage yard were located in such an area.

In 1985, the owners of the construction business wished to add a building to their existing use. Because of the zoning change, they were unable to petition the Zoning Board of Appeals for a use variance. However, the owners applied for a special permit pursuant to a provision of the zoning bylaw authorizing the Board to grant a special permit for an increase in the size of an existing nonconforming building or to extend a nonconforming use on the same lot. This particular provision expanded on the Section 6 special permit "finding" provision of the Zoning Act.

The owners reasoned that the existing building was a lawful non-conforming use. The Zoning Board of Appeals granted a special permit authorizing an addition to the existing building. A Superior Court judge ruled that the owners' use of the parcel was not nonconforming. The Appeals Court agreed.

MENDES V. BOARD OF APPEALS OF BARNSTABLE
28 Mass. App. Ct. 527 (1990)

Excerpts:

Kass, J....

The flaw in the owners' argument lies in a failure to appreciate the statutory meaning of the phrase "nonconforming use." As used in the first paragraph of s.6 of The Zoning Act...and the town by-law, a nonconforming use is one which is lawfully carried on at the time a provision of a zoning code or an amendment to the zoning code is adopted which prohibits that use. So it is that s.6 speaks of "structures or uses lawfully in existence...before the first publication of notice of the public hearing on [the prohibitive zoning] ordinance or by-law." That point, that the rights attaching to nonconformity pertain to a use extant prior to commencement of the process leading to adoption of provisions which prohibit that use, is driven home in the next sentence of the first paragraph of s.6, which sets out the basis on which "[p]re-existing nonconforming structures or uses" may be extended or altered.

Guided by The Zoning Act,...the town by-law describes a nonconforming use as "[a]ny lawful use of a building or premises, or part thereof, existing at a time the zoning by-law was originally adopted in the area in which such building or use is...located."

Again, the reader will note, a use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it. ...By way of example, if, when the locus was first classified by the town as Residence F, permitting only residential use, a building used for offices and manufacturing ancillary to the construction business had been on the site, that would have been a classic nonconforming use.

In the instant case, since the time the owners first began to use the locus for construction business purposes, the town has adopted no by-law amendment which further restricts or alters the use restrictions which have at all times been impressed on the locus. The owners' use of the premises has never been permitted by the town's zoning regulations and has never been nonconforming in the special sense that it existed "at the time the [use restricting] zoning by-law was originally adopted [or amended].". . . . Use of the site for the construction business began only after the locus was already zoned for residence use. It came about, not through preexisting right, deprivation of which might raise constitutional questions, but through the after-the-fact dispensation of a variance.

For the purposes of deciding whether a use is nonconforming within the meaning of G.L. c.40A, s.6, the question is not merely whether the use is lawful but how and when it became lawful. It would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use. Variance procedures presuppose the prohibition of the use sought and operate as a safety valve to relieve an owner of real estate from the hardship of compliance with a zoning regulation resulting from particular physical characteristics that burden the real estate. ...The statutory criteria for a variance set out in G.L. c. 40A, s.10, are demanding, and variances are difficult to obtain. ...By comparison, the special permit power presupposes the allowance of certain uses, but only with the sanction of the local permit granting authority acting in accordance with the fairly flexible criterion of "harmony with the general purpose and intent of the ordinance or by-law." ...In view of the different approaches to the grant of a variance and a special permit, the

former grudging and restricted, the latter anticipated and flexible, we do not think the Legislature intended in G.L. c. 40A, s.6, to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit. ...For the reasons stated, the administrative remedy of seeking expansion of a non-conforming use was not available to the owners.

A nonconforming structure or use is one which lawfully exists prior to a zoning bylaw or amendment, but is maintained afterward even though it does not conform to the new zoning requirement. The existence of a nonconforming structure or use is determined as of the date of the first publication of notice of the public hearing on the bylaw. See Tamerlane Realty Trust v. Board of Appeals of Provincetown, 23 Mass. App. Ct. 450 (1987). It should be noted that structures or uses will be protected from a zoning change and considered lawful if constructed or commenced pursuant to the applicable building permit, special permit or subdivision plan freeze of the Zoning Act.

A structure or use does not obtain nonconforming status due to a self-inflicted nonconformity. See Marblehead v. Deery, 356 Mass. 532 (1969) where a subdivision plan changed a nonconforming structure to an unprotected structure.

The grant of a variance to construct a building or allow a use does not create a nonconforming structure or use. A variance is a variance.

Large Lot Zoning Held Invalid

On April 25, 1988, the town of Chilmark adopted an overlay zoning district entitled "Tea Lane District." The new zoning district was created to protect the historic character of Tea Lane which derived its historic value from an incident during the tea embargo prior to the American Revolution. In order to protect the historic character and safety of the public using the road, the town amended its zoning to require a minimum lot area of 5 acres in the Tea Lane District. See Land Use Manager, Vol. 5, Edition No. 8, October, 1988.

On appeal, the Land Court has ruled that the Tea Lane overlay district is invalid. Pearlson v. Town of Chilmark, (Dukes) Misc. Case No. 129860, January, 1990. The judge concluded that the minimum lot size was intentionally exclusionary in nature.

The judge noted that:

"...the fear of overdevelopment as perceived by some members of the Planning Board seem exaggerated when growth or lack thereof during the past nine years is considered. Protection of flora and fauna comes perilously close to what the Court held required eminent domain action in Aronson. Construction of homes does indeed increase the likelihood of nitrogen loading, but it does not appear that the threat is such that the five acre standard is a rational method of prevention when balanced against damage to the owner, often nonresident, by the requirement of such a large minimum lot size in this area. I can only conclude that the measure basically is anti-growth and exclusionary in nature. This conclusion is reinforced by the fact that Tea Lane is a public way open to all, not just to area home owners."

Communities Must Pay For Landfill Design

Communities that choose to operate landfills must comply with new regulations adopted by the Department of Environmental Protection. In Town of Norfolk v. Department of Environmental Quality Engineering, 407 Mass. 233 (1990), the court ruled that the local mandate provision of Proposition 2 $\frac{1}{2}$, which relieves municipalities from certain expenditures mandated by State regulations, had no application to a DEP regulation requiring the town to construct an impervious liner to prevent ground-water pollution as a condition to the approval of a proposed expansion to the town's landfill. The total cost for the installation of the liner would be about 1 million dollars. The court ruled that since the town had voluntarily chosen to participate in this heavily regulated industry, it thereby subjected itself to the same conditions and costs that are accepted by a private party engaged in the same activity.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Vol. 7, Edition No. 6
August, 1990

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THE 81-FF EXEMPTION

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In past editions of the Land Use Manager, we have explored the protection afforded certain lots from increases in local zoning requirements. See Land Use Manager, Vol. 3, Edition No. 1 (January 1986). The Subdivision Control Law also provides a protection to certain recorded lots from complying with the subdivision rules and regulations adopted by the Planning Board. Chapter 41, Section 81-FF, MGL, deals with the applicability of the Subdivision Control Law to previously recorded plans and provides relief to good faith purchasers of individual building lots. With respect to unregistered land, the first paragraph of Section 81-FF provides the following:

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... recording of the plan of a subdivision in the registry of deeds before the subdivision control law was in effect in the city or town in which the subdivision was located shall not exempt the land within such subdivision from the operation of said law except with respect to lots which had been sold and were held in ownership separate from that of the remainder of the subdivision when said law went into effect in such city or town, and to rights of way and other easements appurtenant to such lots; and plans of subdivisions which were recorded in the registry of deeds and subdivisions made without the recording of a plan after said law

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MANAGER

had gone into effect in such city or town and before February first, nineteen hundred and fifty-two, without receiving the approval of the planning board of such city or town, shall have the same validity and effect as if the subdivision control law became effective in such city or town on February first, nineteen hundred and fifty-two, as above provided.

As to the protection afforded registered land, the second paragraph of Section 81-FF provides:

So far as land which has been registered in the land court is affected by said law, any plan of a subdivision which has been registered or confirmed by said court before February first, nineteen hundred and fifty-two, whether the subdivision control law was in effect in the city or town in which the subdivision was located or not, and whether the plan of the subdivision was approved by the planning board or not, shall have the same validity in all respects as if said plan had been so approved, but the land court shall not register or confirm a plan of a subdivision in a city or town in which the subdivision control law is in effect which has been filed on or after February first, nineteen hundred and fifty-two, unless it has first verified the fact that the plan filed with it has been approved by the planning board, or would otherwise be entitled if it had related to unregistered land, to be recorded in the registry of deeds....

Under the provisions of the first paragraph of Section 81-FF, the recording of a plan does not exempt unregistered lots within a subdivision except with respect to those lots which had been sold and were held in "ownership separate" from that of the remainder of the subdivision when the Subdivision Control Law went into effect in the community. This lot protection also extends to unapproved plans and subdivisions made after the Subdivision Control Law took effect but recorded prior to February 1, 1952.

The court discussed the "ownership separate" provision in Clows v. Planning Board of Middleton, 12 Mass. App. Ct. 129 (1981), when examining whether two parcels of land were entitled to ANR endorsements from the Planning Board. One parcel consisted of 10 lots containing an area of 42,340 square feet and the other parcel consisted of 8 lots containing an area 48,600 square feet. The lots were shown on a plan which had been recorded in the registry of deeds

prior to the Subdivision Control Law taking effect in the town of Middleton. The case was remanded to the Superior Court because it was unclear as to whether the parcels in question were held in isolation from the original subdivision on the date Middleton adopted subdivision control. However, in reviewing the first paragraph of Section 81-FF, the court noted that at best, each parcel would be treated as one lot for the purposes of the 81-FF exemption.

CLOWS V. PLANNING BOARD OF MIDDLETON
12 Mass. App. Ct. 129 (1981)

Excerpts:

Kass, J....

a person who owns a single lot which was conveyed to him or his predecessor in title out of a recorded - but unapproved - subdivision enjoys "grandfather" privileges for that lot if the conveyance out of the subdivision occurred prior to the date on which the town where the land is located adopted the Subdivision Control Law.... We do not mean to suggest that the grandfather rights which s.81FF confers apply solely to persons who have purchased only one lot on an "uncontrolled" plat. During the early decades of this century tracts were often laid out in small lots which were combined to make one building parcel which would meet the needs of the buyer or the lot size requirements of zoning laws. An owner of such a parcel, if a person different from the owner of the remainder of the subdivision, would have the benefit of s.81FF. By contrasting example, therefore, the owner of 1,200 lots in a recorded subdivision of over 1,800 lots who has purchased them from the original owner prior to the adoption of the Subdivision Control Law, and, in a literal sense, owns them separately from the other 600 lots, is not, should he desire to break his tract into smaller parcels, exempt from subsequently enacted subdivision control....

If a person who owned a large tract carved from an old uncontrolled subdivision could (such tract being literally separate from the remainder of the original subdivision), after adoption of subdivision control, secure exemption from the Subdivision Control Law under s.81FF by presenting, *seriatim*, clusters of lots, each cluster drawn from the tract held in ownership separate from that of the original entire uncontrolled subdivision, it would be quite possible by such a tactic to develop an entire tract free of subdivision control.... Construing s.81FF to permit such a course of conduct would be inconsistent with our duty to interpret the statute so as to further a principal object of the Subdivision Control Law, viz.: to ensure efficient vehicular access to each lot in a subdivision.... Nor would such an application of s.81FF be consistent with its limited purpose of exempting parcels isolated from the remainder of the old subdivision before Subdivision Control Law came into effect.

The recording of a subdivision plan in the registry of deeds will protect lots, and the rights of way and other easements appurtenant to such lots, from the operation of the Subdivision Control Law if such lots were separately held prior to the Subdivision Control Law taking effect in the community. At issue in Toothaker v. Planning Board of Billerica, 346 Mass. 436 (1963), was the meaning in Section 81-FF of appurtenant rights of way. The plaintiffs owned approximately 1,200 lots shown on a subdivision plan of over 1,800 lots. The subdivision plan was recorded in 1914. The Subdivision Control Law became effective in Billerica on March 3, 1951. Of the lots shown on the 1914 plan, 649 were protected by Section 81-FF. The plaintiffs submitted a plan to the Planning Board showing a division of land into a number of lots which fronted on ways which were shown on the 1914 plan. Some of the ways had been partially graded and others were partly covered with brush and trees. Several of the ways were dead ends and others joined an unaccepted way bounding the tract. The court ruled that the plan was subject to the Subdivision Control Law and that the rights of way of exempted lots could not be destroyed.

TOOTHAKER V. PLANNING BOARD OF BILLERICA
346 Mass. 436 (1963)

Excerpts:

Whittemore, J....

At issue, therefore, is the meaning of the exemption in s.81FF of appurtenant rights of way. We hold that the words emphasized in the foregoing quotation from s.81FF relate only to each lot sold before the subdivision control law became applicable and refer to the substance of the rights of way or easements appurtenant thereto. The words of the statute do not exempt the owners of the other lots from compliance with the subdivision control law. Nor does the statute fix the location of extent of the rights of way appurtenant to lots sold before the subdivision control law became applicable. Those rights are determined by the private grants....

Of course, both the owners and the planning board must so apply the law that the existing exempt rights of way of the lots separately owned...are not destroyed or substantially limited or interfered with. The agreed facts do not set out the precise language by which the rights of way were granted to the buyers of the lots sold "over the street upon which...[the lot] is located..." It appears likely from this statement in the agreed facts that there is no more definition of the course of the way than is contained in a reference to the way on which the lot is located and that all that was granted in each case was a right of way to one or the other of the public ways, whichever is nearer.... In any event, nothing would preclude application of regulations requiring construction of ways and installation of municipal services.

Whatever the precision of definition of the private rights of way, the planning board, as a condition of approving a subdivision plan for the plaintiffs' land, may impose any lawful requirements, and may disregard the 1914 plan and its scheme except...as...is necessary in order to

leave the lots which were separately owned in 1951 with the substance of their rights of ways. For example, although there is no suggestion in the agreed facts that, apart from the lack of dead-end turning circles, the 1914 ways are too narrow, nothing in the exemption would bar a requirement of greater width for so much of a way as is not adjacent to an exempt lot. Wise planning might point to eventual widening of a way throughout its entire length by acquiring by purchase or eminent domain the necessary part of the frontage of an exempt lot.

The broad purpose of the subdivision law calls for a consistent construction of its exemption provisions. The purpose is set out in G.L. c.41, s.81M. Except only as stated, any or every aspect of this statutory purpose may be served in applying the law to the plaintiffs' land.

With respect to registered land, the second paragraph of Section 81-FF validates all plans which were registered or confirmed by the Land Court before February 1, 1952. It further provides that after that date the Land Court shall not register or confirm a plan of land in a subdivision in a community where the Subdivision Control Law is in effect unless the plan had been approved by the Planning Board or would have been otherwise entitled, if it was unregistered land, to be recorded in the registry of deeds.

The second paragraph of Section 81-FF states that old recorded plans of registered land "shall have the same validity in all respects as if said plan had been so approved [under the Subdivision Control Law]". In Stoner v. Planning Board of Agawam, 358 Mass. 709 (1971), the Planning Board had constructively approved a subdivision plan by failing to act in a timely manner. The court noted that although the plan was constructively approved, the Planning Board had the authority to require the property owner to furnish an adequate performance guarantee for the construction of ways and the installation of municipal services. The necessity of obtaining an adequate performance guarantee was also stressed in Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980), where the court noted:

We are of the opinion that exception (b) of the definition of "Subdivision" in 81L requires either that the approved ways have been built, or that there exists the assurance required by s.81U that they will be built. Otherwise, the essential design of the subdivision control law—that ways and municipal services shall be installed in accordance with specific municipal standards—may be circumvented.

The second paragraph of Section 81-FF does not appear to eliminate the requirement that adequate performance guarantees be obtained for such plans. Also, presumably such plans would be subject to the provisions of Section 81-W relative to the modification, amendment or rescission of previously approved subdivision plans.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition No.7
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REPETITIVE PETITIONS

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As a general rule, a Zoning Board of Appeals or Special Permit Granting Authority, which has denied an application, is not permitted to reverse itself unless a change of circumstances has occurred which materially affects the merits of the case. If it were otherwise, there would be no finality to proceedings before such boards. If parties could repeatedly return to the same board seeking the same request under the same conditions, there would be the danger that the board and objectors would be harassed and their resistance worn down. As the court noted in Bright v. Zoning Board of Appeals, 183 A.2d 603 (1962), "to allow a board to revoke former actions without a change in circumstances would permit interested parties to be unduly harassed and injured through being called upon to contest repeated and frequently recurring agitations pertaining to the same subject matter."

Absent a statute which authorizes a board to rehear an application, courts have held that a board is without general authority to reconsider the same matter. The authority to review a Zoning Board of Appeals' or Special Permit Granting Authority's decision is vested in the courts.

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In some jurisdictions, the question of reapplication is governed by statute. Such statutes prohibit the filing of a new application within a specified period after the application has been denied by the board. Such a restriction does not prevent the filing of an application for a substantially different purpose within such time period.

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Since 1954, the zoning statute in Massachusetts has contained a repetitive petition provision. Prior to a major rewrite of the Zoning Enabling Act in 1975, the state statute provided the following:

After acceptance of this section or corresponding provisions of earlier laws . . . no appeal or petition . . . for a variance . . . and no application . . . for a special exception . . . which has been unfavorably acted upon by the board of appeals shall be considered on its merits by said board within two years after the date of such unfavorable action except with the consent of all but one of the members of the planning board; or of the board of selectmen in a town having no planning board; . . .

The 1975 comprehensive revision of the Zoning Act, St. 1975, C. 808, s.3, required that the Zoning Board of Appeals make a written finding of a specific and material change and that the repetitive petition obtain Planning Board consent after notice is given to parties in interest. The repetitive petition provision of the Zoning Act, Chapter 40A, Section 16, MGL, presently reads as follows:

No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, . . . specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

The repetitive petition provision is silent on the process that should be followed when entertaining a repetitive petition. Does a Planning Board give its consent before the Zoning Board can consider the merits of the petition or does the Zoning Board make the necessary finding and act on the petition before the applicant seeks Planning Board consent? In Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981), the court stated that the policy which underlies

the repetitive petition provision is "to give finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue." Having this policy in mind, it would seem logical that an applicant obtain Planning Board consent before presenting his petition to the Zoning Board of Appeals. The court in Paquin v. Board of Appeals of Barnstable, 27 Mass. App. Ct. 577 (1989) appears to favor such a process when it noted:

the language of s.16 leaves it unclear whether a planning board's function is simply to approve reconsideration by a board of appeals or to endorse favorable action. It is the former, which appears likely, the board of appeals could not even consider the merits of the repetitive petition until the planning board approved.

The former s.20 of G.L. c. 40A called only for planning board approval of consideration on the merits of a subsequent petition. See Shalbey v. Board of Appeals of Norwood, 6 Mass. App. Ct. 521, 527 n.8 (1978).

However, the central question presented in Paquin was whether the constructive grant provisions of the Zoning Act applies to a repetitive petition for a variance. Chapter 40A, Section 15, MGL, provides that failure of a Zoning Board of Appeals to act on a petition for a variance within 100 days after the petition has been filed with the municipal clerk will constitute a grant of the variance. The repetitive petition provision of Section 16 of the Zoning Act contains no time period for action by either the Zoning Board of Appeals or the Planning Board when considering a repetitive petition.

The purpose of the constructive grant provision in Section 15 of the Zoning Act is to induce the Zoning Board of Appeals to act promptly. Paquin argued that the procedural requirements of Section 15 should also apply to the Section 16 repetitive petition provisions to further the purpose of timely action.

PAQUIN V. BOARD OF APPEALS OF BARNSTABLE
27 Mass. App. Ct. 577 (1989)

Excerpts:

Warner, J. . . .

While we must give statutes a reasonable construction so that the purpose of the Legislature may be accomplished, . . . "we will not 'read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.'" . . . Moreover, we should not make a construction which may produce an unworkable scheme or one which allows for frustration of function.

In the case of an original application or petition, the constructive grant provision of s.15 applies to proceedings which are entirely within the board of appeal's control. In the case of a repetitive petition, s.16 introduces the additional element of planning board approval. The board of appeals has no authority over the planning board's timing of its hearings or decisions. If a planning board does not act, purposefully or not, within the time frame prescribed for board of appeals action under s.15, could the Legislature have intended that an application be deemed granted by the board of appeals? We hold that it did not and that the constructive grant provision of s.15 does not apply to a repetitive petition filed under s.16. To conclude otherwise would open the possibility of the planning board, in effect, exercising an essential function of the board of appeals.

Section 16 requires planning board involvement only as a precedent to **favorable** board of appeals action. It might be argued that nothing in s.16 prevents a board of appeals from acting (without planning board consent) **unfavorably** on a repetitive petition (either on a finding that the requisite change has not been shown or on the merits) within the time constraints set out in s.15. However,

a board of appeals, finding "specific and material changes" in a petition under s.16, might be **favorably** disposed to grant a variance but also to attach appropriate "conditions, safeguards and limitations." G.L. c.40A, s.10. Planning board inaction or delay - if a constructive grant were the result - would frustrate the imposition of such restrictions.

While some time limits (both as to threshold and final decision) on planning board and board of appeals action on a repetitive petition would appear to be consistent with legislative intent to prod prompt decision once votes are made which allow reconsideration, those are, in the circumstances, matters calling for explicit consideration and the exercise of judgment by the Legislature. The legislative history of the addition of the constructive grant provision in s.15 lends some support to a conclusion that the failure expressly to deal with the consequences of inaction on a repetitive petition under s.16 may have been inadvertent. The constructive grant amendment to s.15 was made for the first time late in the legislative process of the revision of G.L. c. 40A by amendment from the Senate floor. See 1975 Senate Journal at 2215. Although we are not called upon to address the question in this case, the amendments to s.15 by St. 1987, c. 498, s.3, do not on their face appear to relate to a repetitive petition under s.16. No change has been made in s.16 since its enactment in 1975.

In Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981), the Zoning Board of Appeals denied an application for a special permit to build an addition to a motel. The owner of the motel filed an altered application seeking a determination that the second application contained specific and material changes from the first application. The Planning Board, by a unanimous vote, consented to the renewed application. This was the first time that the court was faced with the issue of what constitutes a specific and material change from the initial special permit application. It was decided that in such discretionary matters, the court will defer to the local review board's determinations.

RANNEY V. BOARD OF APPEALS OF NANTUCKET
11 Mass. App. Ct. 112 (1981)

Excerpts:

Kass, J. . . .

What constitutes a sufficiently revised reapplication for zoning relief has not been previously discussed in our decisions. In considering the question we have in mind the policy which underlies statutory texts such as s.16: to give finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue. . . .
Bois v. Manchester, 113 N.H. 339, 341 (1973). Note, "Zoning Variances," 74 Harv.L.Rev. 1396, 1399-1400 (1961). 7 Rohan, Zoning and Land Use Controls s.51.07[1] (1979). 3 Yokley, Zoning Law and Practice s.18-10 (1979).

On the other hand there is merit in allowing the local permit granting authority some flexibility in reconsidering a request for a special permit in the light of altered conditions. Not least of all, this offers the possibility of land use solutions sufficiently acceptable to the contending parties to keep the matter out of the courts.

To the extent that the local board makes findings that a reapplication is accompanied by circumstances which are specifically and materially different, such a local determination ought to receive the deference from a reviewing court which is generally accorded to the discretionary aspects of local zoning decisions. . . . Whether the plans or the surrounding conditions have changed sufficiently to justify a reapplication during the moratorium period is principally for the local board to determine. . . . The board may give weight to differences which in an absolute sense are relatively minor. . . .

It has always been supposed that if an application disclosed a project materially different from the one first introduced, the bar of s.16 . . . would not stand in the way. . . . The substitution of an apartment building for a

motel wing or an office building for a store block would be an example of an undertaking so fundamentally different from that first proposed as not to confront the barrier of s.16. Necessarily, then, the specific and material changes which s.16 requires must be something less than differences so radical that they obviate scrutiny under the statute altogether. The board cited the following as significant and material changes:

1. revision of the outdoor lighting plan so that all lights were flush with the ceiling and elimination of direct lights or fixtures from an elevation twenty feet above the level of the parking area;
2. installation of blackout drapes in the windows of the proposed addition;
3. installation of sound insulating materials in the exterior walls of the proposed addition so as to suppress noise;
4. landscaping of parking area along its westerly boundary with an eight foot privet hedge.

Each of these modifications was responsive to a ground of refusal mentioned by the board in its rejection of the first application. While each of the changes taken in isolation has a cosmetic quality, taken together they resulted in a less intrusive building, and it was this intrusive character which evoked the initial rejection. We are of the opinion that the board was warranted in concluding that changes directly responsive to the board's initial objections were specific and material within the meaning of the statute. The board's findings also suggest that the board regarded itself as having acted on erroneous information in concluding initially that the proposed motel addition would adversely affect traffic on North Beach Street and the value of nearby residential properties. To the extent that the board thought itself in error about underlying assumptions concerning the proposal, this constituted a change of circumstances which permitted the board to entertain a second application for zoning relief. We have considered and reject the objectors' contention that a hearing on a second application should be limited to evidence received at the hearing on the first application. No such limitation is implied, let alone expressed, in the statute or our decisions.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition No. 8
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L

PERIMETER PLANS

YOU BE THE JUDGE

A

In Volume 7, Edition No. 4 (May, 1990), of the Land Use Manager, we reviewed recent lower court decisions dealing with the issue of perimeter plans. The cases we reviewed supported the position that perimeter plans are not entitled to an "approval not required" (ANR) endorsement from the Planning Board.

N

Bart J. Gordon, Esq., of Bulkley, Richardson and Gelinas, and Paul L. Feldman, Esq., of Davis, Malm and D'Agostine, are of the opinion that a Planning Board has no choice and must endorse a perimeter plan. They have written an article supporting their contention which we have reproduced in this edition of the Land Use Manager. We feel their analysis will be useful to local officials as it presents arguments that might be raised by a landowner seeking an ANR endorsement for a perimeter plan.

D

If it were not for the fact that ANR plans are entitled to a zoning protection pursuant to the provisions of the Zoning Act, there probably would be little interest as to whether a perimeter plan should receive an ANR endorsement. In their article, Mr. Gordon and Mr. Feldman note that perimeter plans are entitled to zoning protection, citing Cape Ann Development Corp., Wolk, and Samson (where Planning Boards had endorsed or failed to seasonably act on perimeter plans). These cases, however, did not decide that perimeter plans must be endorsed by the Planning Board.

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M A N A G E R

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The focus of our Land Use Manager was not on zoning protection but whether a perimeter plan is entitled to an ANR endorsement under the provision of the Subdivision Control Law. As noted in the following article, Section 81-P states that an endorsement shall not be withheld unless the plan shows a subdivision. Section 81-P deals with the process for endorsement. Whether a plan requires approval or not is determined under Section 81-L, the definition of subdivision, which defines when a division of a tract of land will not constitute a subdivision.

We agree that there is an obligation on the part of the Land Use Manager to point out both sides of disputed issues. The cases referred to in the Land Use Manager dealt with the question of whether a plan of land was entitled to an ANR endorsement. Again, it is our belief that Twomey, Horne and Perry support the position that unless a plan shows a division of land it is not entitled to an ANR endorsement and we are unaware of any cases which have reached a different conclusion.

We wish to thank Mr. Gordon and Mr. Feldman, who are notable land use attorneys, for taking the time to express their views. We would now suggest that you read the following article and Vol. 7, Edition No. 4 of the Land Use Manager.

Are perimeter plans entitled to an ANR endorsement?
You be the judge.

Perimeter Plans Are Entitled To ANR Endorsement

By Bart J. Gordon and Paul L. Feldman

In Land Use Manager, vol. 7, Edition 4, May, 1990, on Perimeter Plans, Donald Schmidt suggests that a perimeter plan -- a plan showing the circumference of property and not dividing the property into two lots -- is not entitled to an endorsement under G.L. c. 41, §81P. Mr. Schmidt relies on two Superior Court decisions that suggest that a planning board need not endorse a perimeter plan as "approval not required" ("ANR") under the Subdivision Control Law. The absence of such endorsement may be intended to deprive the plan of any zoning freeze protection under G.L. c. 40A, §6, sixth paragraph. Planning boards who wish to prevent such freezes may rely on the Land Use Manager to justify refusal to give an ANR endorsement. Such reliance, however, is misplaced and may result in significant litigation.

The sole inquiries for a Planning Board when reviewing a request to endorse an ANR plan is whether the plan shows a subdivision of land and whether vital access is assured. A perimeter plan does not show a subdivision of land. It is a plan of existing ownership, and no new boundaries are created. Nonetheless, despite questions raised by the Superior Court decisions, they are plans which the Planning Board must endorse under G.L. c. 41, §81P. The statute is clear:

"Any person wishing to cause to be recorded a plan of land situated in a ... town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such ... town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall

forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words 'approval under the subdivision control law not required' or words of similar impact with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision" (emphasis added).

The language of the statute says that if the plan does not show a subdivision, a planning board must endorse it. The fact that a plan under G.L. c. 41, §81X, could be recorded with a surveyor's certificate (of no new lines of division of existing ownership) does not provide a board with a basis for failure to endorse a perimeter plan. If the planning board fails to act on endorsing the plan, an applicant is entitled to a certificate from the town clerk and the failure to act has the effect of an endorsement.

There are several appellate decisions acknowledging planning board endorsement of perimeter plans and the effect of a failure to endorse. See Cape Ann Development Corp. v. Gloucester, 371 Mass. 19 (1976):

In December, 1972, Cape Ann submitted a 'perimeter plan' of the locus to the Gloucester Planning Board, requesting that the plan be endorsed subdivision approval not required. See G.L. c. 41, §81P. A city clerk's certificate concerning the failure of the planning board to act seasonably, equivalent in effect to such an endorsement (G.L. c. 41, §81P), was obtained and recorded with the 'perimeter plan' in the registry of deeds."

See Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976): "the planning board's endorsement under G.L. c. 41, §81P, on his 'perimeter plan'...." Samson v. San Land Development Corp., 17 Mass. App. Ct. 977, 978 (1984): "On January 26, 1972, San-Land filed a perimeter plan with the planning board and

obtained its stamp indicating that subdivision approval was not required. See G.L. c.41, §81P." Each of these cases makes clear that the zoning freeze protections of G.L.c. 40A, §6, apply to perimeter plans. We have found no reported appellate case in which a planning board was upheld in refusing to endorse a perimeter plan, although the Malden Trust Company v. Twomey, Middlesex Sup. Ct. 6574 (Sept. 28, 1989), decision does reach this result.

Section 81P twice uses the word "shall" to describe the planning board's obligation to endorse a plan if it does not show a subdivision. "The word 'shall' in a statute is commonly a word of imperative obligation and is inconsistent with the idea of discretion." Johnson v. District Attorney for the Northern District, 342 Mass, 212, 215 (1961). The Superior Court cases turn the mandatory "shall" into a discretionary "need not."

To reach this result, a court must disregard the language of G.L. c. 41, §81P, and existing appellate decisions construing it. The Superior Court decisions pointedly avoid the policy issue of whether perimeter plans should receive zoning freeze status. Indeed, despite language in Horne v. Board of Appeals of Chatham, Barnstable Sup. Ct. 46345 (Nov. 4, 1986), that the planning board "should not have endorsed" the perimeter plan, the Court held that the endorsement (even if erroneous) conferred a zoning freeze. A large body of law exists construing zoning freezes. See B.J. Gordon and R.C. Davis, Zoning Freezes, Chapter 7, Massachusetts Zoning Manual, (MCLE, 1989). While planning boards may be

frustrated by a landowner's attempt to secure some protection from a rezoning which might have catastrophic economic impact, the Legislature in G.L.c. 40A, §6, has struck a balance to afford landowners some protection against changes while a project is under development. One may disagree with the statute, but, until it is amended, it is the law.

There is an obligation on the part of Land Use Manager to point out both sides of disputed issues. As is indirectly suggested, by reference to the cases of Bloom v. Planning Board of Brookline, 346 Mass. 270 (1983), and Perry v. Planning Board of Nantucket. 15 Mass. App. Ct. 144 (1903), a landowner may avoid a planning board's refusal to endorse a perimeter plan by filing a plan with a division into lots but adding a notation that the lots may not conform to the zoning by-laws or that one of the lots is not a buildable lot. The Bloom and Perry cases suggest that a freeze may be obtained by filing a perimeter plan with an arbitrary line of division, requiring an ANR endorsement. There is no policy reason to require such a tactic, particularly where the language of §81P is unequivocal. Further, a planning board's failure to give an §81P endorsement should - if the plan does not show a subdivision - lead to a clerk's certificate and the same result.

For these reasons, Land Use Manager and the Twomey case may be incorrect in suggesting that a perimeter plan is not entitled to ANR endorsement. The statutory language, appellate case precedent, and the policy underlying zoning freezes support a

contrary interpretation. Until G.L. c. 41, §81P, or c. 40A, §6, sixth paragraph, are changed, our position is that a planning board has no choice regarding endorsement of perimeter plans. Under the statute, if no subdivision is shown, the board must provide the statutory endorsement. If it fails to act, the town clerk must so certify and the effect of endorsement is achieved.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

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November, 1990

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THE SEVEN-MONTH ZONING PROTECTION

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Through the years, one prime concern of the Legislature has been to protect certain divisions of land from future changes in local zoning requirements. The fifth paragraph of Chapter 40A, Section 6, MGL, protects land shown on preliminary or definitive plans from all zoning changes for a period of eight years. If a preliminary plan is submitted, a definitive plan must be submitted within seven months. The eight-year protection period runs from the date of the Planning Board's endorsement of its approval of the definitive plan. Chapter 40A, Section 6 provides as follows:

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted... before the effective date of [the] ordinance or by-law, the land shown on such plan shall be governed by the... zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval,...

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Chapter 40A, Section 6 further provides that if a Planning Board disapproves a definitive plan, a landowner can preserve his zoning protection by filing an appeal pursuant to Section 81BB of the Subdivision Control Law. Such an appeal will protect the land shown on such plan from any zoning amendment which becomes effective after the filing date of the preliminary plan.

The zoning in effect is the zoning regulations which have been adopted by the City Council or Town Meeting. The publication of the public hearing notice by the Planning Board does not prevent a landowner from filing a subdivision plan to protect his land from future zoning changes. Chapter 40A, Section 5, MGL, provides:

The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty.

The net effect of Chapter 40A is to impose a moratorium on the application of new and more stringent zoning requirements imposed by an amendment to a zoning ordinance or bylaw which occurs subsequent to the submission of a plan under the Subdivision Control Law provided the plan is duly approved by the Planning Board.

The review of a proposed subdivision of land is governed by the provisions of the Subdivision Control Law, Chapter 41, Sections 81K-81GG, MGL. The Subdivision Control Law establishes an orderly process so that a subdivision plan will receive the approval of a Planning Board if the plan conforms to the reasonable rules and regulations of the Board. Section 81U contains the procedural requirements for approval, modification or disapproval of a definitive plan. The second paragraph of Section 81U provides:

In the event of disapproval, the planning board shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board or officer and shall revoke its disapproval and approve a plan which, as amended conforms to such rules and regulations or recommendations.

There have been many court decisions that have dealt with the relationship between the operation of the Subdivision Control Law and the grandfathering provisions of the Zoning Act. Recently, in Arenstam v. Planning Board of Tyngsborough, 29 Mass. App. Ct. 314 (1990), the court had to interpret the extent of the seven month zoning protection for land shown on a preliminary plan filed with the Planning Board.

In Arenstam, a landowner had filed a preliminary plan prior to the town amending its zoning bylaw. The new zoning bylaw prohibited commercial or industrial development on his parcel. Exactly seven months after submission of the preliminary plan, a definitive plan was filed with the Planning Board. The plan was eventually disapproved by the Planning Board because it did not comply with their rules and regulations or with the old zoning bylaw in effect at the time of the submission of the preliminary plan. At a later date, the landowner made the necessary corrections and resubmitted his plan. The Planning Board disapproved the amended plan on the grounds that the land was now governed by the new zoning bylaw because the amended plan was submitted after the seven-month protection period.

The landowner argued that because the original definitive plan was submitted within seven months of the preliminary plan, he was entitled to a zoning protection. In support of his argument, he referred the court to the above-noted provision of Section 81U of the Subdivision Control Law which places no time limit on submitting an amended plan when the original definitive plan has been disapproved by the Planning Board. The court, in deciding against the landowner, determined that the Subdivision Control Law does not provide for such an open-ended process and places the responsibility on a landowner to present a definitive plan which is entitled to approval by the Planning Board. A zoning protection is lost if the definitive plan is not approved, and a landowner fails to appeal the disapproval pursuant to Section 81BB of the Subdivision Control Law.

ARENSTAM V. PLANNING BOARD OF TYNGSBOROUGH
29 Mass. App. Ct. 314 (1990)

Excerpts:

Ireland, J...

In our view, the Land Court and the board were correct in ruling that G.L.c.40A, s.6, does not give "grandfather" protection to the locus in the circumstances disclosed. The apparent purpose of the requirement of s.6 that the

definitive plan be submitted within seven months of the date the preliminary plan was filed is to give the developer a reasonable time to work out details of an approvable plan with the planning board and the board of health, while at the same time avoiding an open-ended suspension of zoning amendments that are adopted by the town during the subdivision plan approval process. It is true that s.6 refers to a "definitive plan or an amendment thereof [which] is finally approved "; and that G.L.c.41, s.81U, puts no limit on the time a developer has to amend his plan so as to meet the board's reasons for disapproval. To preserve the sense of s.6, its reference to amended definitive plans must be read to apply only to those amended plans filed with the board within the seven-month period after submission of the preliminary plan. "[A]ny definitive plan, filed more than seven months after a preceding preliminary plan, is to be treated as a new plan, which gains protection...only from the date when it is filed and not as of the date of the filing of the preliminary plan."...

Where a definitive plan is arguably entitled to approval by the planning board, a developer can preserve whatever rights he may have by filing an appeal under G.L.c.41, s.81BB, from a decision by the planning board disapproving the plan....This remedy, described in s.81BB,...as "exclusive," would preserve the grandfather protection of s.6 if it should be determined that the plan was, in fact, entitled to approval. Here, however, the plaintiff concedes that the definitive plan originally filed was not entitled to approval and that an appeal would have been fruitless. In these circumstances, having filed the original definitive plan at the end of the seven-month period prescribed by s.6, the plaintiff left himself no time within which to file an amended definitive plan under the provisions of G.L.c41, s.81U, that might be eligible for the protection of s.6.

As previously noted, the definitive plan zoning freeze protects the land shown on such plan from all zoning changes for an eight-year period. Within the eight-year period, a landowner may obtain a building permit based upon the zoning in effect at

the time the subdivision plan was first submitted to the Planning Board. After the eight-year period, the lots shown on the plan must conform to any zoning change which was enacted after the submission date of the original subdivision plan unless the lot has obtained some other zoning protection.

For example, a subdivision lot for single or two-family use can be protected from future increases in area, frontage or yard requirements if such lot is separately described and separately held at the time of the increased zoning requirements. For a more indepth review of the separate lot protection, see Land Use Manager, Volume 7, Edition Nos. 1, 3, 4, 5 and 6. It is not uncommon for owners of subdivision plans to "checkerboard" in order to obtain the separate lot protection for each lot. "Checkerboarding" is a practice whereby an owner conveys alternate lots to other persons, so no two adjacent lots would be in common ownership, and each lot would fall into the single and separate ownership category.

Prior to the enactment of the new Zoning Act (St. 1975, c.808, s.3), the old Zoning Enabling Act provided the following lot protection:

Any lot lawfully laid out by plan or deed duly recorded, as defined in section eighty-one L of chapter forty-one...which complies at the time of such recording or such endorsement, whichever is earlier, with the minimum area...requirements, if any, of any zoning...by-law in effect in the ...town where the land is situated, notwithstanding the adoption or amendment of provisions of a zoning...by-law in such...town imposing minimum area...requirements...in excess of those in effect at the time of such recording or endorsement (1) may thereafter be built upon for residential use if, at the time of the adoption of such requirements or increased requirements, or while building on such lot was otherwise permitted, whichever occurs later, such lot was held in ownership separate from that of adjoining land located in the same residential district....

The key phrase under the old statute was "or while building on such lot was otherwise permitted." Under this provision, a subdivision lot could be "checkerboarded" at any time within the definitive plan protection period and be protected as a separate lot since "building on such lot was otherwise permitted" at the time of the conveyance.

When the Legislature rewrote the Zoning Act in 1975, they eliminated the "or while building on such lot was otherwise permitted" proviso. In Wright v. Board of Appeals of Falmouth, 24 Mass. App. Ct. 409 (1987), the court reviewed the existing separate lot protection provision of the Zoning Act and noted that a lot must be separately described and separately held at the time of zoning change in order to be protected as a separate lot. Therefore, the definitive plan zoning freeze is more limited today than it was under the provisions of the old Zoning Enabling Act. A landowner cannot "checkerboard" at any time during the eight-year period. Conveyance of a subdivision lot after the zoning change will not afford the lot separate lot protection.

WRIGHT V. BOARD OF APPEALS OF FALMOUTH
24 Mass. App. Ct. 409 (1987)

Excerpts

Cutter, J...

The provisions of old c.40A, s.5A and old s.7A, so far as clearly continued at all (in respects here relevant) in new c.40A, are found in new c.40A, s.6. The first sentence of the fourth paragraph of new s.6, reads in part, "Any increase in area. . .of a zoning. . .by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage..." (emphasis supplied)... this sentence was interpreted in Adamowicz v. Ipswich, 395 Mass. 757, 762-763 (1985), S.C., 772 F.2d 5 (1st Cir. 1985), as providing that the new s.6 looks to the most recent instrument of conveyance prior to the zoning change to establish the meaning of that language. As to the increases in minimum lot size affecting the locus, both occurred prior to the "checkerboarding" conveyances effected by W&J on September 15, 1981. As of the date of each of these lot size increases, all the lots shown on the subdivision plan were still owned by W&J.... The new c.40A, s.6, thus affords each of the plaintiffs no protection from the present zoning by-law lot size requirements.

**NOTICE OF PUBLIC HEARING ON
PROPOSED ZONING AMENDMENTS:**

As you are aware, Chapter 40A, Section 5, MGL, requires that the Department of Community Affairs (EOCD) must be notified as to any public hearing scheduled by the planning board relative to a proposed amendment to the local zoning bylaw or ordinance. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the scheduled hearing by the planning board.

In order to be assured that our records will reflect proper notice, please mail such public hearing notices to the following address:

Donald J. Schmidt
Executive Office of Communities
and Development
100 Cambridge Street - Room 1803
Boston, MA 02202

The Zoning Act also authorizes the Department to grant waivers of notice when a planning board fails to give proper notice to the Department. A waiver of notice can only be granted prior to town meeting or city council action on a proposed zoning change.

Zoning bylaws must be submitted to the Attorney General for approval pursuant to Chapter 40, Section 32, MGL. In the next edition of the Land Use Manager we will review some of the zoning bylaws which were disapproved by the Attorney General during 1989.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition No. 10
December, 1990

L

ZONING BYLAWS ATTORNEY GENERAL'S APPROVAL

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After a town meeting has adopted a zoning proposal, the change must be submitted to the Attorney General for approval as required by Chapter 40, Section 32, MGL. The Attorney General's authority to disapprove a zoning bylaw is limited in that he may only disapprove a bylaw if it violates state procedural or substantive law. If the Attorney General disapproves a zoning bylaw, he must give written notice to the Town Clerk stating the reasons for disapproval.

D

Chapter 40A, Section 5, MGL, provides a specific procedure a municipality must follow when adopting or amending its zoning bylaw. It is important that local officials understand the procedural requirements to avoid having the Attorney General disapprove a by-law due to a procedural defect. Local governments have the power to enact zoning bylaws to regulate land use and every presumption is to be made in favor of the validity of such bylaws. In reviewing the substance of a particular zoning bylaw, the Attorney General may disapprove the bylaw if he finds that the zoning regulation is inconsistent with the constitution or laws of the Commonwealth.

U

Landlaw, Inc. provides professionals with up-to-date information on local land use regulations. Located in Waltham, Landlaw maintains zoning information on all 351 Massachusetts municipalities.

S

E

M A N A G E R

Donald J. Schmidt, Editor
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Recently, Landlaw prepared a report for the Executive Office of Communities and Development (EOCD) summarizing the zoning bylaws which were disapproved by the Attorney General during 1989. Due to the length of the original document, Landlaw prepared a condensed version of the report which we have reproduced in this edition of the Land Use Manager. Some of the mistakes which caused the Attorney General to disapprove a zoning bylaw included the following:

- Planning Board failed to submit a report to town meeting and 21 days had not passed between the date of the Planning Board hearing and town meeting.
- Planning Board public hearing notice only made reference to a public hearing on "proposed amendments" which was determined not to sufficiently identify the subject matter of the public hearing.
- Notice of the Planning Board public hearing did not appear once in each of two successive weeks in the newspaper.
- Planning Board failed to hold a public hearing.
- Public hearing notice was only published 10 days prior to the hearing.
- Zoning proposal failed to obtain the two-third vote requirement.
- Planning Board failed to send public hearing notice to EOCD.
- Planning Board public hearing was held after town meeting vote.
- Planning Board hearing was held more than 6 months before town meeting vote.

Some of the zoning proposals which were disapproved because of substance included the following:

- Zoning proposal changed certain industrial districts to commercial districts where solid waste disposal facilities were not permitted. Prior to this amendment, solid waste disposal facilities were allowed by special permit in the town's industrial zones. This special permit authorization was in effect as of July 1, 1987. The zoning proposal was disapproved because it was inconsistent with G.L. c.40A, s.9, which states, in part, that a town shall not adopt a bylaw prohibiting the siting of a solid waste disposal facility or the expansion of an existing facility on any locus zoned for industrial use unless such prohibition was in effect on or before July 1, 1987.

- Zoning proposal would have prohibited the installation of sewer treatment plants or community subsurface disposal systems by private developers unless such installation was jointly approved by the Planning Board, Board of Health, and Board of Sewer Commissions. The zoning proposal was disapproved because there were no standards to guide the review boards in deciding whether to grant or deny the installation, leaving the boards with unrestrained discretion. A bylaw must contain standards to guide review boards, otherwise a landowner is deprived of any basis on which he might appeal for some determination of the propriety of the conduct of a review board.
- Zoning proposal would have allowed owners of structures in which residential units were illegally created prior to a certain date, to apply for a special permit to legalize the units. The bylaw was disapproved because it purported to delegate to the Board of Appeals power to bring about situations where the regulations and restrictions would not be uniform for each class or kind of building, structure, or land, and for each class or kind of use throughout each district as required by Section 4 of the Zoning Act. It opened the door to discrimination not based upon valid differences. Effectively, the amendment would have authorized spot zoning.
- Zoning proposal would have had the effect of allowing all uses within a particular zone only upon the issuance of a special permit. The bylaw was disapproved as the establishment of an all-special permit zone is inconsistent with the provisions of the Zoning Act.
- Zoning proposal would have prohibited the construction of metal-clad or plastic-clad buildings in a business district. The bylaw was disapproved because it was inconsistent with G.L. c.40A, s.3, which specifies that no zoning bylaw shall regulate or restrict the use of materials or methods of construction of structures regulated by the State Building Code.
- Zoning proposal would have required, in certain business districts, a buffer strip on any lot for multifamily use which abuts a premise used residentially. Premises used residentially in business districts were nonconforming. The bylaw was disapproved because it was inconsistent with the uniformity requirement of Section 4 of the Zoning Act.

**LANDLAW ZONING RESEARCH REPORT
SELECTED 1989 ATTORNEY GENERAL ZONING BY-LAW DISAPPROVALS**

PAGE 1

{TOWN}	ACTED ON	STATUS	TOWN MEETING DATE
	12 JAN 1989	Disapproved	STM 11/14/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
18	Zoning Districts/Boundaries	Extent of RO district along Auburn street changed from 200' from the <u>centerline</u> of the road to 200' from the <u>sideline</u> of the road. Disapproved by the Attorney General because no publication, posting or notification of the public hearing took place.

{TOWN}	ACTED ON	STATUS	TOWN MEETING DATE
	22 AUG 1989	Disapproved	ATM 5/02/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
16	Buffer Area (Greenbelt)	Greenbelt by-law for the town's industrial districts. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing in violation of Section 5 of the Zoning Act.
46	Lot Area (Density Revision)	Increase in the required minimum lot area for apartments. Prior to amendment, 10,000 s/f was required for the first unit and 5,000 s/f for each additional unit, up to 15 units. Beyond 15 units, 3,000 s/f was required. The new rules impose a minimum lot area of 12,500 s/f with 8,000 s/f for additional units. The new requirements are somewhat more stringent for projects within the Residence B district. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing in violation of Section 5 of the Zoning Act.
49	Parking (Substantive Amendments)	Increase in the required parking spaces for multi-family projects from 2 to 3 per unit. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing in violation of Section 5 of the Zoning Act.

{TOWN}	ACTED ON	STATUS	TOWN MEETING DATE
	01 AUG 1989	Disapproved	STM 5/01/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
24	Zoning Districts/Industrial	New provision would have changed the names of the industrial districts to "commercial" districts, added a new definition for "commercial district" and established a new table of uses in an attempt to prohibit the siting of a solid waste disposal facility. Disapproved by the Attorney General as violative of c. 40A, Section 9 because a city or town may not adopt an ordinance or by-law prohibiting the siting of a solid waste disposal facility on any locus zoned for industrial use as of July 1, 1987. Because solid waste disposal facilities were allowed by special permit in the Town's industrial zone as of July 1, 1987, the "prohibition" voted under Article 21 was void.

LANDLAW ZONING RESEARCH REPORT
SELECTED 1989 ATTORNEY GENERAL ZONING BY-LAW DISAPPROVALS

PAGE 2

(TOWN)

	ACTED ON	STATUS	TOWN MEETING DATE
	30 JAN 1989	Disapproved	STM 10/17/88

ARTICLE # CLASSIFICATION

27 Rezoning// Bus > Res

DESCRIPTION

Property on Route 6A from Commercial Low Density to Residential Medium Density. Disapproved by the Attorney General because both the warrant and the legal notice indicated that what was to be considered relative to the described area was a zoning change from Commercial Low Density to Village Business, not Residential Medium Density. Thus, neither the warrant wording requirements of G.L. c. 39, Section 10 nor the public notice requirements of G.L. c. 40A, Section 5 were satisfied.

(TOWN)

	ACTED ON	STATUS	TOWN MEETING DATE
	07 FEB 1989	Disapproved	STM 10/25/88

ARTICLE # CLASSIFICATION

21 Rezoning// Ag > Bus

DESCRIPTION

Property on Route 20 and Old Worcester Road from Agricultural to Community Business. Disapproved by the Attorney General because the Planning Board hearing was only legally noticed once and not "once in each of two successive weeks", as is required by G.L. c. 40A, Section 5. Citing Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971).

(TOWN)

	ACTED ON	STATUS	TOWN MEETING DATE
	22 MAY 1989	Disapproved	STM 9/9/87

ARTICLE # CLASSIFICATION

9 Flood Plain

DESCRIPTION

Adoption of a new Flood Plain district by-law. Disapproved by the Attorney General because the Planning Board hearing to consider this amendment was held over two months AFTER the Town Meeting vote. Chapter 40A, Section 5 contemplates the Planning Board public hearing be held before the Town Meeting vote.

(TOWN)

	ACTED ON	STATUS	TOWN MEETING DATE
	07 DEC 1989	Disapproved	ATM 6/01/89

ARTICLE # CLASSIFICATION

16 Flood Plain

DESCRIPTION

Adoption of a new Flood Plain district. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing to consider the zoning amendment.

LANDLAW ZONING RESEARCH REPORT
SELECTED 1989 ATTORNEY GENERAL ZONING BY-LAW DISAPPROVALS

PAGE 3

{TOWN}	ACTED ON	STATUS	TOWN MEETING DATE
	10 APR 1989	Disapproved	STM 1/23/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
13	Rezoning// Var > Bus	Expansion of the Commercial Industrial district known as the Denison Lumber Mill District to include various parcels on Assessors' map 419. <u>Disapproved</u> by the Attorney General because the warrant indicated that Map 419 - Parcels 8,9,13 & 14 would be rezoned whereas the Town Meeting voted to rezone these parcels <u>and</u> portions of Parcel 7. The portion of Parcel 7 voted to be rezoned contained approximately 40 acres and the balance of the rezoning contained 42.33 acres. The Attorney General found this difference to be significant since the voters reviewing the Town Meeting warrant and map 419 would have had no way of knowing that a 40 acre portion of parcel 7 was to be considered for rezoning. Therefore, the subject matter of the rezoning of part of parcel 7 was not contained in the warrant and could not be validly acted upon at Town Meeting. Citing <u>Nelson v. Belmont</u> , 274 Mass. 35 (1931) and <u>Fish v. Canton</u> , 322 Mass. 219 (1948).

{TOWN}	ACTED ON	STATUS	TOWN MEETING DATE
	14 FEB 1989	Disapproved	ATM 10/17/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
38	Sewage Treatment Plant	By-law provision would have required the installers of Sewage Treatment Plants or Community Subsurface Disposal Systems to secure the joint approval of the Planning Board, Board of Health and Sewer Commissioners. <u>Disapproved</u> by the Attorney General because the proposed amendment was "...devoid of any standards whatsoever to guide the specified boards in deciding whether to grant or withhold such approval." Citing <u>Commonwealth v. Protami</u> , 354 Mass. 210, 211 (1968) and <u>City of Lakewood v. Plain Dealer Publishing Co.</u> , 486 U.S. ___, 108 SC 2138 (1988).

{TOWN}	ACTED ON	STATUS	TOWN MEETING DATE
	17 NOV 1989	Disapproved	STM 6/26/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
5	Design Review	Architectural compatibility standards added to the Granby zoning by-law with respect to projects within the Route 202 commercial corridor. <u>Disapproved</u> by the Attorney General because the first publication of the legal notice of the Planning Board's public hearing occurred 13 days before the hearing. Section 5 of c. 40A requires a 14 day notice.

LANDLAW ZONING RESEARCH REPORT
SELECTED 1989 ATTORNEY GENERAL ZONING BY-LAW DISAPPROVALS

PAGE 4

(TOWN)

ACTED ON

17 NOV 1989

STATUS

Disapproved

TOWN MEETING DATE

STM 6/26/89

ARTICLE # CLASSIFICATION

6 Rezoning// Var > Ag

DESCRIPTION

Rezoning of various parcels throughout Granby to the Agricultural Preservation district. Disapproved by the Attorney General because the first publication of the legal notice of the Planning Board's public hearing occurred 13 days before the hearing. Section 5 of c. 40A requires a 14 day notice.

(TOWN)

ACTED ON

30 AUG 1989

STATUS

Disapproved

TOWN MEETING DATE

ATM 5/01/89

ARTICLE # CLASSIFICATION

17 Building Regulation

DESCRIPTION

By-law amendment would have banned the construction of metal clad or plastic clad buildings in the Business and Industrial district. Disapproved by the Attorney General because Section 3 of c. 40A specifies that "no zoning ordinance or by-law shall regulate or restrict the use of materials or methods of construction of structures regulated by the state building code."

(TOWN)

ACTED ON

14 FEB 1989

STATUS

Disapproved

TOWN MEETING DATE

STM 11/15/88

ARTICLE # CLASSIFICATION

11 Wetland (Limited Project Exception)

DESCRIPTION

Amendment would have prohibited the alteration of driveways of 5,000 s/f or more of combined W district and/or Inland Wetlands. Disapproved by the Attorney General because the legal notice and warrant made reference to a restriction on the length of a driveway crossing wetlands of more than 150' and did not mention the alteration of 5,000 s/f or more of wetland area. The Attorney General found this difference to be substantively significant and determined the public notice requirements of G.L. c. 40A, Section 5, and the warrant wording requirements of G.L. c. 39, Section 10 had therefore not been met. Citing Nelson v. Belmont, 274 Mass. 35 (1931) and Fish v. Canton, 322 Mass. 219 (1948).

**LANDLAW ZONING RESEARCH REPORT
SELECTED 1989 ATTORNEY GENERAL ZONING BY-LAW DISAPPROVALS**

PAGE 5

(TOWN)	ACTED ON	STATUS	TOWN MEETING DATE
	18 SEP 1989	Disapproved	ATM 5/01/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
36	Uses/Inn	Deletion of by-law provisions allowing the rental of no more than 3 rooms in an existing dwelling. <u>Disapproved</u> by the Attorney General because the Town Meeting vote did not meet the two-thirds requirement for zoning by-law amendments set forth in c. 40A, Section 5. This warrant article was subsequently approved by the Attorney General upon reconsideration on November 7, 1989 after the Town Clerk submitted a "corrected" vote count.
38	Uses/Commercial	Proposed amendment would have changed 23 commercial, retail and residential uses formerly allowed by right to specially permitted uses in the Business II district. <u>Disapproved</u> by the Attorney General because the ultimate effect of the amendment would have been that all uses within the zone, with minor exceptions, would have been allowed by special permit only, citing, <u>SCIT, Inc. v. Planning Board of Braintree</u> , 19 Mass. App. Ct. 101, 108 (1984) (Invalidated Braintree zoning by-law requiring a special permit for all uses in the Town's business districts on the grounds that Section 4 of the Zoning Act does not contemplate, once a district is established and uses within it authorized by right, the conferral on local zoning boards of a "roving and virtually unlimited" power to discriminate as to uses between landowners similarly situated.).

(TOWN)	ACTED ON	STATUS	TOWN MEETING DATE
	05 JUL 1989	Disapproved	ATM 4/24/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
29	Buffer Area (Greenbelt)	Amendment would have had the effect of requiring a "buffer strip" on any lot in a Business District on which a multi-family dwelling is placed which abuts premises used residentially. <u>Disapproved</u> by the Attorney General as violative of the district uniformity requirements of c. 40A section 4. Under the provisions of the Medfield zoning law, premises used residentially in a Business-Industrial district are non-conforming. The by-law would have resulted in the unequal treatment of areas within a zone near parcels dedicated to non-conforming uses. Additionally, once a non-conforming residential use is changed to a conforming use, the buffer requirement would be eliminated thereby effectuating the amendment of a zoning restriction without the benefit of a Town Meeting vote, citing <u>SCIT, Inc. v. Planning Board of Braintree</u> , 19 Mass. App. Ct. 101 (1984).

LANDLAW ZONING RESEARCH REPORT
SELECTED 1989 ATTORNEY GENERAL ZONING BY-LAW DISAPPROVALS

PAGE 6

{TOWN}

ACTED ON

STATUS

TOWN MEETING DATE

28 APR 1989

Disapproved

STM 2/27/89

ARTICLE # CLASSIFICATION

8 Rezoning// Bus > Res

DESCRIPTION

Rezoning on Route 47 from Commercial to Rural Residential. Disapproved by the Attorney General because the legal notice for the public hearing did not appear once in each of two successive weeks as required by G.L. 40A, Section 5. Citing Crall v. Leominster, 362 Mass. 95 (1972). Additionally, G.L. c. 40A, Section 5 indicates that "if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until a subsequent public hearing is held with notice and report as provided." The time frame between the hearing and the town meeting action exceeded the six month limitation in this case.

{TOWN}

ACTED ON

STATUS

TOWN MEETING DATE

05 JUL 1989

Disapproved

ATM 5/1/89

ARTICLE # CLASSIFICATION

42 Definition/Frontage

DESCRIPTION

Definition of "frontage." Disapproved by the Attorney General on the grounds that the public hearing to consider this amendment occurred more than 6 months before the date of the Town Meeting in violation of c. 40A, Section 5 (3rd Paragraph).

{TOWN}

ACTED ON

STATUS

TOWN MEETING DATE

30 JUN 1989

Disapproved

STM 4/25/89

ARTICLE # CLASSIFICATION

17 Uses/Antique Stores

DESCRIPTION

By-law would have allowed antique shops to operate in residential districts without the requirement of their being an accessory use to a single family dwelling. Disapproved by the Attorney General because the record of the action taken at Town Meeting did not satisfy the requirement that the two-thirds count be taken and the vote recorded in the records of the clerk, as required by c. 39, Section 15.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Kevin M. Smith, Acting Secretary

Vol. 8, Edition No. 1
July, 1991

L

ZONING ENFORCEMENT STATUTE OF LIMITATIONS

A

Statute of Limitations. A statute prescribing limitations to the right of action on certain described causes of actions; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued. Black's Law Dictionary (Revised, 4th ed., 1968).

D

MGL, Chapter 40A, Section 7, provides two statutes of limitations relative to seeking enforcement action concerning certain zoning violations. In relevant part, Section 7 provides:

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[1]...if real property has been improved and used in accordance with the terms of the original building permit..., no action...to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation..., shall be maintained, unless such action,...is commenced...within six years next after the commencement of the alleged violation of law; [2]...no action,...the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation of the provisions

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M A N A G E R

of..., any ordinance or by-law,...or the conditions of any variance or special permit,... shall be maintained, unless such action,...is commenced ...within ten years next after the commencement of the alleged violation.

The first proviso was inserted into the Zoning Enabling Act by St.1970, c.678, s.1. In order to obtain the protection of this particular proviso, a landowner must show that the property was improved in "accordance with the terms of the original building permit." In Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205 (1982), a landowner contended that the present use of his property was protected by the six-year statute of limitations.

In 1926, the property was operated as a full-service resort hotel whose primary purpose was to provide lodging, meals, and entertainment for overnight guests. With very few structural changes, the hotel was transformed into an entertainment complex. The same space which formerly housed a dining room, reading room, guest rooms, and a lobby now contained seven bars distributed among three distinct clubs. A predominantly middle-aged and older clientele had been displaced by young people who were encouraged to patronize the hotel for its bars and nightlife. The hotel owners claimed that the current use of the hotel was in accordance with certain previously issued building permits.

In 1956, a building permit was issued to enclose an open porch on one corner of the hotel. The application for the permit only stated that the owner proposed to enclose the porch. There was no indication as to the reasons or need for the enclosure. Cape Resort could not produce any evidence on how the porch was used in 1956. The present layout of the ground floor area showed that the porch no longer constituted a distinct space in the hotel but was simply a part of an existing game room. As to this particular building permit, the court found that Cape Resort could not prove that the porch was being "used in accordance" with the original permit authorizing its enclosure. The 1956 permit offered no protection for the current use of the hotel.

However, another building permit was issued to the hotel owner in 1961. In the application for this permit it was noted that the owner proposed to add a 21' x 43' addition to the side of the hotel and remodel a portion of the interior. The plan which accompanied the application for the building permit to build this addition indicated very clearly that the space would include a bar, cocktail

lounge, and entertainment facilities. Since 1961, this area of the hotel had been used for afternoon happy hours and dancing, drinking and evening entertainment. In this instance, the court found that Cape Resort met the requirement that the space be used in accordance with the terms of the original building permit. Even though such activity was illegal in 1961, the action to enjoin that use came after the six-year time period, making such activity in that particular area of the hotel a protected use.

Also discussed in Cape Resort was the meaning of the term "original building permit." It was argued that the term "original building permit" was limited to a permit which authorized the erection of a new and independent building or structure and that alterations of or additions to existing buildings undertaken in accordance with a properly issued building permit would not be afforded the protection of the six-year statute of limitations. The court noted that this interpretation would conflict with the obvious intent of the Legislature to limit the time within which building permits could be attacked as issued in violation of a zoning regulation. The court determined that the term "original building permit" meant the first permit issued with respect to a particular improvement of real property. Furthermore, the court noted that the phrase "use allowed by said permit" was not limited to a new and distinct use but also included the same use which was currently being conducted in an existing structure.

The second proviso, the ten-year statute of limitations, was inserted into the Zoning Act by St.1987, c.481, s.1. Chapter 481 of the Acts of 1987 was entitled "AN ACT FURTHER REGULATING THE ILLEGAL USE OF BUILDINGS OR STRUCTURES." Although the statutory language was silent on the question of use violations, there was some debate among Zoning Enforcement Officers as to whether the intent of the ten-year statute of limitations was to protect use as well as structural violations. This issue was put to rest when the court decided Lord v. Zoning Board of Appeals of Somerset, 30 Mass. App. Ct. 226 (1991).

Lord owned a single-family structure which was located in a single-family residential district. In that particular zoning district, a two-family structure was permitted upon the issuance of a special permit. In 1966, a building permit was issued which authorized an addition to the first floor of the single-family home. The addition consisted of two bedrooms and a living room. At the same time Lord constructed the addition, he also converted a bedroom and living room on the first floor to a kitchen and bathroom. The 1966 building permit made no reference to two-family construction or use. Between 1967 and 1976, Lord did additional work to the single-family structure without obtaining building permits. He added three bedrooms and a living room in the basement which already had a kitchen and a bathroom. After the basement conversion, the house was used as a two-family residence. In 1972, Lord obtained a building permit to construct a two-car garage. The

Town was unaware that the structure was being used as a two-family residence until 1988 when the Building Inspector issued a cease and desist order. Lord applied for a special permit for a two-family residence which was denied by the Zoning Board of Appeals. On appeal, Lord argued that he did not need a special permit as the ten-year statute of limitations protected the use of his house as a two-family residence.

LORD V. ZONING BOARD OF APPEALS OF SOMERSET
30 Mass. App. Ct. 226 (1991)

Excerpts:

Armstrong, J. . . .

The second paragraph of G.L. c.40A, s.7, as amended through St.1987, c.481, s.1, contains two separate limitations periods for actions brought to redress zoning violations: the first, six years, applicable to actions complaining of structural violations or use violations if "real property has been improved and used in accordance with the terms of the original building permit"; the second, ten years, applicable to actions complaining of structural violations for which no permit was given. (The limitations period runs in each case from the commencement of the alleged violation.) In contrast to the six-year limitations period applicable to zoning violations ostensibly authorized by a building permit, which explicitly covers both structural violations and use violations, the ten-year limitations period for zoning violations unsanctioned by a permit covers only structural violations. The omission of protection for use violations not sanctioned by permit is plain on the face of the statute.

The six-year limitations period does not protect the use of the premises as a two-family house.... the record here does not show that the 1966 building permit for the addition contemplated introduction of two-family use. Nor, by 1972, can it be said that a permit for a two-car garage signaled that two families would be using the house.

When the Legislature enacted the six-year statute of limitations, they included a retroactive provision which specified that the six-year time period would apply to any action which arose prior to the effective date of the Act. Evans v. Building Inspector of Peabody, 5 Mass. App. Ct. 805 (1977). The legislation which inserted the ten-year statute of limitations into the Zoning Act did not contain a similar retroactive provision. Does the ten-year statute of limitations reach back and protect structures that violated zoning prior to the effective date of the ten-year period?

As was noted in Cranberry Realty & Mortgage Co. v. Ackerly Communications, Inc., 17 Mass. App. Ct. 255 (1984), "all statutes are prospective in their operation unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. Doubtless, all litigation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions, or causes of action."

The courts have established the general rule that statutes of limitations relate only to remedy, and they control future procedure in reference to previously existing causes of action. Anderson v. Phoenix Investment Counsel of Boston, Inc., 387 Mass. 444 (1982); Cioffi v. Guenther, 374 Mass. 1 (1977). It has also been held that a statute of limitations which forecloses existing causes of action is constitutional if litigants are afforded a reasonable period before the statute's effective date to commence their actions. Mulvey v. Boston, 197 Mass. 178 (1908). In Evans, supra at 806, the court found that the ninety-day grace period before a general law takes effect allows a reasonable time for affected persons to take appropriate action. Although there is no case on point, it would appear that the ten-year statute of limitations would be applicable to structural violations that predated the enactment of the statute.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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Vol. 8, Edition No. 2
August, 1991

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THE SECTION 6 FINDING (Part I)

N

A nonconforming structure or use is a structure or use which was lawfully in existence prior to the enactment of a zoning ordinance or bylaw, and is maintained after the effective date of the ordinance or bylaw, although it does not comply with applicable zoning requirements. For many years in Massachusetts, structures and uses which are inconsistent with the zoning ordinance or bylaw but which predate its adoption or amendment have been exempted from the operation of the new zoning ordinance or bylaw.

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The first statute enabling cities and towns to adopt zoning ordinances or bylaws was St. 1920, c.601 and Section 7 of that statute provided that:

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An ordinance or by-law...shall not apply to existing buildings or structures nor to the existing use of any building, structure or premises, but it shall apply to any alteration of a building or structure to provide for its use for a purpose, or in a manner, substantially different from the use to which it was put before alteration.

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Since 1920, the zoning statute has contained substantially the same language protecting the right to continue a nonconforming use or maintain a nonconforming structure. The rationale behind protecting nonconforming structures or uses can be found in Opinion of the Justices, 234 Mass. 597 (1920), where the court noted that "rights already acquired by existing use or construction of buildings in general ought not to be interfered with."

One of the main purposes of zoning is to stabilize the use of property, and the advantage that owners of nonconforming property acquire by the enactment of a zoning regulation has not been substantially augmented by the courts unless permitted by the zoning ordinance or bylaw. In general, the courts have upheld the right of local communities to prohibit or regulate changes to nonconforming structures or uses.

The relevant section of the General Laws dealing with the issue of nonconforming structures and uses is Chapter 40A, Section 6. The first sentence of Section 6 prescribes the following minimum zoning protections afforded nonconforming structures and uses.

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.

The second sentence of Section 6 provides a method whereby nonconforming structures or uses may be extended, altered or changed if a specific finding is made by the granting authority.

Pre-existing nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood.

This "finding" provision has been the center of much confusion and controversy. To render the statute intelligible, the court, in Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987), was forced to add the words "structure or" so that the concluding portion of this sentence would read "shall not be substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

The "finding" provision has also caused concern at the local level. For example, it does not specify a procedure and the type of permit that must be issued by the finding authority when approving the requested change, extension or alteration. Many cities and towns have attempted to deal with the procedural ambiguities by providing in their zoning ordinances or bylaws a special permit review for applicants wishing to change, extend or alter a nonconforming structure or use. In Shrewsbury Edgemere Associates Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317 (1991), the court considered the question whether a municipality has the authority under the "finding" provision of the Zoning Act to authorize a change, extension or alteration to a nonconforming use by special permit and require a super majority vote of the special permit granting authority. Chapter 40A, Section 9 requires that approval of a special permit requires a unanimous vote of a three member board, four votes of a five member board, and a two-thirds vote of a board with more than five members.

A developer sought to convert a nonconforming drive-in theater to a water amusement park. The zoning bylaw of the town of Shrewsbury required a special permit in order to change, alter, or expand a prior nonconforming use. The bylaw designated the Zoning Board of Appeals as the special permit granting authority for such special permit applications. The developer argued that the Chapter 40A "finding" provision did not authorize the Board of Appeals to make the "finding" by other than a simple majority vote as Section 6 only allows a municipality to choose the special permit granting authority but not the procedure. The court did not agree.

SHREWSBURY EDGEMERE ASSOCIATES V. BOARD OF APPEALS OF SHREWSBURY
409 Mass. 317 (1991)

Excerpts:

Lynch, J. . . .

General Laws c.40A, s.1A, differentiates between the permit granting authority and the special permit granting authority under the zoning by-law, the principal distinction being that the latter is the authority that issues special permits. General Laws c.40A, s.9, requires that approval of an application for a special permit requires four votes of a five-member board. The statute does not require that permit granting authorities always act by super majority. It follows, therefore, that by authorizing the municipality to choose the special permit granting authority, when it does so, that body uses the procedure which defines it. We conclude that G.L. c.40A, s.6, authorizes, but it does not require, a municipality to choose a special permit application as the procedure for extension or alteration of a nonconforming use.

We agree with the board that there is no reason to think the Legislature intended special permits issued for changes in nonconforming uses to be less stringently dispensed than any other type of special permit. Prior to the 1975 amendment, the Zoning Enabling Act allowed a town to forbid any changes in nonconforming uses, and required a unanimous vote by a zoning board of appeals to decide in favor of any application under any zoning ordinance or by-law. . . . As we read the statute, the Legislature has liberalized these rules to permit a town to require the same number of affirmative votes to grant applications for the alteration of a nonconforming use as to grant any other special permit, or to delegate the chore to the permit granting authority which would permit approval by a simple majority.

In Walker v. Board of Appeals of Harwich, 388 Mass. 42 (1983), the Massachusetts Supreme Judicial Court noted that the Section 6 "finding" provision authorizes the granting of special permits for changes in existing structures..." but did not address the question whether municipalities were required to provide a process authorizing changes to nonconforming structures and uses. However, in Sullivan v. Board of Appeals of Harwich,

15 Mass. App. Ct. 286 (1983), the court noted that the power of a municipality to regulate changes in nonconforming uses appeared more clearly under the previous state zoning statutes but suggested that it was quite possible that the Section 6 "finding" provision could be read "as authorizing municipalities to provide extensions or alterations of nonconforming uses by special permit while not requiring them so to provide."

In the next edition of the Land Use Manager, we will continue our look at the Section 6 "finding" provision and focus on the issue as to whether the Section 6 finding process is an optional provision of the Zoning Act.

**AN ACT RELATIVE TO RULES AND REGULATIONS IMPACTING
AGRICULTURAL OPERATIONS**

One of the infamous outside sections of the fiscal year 1991 state budget (see St. 1990, c.150, s.260) added the following section to MGL, Chapter 30A:

Section 18. All state, regional and municipal agencies, boards, commissions, before any rule, regulation, law or other restriction is enacted, shall make public and post in writing whether or not such restrictions will impact on agricultural operations based in the commonwealth. Further, if such rule, regulation, law or other restriction is determined to have a potential impact on agriculture, the responsible agency in consultation with the department of food and agriculture, shall conduct an impact assessment to determine the extent of such impact, including, but not limited to: the effect on future land use and related environmental impacts, including costs and submit to the joint committees on natural resources and agriculture and to the house and senate committee on ways and means a copy of their findings forty-five days prior to promulgation.

Although this legislation was most likely directed towards state agencies, local municipal boards must comply with the new law. Before a local board adopts a regulation, it must post the regulation and note whether or not such regulation will have an impact on agricultural operations. The Department of Food and Agriculture has not prepared any guidelines to assist communities in determining what is meant by the term "impact on agricultural operations." The Legislature did not allocate any funds to the Department to pay for the cost of conducting any impact assessment. Failure to provide the necessary funding raises the question whether the new law is in conflict with the local mandate statute, MGL, c.29, s.27c. Until further clarification, the onus should be on the local agricultural community to make the claim that the proposed regulation requires the preparation of an impact assessment.



Commonwealth of Massachusetts
Executive Office of Environmental Affairs

Department of Environmental Protection

William F. Weld
Governor

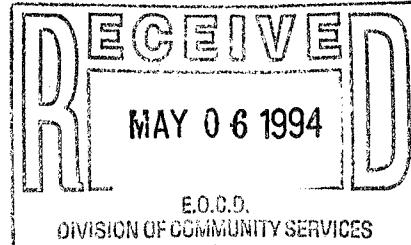
Trudy Coxe
Secretary, EOEA

Thomas B. Powers
Acting Commissioner

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MAY 2 1994

BERKSHIRE COUNTY
REGIONAL PLANNING COMMISSION



April 27, 1994

Paul Boudreau
Berkshire County
Regional Planning Commission
10 Fenn Street
Pittsfield, MA 01201

Re: Status of M.G.L. c. 30A, §18 (1990) re: Public Notice of Rules and Regulations
Impacting Agricultural Operations

Dear Paul,

You recently contacted this office regarding the above-referenced statute. I have contacted our legal department and have been informed that, although published in the annotated version of the Massachusetts General Laws, this statute does not have the effect of law.

In the opinion of the DEP legal department, this statute does not have the effect of law because, after its passage in 1990, this bill was returned to the legislature by the Governor for amendment pursuant to Article 56 of the Amendments to the Massachusetts Constitution. The Attorney General has interpreted Article 56 to require re-enactment by the legislature after a bill has been returned to it by the Governor for amendment.

Chapter 30A, §18 was not reenacted by the legislature after it was returned for amendment by the Governor and, thus, does not have the effect of law.

Thank you for referring this question to this office. Please call if you have additional questions. I can be reached at (617) 556-1106.

Sincerely,

Joan W. Pierce
Joan W. Pierce
Planner, DWS/Boston



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF FOOD AND AGRICULTURE
100 CAMBRIDGE ST., BOSTON, MA 02202 617-727-3000 FAX 727-7235

WILLIAM F. WELD
Governor

TRUDY COXE
Secretary

ARGEO PAUL CELLUCCI
Lt. Governor

JONATHAN L. HEALY
Commissioner

GUIDELINES FOR COMPLYING WITH M.G.L.
C. 30A, § 18: AGRICULTURAL IMPACT ASSESSMENT

These guidelines have been prepared by the Department of Food and Agriculture in order to assist state, regional and municipal authorities in their completion of the agricultural impact assessment required by M.G.L. c. 30A, section 18. The Department will work with each entity in order to ensure that the impact assessment is reviewed and completed in a timely manner.

A. Definitions

1. Agriculture: the raising of animals, including but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals, for the purpose of selling such animals or a product derived from such animals in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market, and also horticultural uses, including but not limited to, the raising of fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flowers, sod, trees, nursery, or greenhouse products, and ornamental plants and shrubs for the purpose of selling such products in the regular course of business; or when primarily and directly used in raising forest products under a program certified by the state forester to be a planned program to improve the quantity and quality of a continuous crop for the purpose of selling such products in the regular course of business.
2. Responsible agency: the state, regional, and municipal agency, board, or commission that is responsible for the enactment of the proposed rule, regulation, law and other restriction.

B. Applicability of M.G.L. c. 30A, § 18

1. The statute applies any time that a responsible agency proposes any new rule.

2. The responsible agency must determine, before enactment of the rule, whether or not the proposed rule will impact (negatively or positively) any agricultural operation within the commonwealth.

In making this determination the responsible agency must identify any agricultural operations which are potentially directly or indirectly impacted by the scope of the proposed rule, whether or not the rule was intended to effect agricultural operations.

The Department will, upon receipt of the necessary information, provide an opinion to the responsible agency as to whether or not the proposed rule will impact agricultural operations within the commonwealth.

3. This determination must be posted in writing before the adoption of the rule, and if the determination is made that the rule will impact agriculture within the commonwealth, an Agricultural Impact Assessment, ("Assessment"), must be completed prior to the adoption of the proposed rule.

C. Content of the Agricultural Impact Statement

If the results of the preliminary review demonstrate that the proposed rule, regulation, law or other restriction may have a potential impact on agricultural operations in the Commonwealth, an Assessment must be completed by the responsible agency, in consultation with the Department of Food & Agriculture (the "Department").

The Assessment prepared by the responsible agency, in consultation with the Department must contain the following information:

1. a copy of the proposed rule;
2. a description of the intended purpose of the rule;
3. a statement describing the manner in which the rule accomplishes the purpose, and why this rule was selected over alternative rules;
4. a statement as to whether or not the rule is targeted towards agricultural activities, or incidentally effects these activities;
5. a description of the impacted land area, with a clearly legible 1:25,000 topographic base map, where appropriate;
6. a detailed description of the agricultural operations which will be impacted, including the number of operations and the type of farming impacted, and total agricultural acres impacted;

7. a description of the potential direct and indirect impacts of the proposed rule, regulation, law or other restriction may have on the following:
 - (a) the future land and related environmental impacts of the directly affected area as well as future land and related environmental impacts on land in the Commonwealth as a whole, where applicable;
 - (b) agricultural operations located in the targeted area;
 - (c) agricultural operations in surrounding areas and in the remainder of the Commonwealth;
 - (d) the farmers ability to utilize his existing soil resources;
 - (e) the farmers ability to utilize existing water resources;
 - (f) the farmers ability to continue raising the existing agricultural commodity at current levels, or to change commodities, how will the responsible agency assist in these areas;
 - (g) the farmers ability to operate all farm machinery;
 - (h) the farmers ability to allow secondary uses on the farm including recreation;
 - (i) the ability of the farmer to market their product
8. the costs to agricultural operations, including those both directly and indirectly affected by the proposed rule;
9. the potential for recovering or mitigating the costs.
10. An analysis of all alternatives to the proposed rule, which might impact agricultural operations in a reduced manner while accomplishing the goals of the proposal.
11. State the statutory and/or local authority for the enactment of the proposed rule, and its relationship with G.L. c. 40A and G.L. 111 section 125A.

All information provided must be verified by substantial evidence and submitted with the Assessment.

The Department suggests that, in order to assist the responsible agency in preparing the Assessment, an advisory group is convened to review the proposed rule. This advisory group should be comprised of members of the agricultural community as well as other appropriate persons. Where feasible, a Department staff person

will be available to participate as a member of this advisory group.

D. The Agricultural Impact Board

An Agricultural Impact Review Board ("Board") may be formed to assist the Department with its review of all Agricultural Impact Statements. The Department will present its comments on completed Assessments to the Board and will incorporate the Board's comments into its summary review for presentation to the responsible agency. The Department will ask for representatives from the following organizations to participate on the Board: two farmers from differing agricultural areas, DEP; USDA SCS, conservation district, Massachusetts Farm Bureau, Food and Agriculture Board.

E. Timeline for Review Process

The Department will make every effort to work with the responsible agency to complete the Assessment in a reasonable period of time. The Department will assist the responsible agency in obtaining accurate information in its assessment, but it is the agency's responsibility for compiling the Assessment. In order to assist in its review of the submitted Assessment, the Department may contact various members of the agricultural community knowledgeable in specific areas. The Board will meet on a quarterly basis, in order to review the cumulative impacts of the Assessments prepared in that quarter.

The Department and Board shall complete their review of the draft Assessment within sixty days from the date of receipt of the completed draft Assessment, and shall return the draft Assessment, with comments, to the responsible agency.

F. Submission to the Joint Committee

The statute requires that the final Assessment be submitted to the joint committees on natural resources and agriculture and to the house and senate committee on ways and means at least forty five days prior to promulgation.

June, 1994

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

Vol. 8, Edition No. 3
September, 1991

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THE SECTION 6 FINDING (Part II)

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In the last edition of the Land Use Manager, we reviewed Shrewsbury Edgemere Associates Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317 (1991), where the court considered the question whether the Section 6 "finding" provision of the Zoning Act authorizes a community to allow a change, extension or alteration to a nonconforming use by special permit and requires a super majority vote of the special permit granting authority. In this edition of the Land Use Manager, we continue our look at the Section 6 "finding" provision. Is this an optional provision of the Zoning Act or are communities required to provide for such a process in their zoning ordinances or bylaws?

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Lower courts have had conflicting views on whether the Section 6 "finding" provision is a mandatory requirement. In Merna v. Long Point Marine, Inc., (Plymouth) C.A. No. 80-12466, 1982, the Superior Court found that a bylaw which limits the expansion of change of a nonconforming use to ten percent was inconsistent with the "finding" provision of the state statute. Also in Public Storage Inc. v. Defelice, (Suffolk) Misc. Case No. 116831, 1989, the Land Court noted that the Zoning Act provides that a party is entitled to change from one nonconforming use to

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another if the permit granting authority makes a finding that the new use would not be substantially more detrimental than the prior nonconforming use. On the other hand, in Johnson v. Moran, (Middlesex) Misc. Case No. 122425, 1987, the Land Court found that the Zoning Act is an enabling act which establishes minimum standards and does not prevent the legislative body from establishing additional criteria and in Blasco v. Board of Appeals of the Town of Winchendon, (Worcester) Misc. Case No. 131799, 1989, the court held that the Zoning Act does not require a municipality to allow a change to a nonconforming use upon a finding that such change will not be substantially more detrimental than the existing use to the neighborhood.

The Winchendon case was appealed. In Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991), the Massachusetts Appeals Court decided that the Zoning Act, by itself, does not entitle a landowner to make a change to a nonconforming use if the local review board makes the necessary finding. Mabardy Washed Sand and Gravel operated a nonconforming gravel pit in the town of Winchendon. Mabardy applied to the Zoning Board of Appeals for a special permit to change its nonconforming use from a gravel operation to a demolition landfill. The Zoning Board of Appeals determined that the proposed use would not be more detrimental to the neighborhood than the existing gravel operation, and granted the special permit. On appeal, the court reviewed the zoning bylaw and found that the bylaw authorized an alteration of a nonconforming use of a building or structure but did not authorize the Zoning Board of Appeals to grant a special permit to allow a change to a nonconforming use of land. Since the bylaw did not permit a change to a nonconforming use, the court considered the question whether the Zoning Act mandates that communities must allow such a change after the proper finding by the appropriate municipal body.

BLASCO V. BOARD OF APPEALS OF WINCHENDON
31 Mass. App. Ct. 32 (1991)

Excerpts:

Fine, J. ...

The first two sentences of G.L. c.40A, s.6, as inserted by St. 1975, c.808, s.3, have been described as "difficult and infelicitous."...

The language suggests, on the one hand, that local zoning by-laws govern the extent to which there may be changes in nonconforming uses and, on the other, that changes in nonconforming uses may be made by a property owner so long as the appropriate municipal

body makes the required finding. The two sentences are either contradictory to each other, or the second sentence provides for an exception to the rule stated in the first sentence. Such an exception, however, would swallow the rule. ... We conclude that, with respect to the question before us, the language is ambiguous. We proceed, therefore, to consider the legislative history of G.L. c.40A, s.6, and the policies relating to nonconforming uses likely to have affected the legislative intent.

The legislative history suggests an intent to allow local zoning authorities, through their by-laws, to regulate and even prohibit changes in nonconforming uses. "Prior to the 1975 amendment, the Zoning Enabling Act allowed a town to forbid any changes in nonconforming uses, and required a unanimous vote by a zoning board of appeals to decide in favor of any application under any zoning ordinance or by-law. ... In the Shrewsbury case, the issue was the number of votes required by G.L. c.40A, s.6, to approve a change in nonconforming use. ... The court's comment, at 322, that, in enacting G.L. c.40A, s.6, the Legislature "liberalized" the rules relating to changes in nonconforming uses must be read as relating specifically to the relaxation of the earlier requirement of a unanimous vote to allow such a change.

The court had occasion in the Shrewsbury decision to refer to the legislative history of G.L. c.40A, s.6, as follows: "The 1975 revision of the Zoning Enabling Act, St. 1975, c.808, s.3, resulted from a report to the Legislature by the Department of Community Affairs, which recommended a number of changes. See 1972 House Doc. No. 5009, Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act (report)." Id. at 320. We refer, therefore, to that report. In discussing changes in nonconforming uses, the report notes, at 39, the unanimity of authoritative opinion that "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases" and the consequent legislative prohibition or regulation of, among other things, changes of use. The report then points out, at 43-44, that strict enforcement of rules prohibiting changes may, in certain situations, have a detrimental effect on a community. ... To meet that concern, the report, at 44, recommends "that the enabling act explicitly recognize the validity of regulations which authorize such a change of use upon application to the board of appeals, after a showing that the proposed change of use will be less detrimental to

the neighborhood than the existing use"...the recommendation, contained in the report on which G.L. c.40A, s.6, was based, was clearly directed towards the kind of local regulations which should be recognized and not what right a property owner might have with respect to the use of his property.

Earlier drafts of G.L. c.40A, s.6, contained language similar to that now in the second sentence of s.6, but in a provision included in the first sentence rather than in a separate sentence. ... Those drafts more clearly indicated a legislative intent to allow local regulation, or even prohibition, of changes in nonconforming uses. One might speculate that the change to the present form, with two separate sentences, was made carelessly and at the last minute to avoid the long and cumbersome first sentence in the earlier drafts. ... In any event, there is no indication in any report of which we are aware that the Legislature intended at the last minute either to bestow vastly expanded rights on owners of property with nonconforming uses or to take away rights historically residing with the local zoning authorities.

Moreover, whatever harshness might result from a particular town by-law's strict regulations of changes in nonconforming uses is justified by policy considerations which generally favor their eventual elimination. ... If the law were such that any property owner had the right to change a nonconforming use to any other use so long as the new use was not substantially more detrimental to the neighborhood, nonconforming uses would tend to exist in perpetuity, and any comprehensive municipal plan for regulating uses in particular districts would never fully take effect. Further, the interpretation of G.L. c.40A, s.6, advanced by Mabardy would tend to detract from another principle underlying the Zoning Enabling Act, that of allowing the maximum scope for local self-determination. ...

Based on both the legislative history of G.L. c.40A, s.6, and the policies underlying it, we resolve the ambiguity in the statute by recognizing the continuing right of a municipality through its zoning by-law to regulate or forbid changes in nonconforming uses. Winchendon's by-law does not permit the change proposed by Mabardy. Winchendon is free to amend its by-law to allow such changes. Should Winchendon so amend its by-law, any change authorized by it may take effect so long as the finding required by s.6 is made.

The first sentence of Section 6 describes the minimum protection afforded structures and uses from the enactment of new zoning regulations. A zoning amendment will not apply to:

1. a structure or use which was lawfully in existence or lawfully begun,
2. any alteration, reconstruction, extension or structural change to a single or two-family residential structure which does not increase the nonconforming nature of the structure, or
3. any alteration to a nonconforming structure which would not permit the use of the structure for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.

A zoning amendment will apply to:

1. any change or substantial extension of a nonconforming use,
2. any reconstruction, extension or structural change to a nonconforming structure, and
3. any alteration to a nonconforming structure which would permit the use of the structure for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.

The extent that nonconforming structures or uses may be extended, altered or changed is left to the discretion of the local legislative body. The second sentence of Section 6 does not require that communities authorize the extension, alteration or change of nonconforming structures or uses after there is a finding that the extension, alteration or change will not be substantially more detrimental to the neighborhood than the existing nonconformity.

In the next edition of the Land Use Manager, we will take a closer look at the issue of when a zoning ordinance or bylaw will apply to an alteration to a nonconforming structure.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor

Mary L. Padula, Secretary

Vol. 8, Edition No. 4
November, 1991

L

REGULATING NONCONFORMING STRUCTURES

A

MGL, Chapter 40A, Section 6 prescribes the minimum zoning protections afforded to nonconforming uses, structures and the existing use of any nonconforming structure. A nonconforming structure may be altered provided the alteration would not permit the use of the structure for a substantially different purpose or for the same purpose in a substantially different manner. In relevant part, the first sentence of Section 6 provides that:

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...a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence... but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of... public hearing [on such ordinance or bylaw], to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner...

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In Nichols v. Board of Zoning Appeal of Cambridge, 26 Mass. App. Ct. 631 (1988), the court determined that Section 6 requires that any alteration to a nonconforming structure which will provide for a different use must comply with the provisions of the zoning ordinance or bylaw.

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Nichols wished to convert his garage so that he could use it as a home architect's office which was a permitted accessory use in a residential district. The garage did not meet the sideline requirements of the zoning ordinance but was a preexisting nonconforming structure. Nichols obtained a building permit from the Building Inspector and renovated his garage. The improvements made by Nichols did not change the footprint of the garage. More than a year after the garage had been converted into a home office, another Building Inspector notified Nichols that the renovations violated the zoning ordinance and that such renovations required a special permit. Nichols appealed to the Zoning Board of Appeals and the Board of Appeals upheld the Building Inspector's determination.

The provisions of the Cambridge Zoning Ordinance were similar to the statutory provisions of Section 6 governing nonconforming uses and structures. In relevant part, the zoning ordinance provided:

Section 8.11 This ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or structure or of land...but it shall apply to any change or use thereof and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent.

The ordinance regulated alterations to nonconforming structures and changes to nonconforming uses in the following manner:

Section 8.21 Any nonconforming structure or use which existed at the time of the first notice of public hearing by the Planning Board of the applicable provisions of this or any prior ordinance or any amendment thereto may be continued or changed to be conforming, but when so changed to be conforming it shall not be made nonconforming again.

Section 8.22 In a Residence district the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure (but not the alteration or enlargement of a nonconforming use)...

The question before the court was whether the first sentence of Section 6 and the Cambridge Zoning Ordinance allowed as a matter of right an alteration of a nonconforming structure to accommodate a change from a permitted use to another permitted use.

NICHOLS V. BOARD OF ZONING APPEAL OF CAMBRIDGE
26 Mass. App. Ct. 631 (1988)

Excerpts

Dreben, J. . . .

We turn to the governing statute and ordinance,...General Laws, c.40A, s. 6, "prescribes the minimum of tolerance that must be accorded to nonconforming uses, existing buildings and structures, and the existing use of any building or structure..."...Briefly stated, the ordinance provides that it applies to the three situations of nonconformity permitted by the statute; (1) a change of use; (2) an alteration of a nonconforming building amounting to a "reconstruction, extension or structural change"; and (3) "any alteration of a [nonconforming] building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration."

The plaintiffs would have us construe the ordinance as only requiring a special permit when there is an alteration to a building to accommodate a change from a nonconforming use to another nonconforming use. Neither the statute nor the ordinance is so limited. As indicated above, the ordinance applies in three nonconforming situations. The first is when there is any change in a nonconforming use. Section 8.21... makes clear that a change to a permitted use may be effected without seeking a special permit. A fortiori, if no alterations are made, a change from a permitted use to another permitted use need not be presented to the board of zoning appeal. The change in use referred to in s. 8.11 applies only when the use, although changed, is still nonconforming.

When, however, a nonconforming structure is altered to provide for a use different from the use prior to alteration (situation three), the ordinance applies even if the new use is a permitted one. Beginning with St. 1920, c.601, s. 7, with only minor changes in language, the zoning statute applies to "any alteration of a building to provide for its use for a purpose, or in a manner, substantially different from the use to which it was put before the alteration." See Opinion of Justices, 234 Mass. 597, 603 (1920). If the plaintiffs' construction were accepted, the third portion (in our numbering) of the ordinance (and the zoning statute) would be wholly superfluous as changes from one nonconforming use to another are already covered by the first portion.

Although the provisions of the Cambridge Zoning Ordinance required that Nichols obtain a special permit, the court strongly suggested that the special permit application could be favorably acted upon by the Board. The court noted that:

...when the board considers the application for a special permit it will doubtless consider the following matters favoring its grant. The footprint of the building has not changed, and there has been no increase in its nonconformity. As the judge intimated, the appearance of the garage has improved. Moreover, while the city is not estopped by the action of the first zoning inspector, the board, in considering whether to a grant permit in these circumstances, may take into account the good faith reliance of the plaintiffs on the actions of the city's officials.

Under the provisions of Section 6 of the Zoning Act, an alteration to a nonconforming structure is permissible if the alteration does not permit the use of the structure for a substantially different manner or to a substantially greater extent. Since the alterations in Nichols permitted a change in use, such alterations were not permitted by the Zoning Act and therefore were subject to the special permit provisions of the Cambridge Zoning Ordinance.

The Massachusetts Supreme Judicial Court, in Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991), narrowly interpreted the provisions of the first paragraph of Section 6. The Rockwood court further recognized the right of a municipality to regulate or forbid changes to nonconforming structures. Snow Inn was a nonconforming structure because it did not comply with the setback requirements of the Harwich Zoning Bylaw. Snow Inn Corporation proposed a project which would have increased building lot coverage from 64,740 square feet to 85,865 square feet. The Zoning Board of Appeals granted a special permit authorizing the changes proposed by Snow Inn Corporation. Rockwood, an abutter, appealed the Zoning Board's decision.

The Harwich Zoning Bylaw contained a maximum lot coverage provision restricting building coverage to no more than fifteen percent of the lot. The proposed changes and extensions resulted in the Inn exceeding the zoning bylaw's lot coverage requirement. The Harwich Zoning Bylaw mirrored the Section 6 finding provision and authorized the Zoning Board of Appeals to grant a special permit allowing a change to a nonconforming structure provided such change would not be substantially more detrimental to the neighborhood than the existing nonconforming structure. At issue before the court was whether the Zoning Act or the Harwich Zoning Bylaw authorized the issuance of the special permit when the proposed change would violate existing zoning requirements.

ROCKWOOD V. THE SNOW INN CORP.

409 Mass. 361 (1991)

Excerpts:

O'Connor, J. . . .

We conclude, apparently different from the trial judge, that the first sentence of the quoted portion of s. 6 requires that, in the absence of a variance, any extension or structural change of a nonconforming structure must comply with the applicable zoning ordinance or by-law. Then, if the proposed extension or change conforms to the by-law, the second quoted statutory sentence requires for project approval a finding that the extension or change will not be substantially more detrimental to the neighborhood than the existing nonconforming structures. If the first and second sentences are read together, the statute permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or by-law, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures.

If we were not to construe G.L. c.40A, s. 6, in that way, the provision in the first quoted sentence that a zoning ordinance or by-law "shall apply...to any reconstruction, extension or structural change of [a protected nonconforming structure]" would be meaningless surplusage. Indeed, even as to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that "would intensify the existing nonconformities or result in additional ones." Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 22 (1987).

Section X (J) of the Harwich zoning by-law tracks the second sentence quoted from G.L. c.40A, s. 6. Section X (J) provides: "Pre-existing non-conforming structures or uses may be changed, extended or altered on special permit from the Board of Appeals, provided that no such change, extension or alteration shall be permitted unless there is a finding by the Board that such change, extension or alteration shall not be substantially more detrimental to the neighborhood than the existing non-conforming use." Section X (J) is applicable under G.L. c.40A, s. 6, but, contrary to the trial judge's apparent understanding, we do not understand Section X (J) to mean that the board's finding that the project will not be substantially more detrimental to the neighborhood than the existing nonconforming structure entitles the developer to make structural extensions or changes that would cause lot coverage or other by-law provisions to be violated.

In Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991), the court determined that the second sentence of Section 6 does not require that communities authorize the extension, alteration or change of a nonconforming structure or use after a finding that the extension, alteration or change will not be substantially more detrimental to the neighborhood than the existing nonconformity. This is a significant decision by the court. By deciding that the Section 6 finding is an optional provision of the Zoning Act, the court has recognized the authority of a community to regulate or forbid extensions, alterations or changes to nonconforming structures.

Many communities rather than establishing their own regulations or special permit requirements, have inserted in their zoning ordinances and bylaws the Section 6 finding provision of the Zoning Act. If a zoning ordinance or bylaw mirrors or refers to the Section 6 finding, then according to Rockwood, no extension, alteration or change to a nonconforming structure is permissible unless:

- (1) the extension, alteration or change meets the requirements of the zoning ordinance or bylaw and,
- (2) the extension, alteration or change is found by the appropriate review board not to be substantially more detrimental to the neighborhood than the preexisting nonconforming structure.

Any extension, alteration or change which does not conform to the provisions of the zoning ordinance or bylaw will require a variance from the Zoning Board of Appeals. If a zoning ordinance or bylaw remains silent and does not specifically authorize an extension, alteration or change to a nonconforming structure, a variance must also be obtained from the Zoning Board of Appeals before a building permit can be issued.

Planners and Planning Boards should review the nonconforming use and structure provisions of their local zoning ordinance or bylaw. Municipal officials may find that their local zoning ordinance or bylaw severely limits the ability of a landowner to make any extension, alteration or change to a nonconforming structure. Rather than requiring landowners to seek a variance before they extend, alter or change a nonconforming structure, communities may want to consider amending their zoning regulations to provide alternatives to the variance process.

On the following page is a chart outlining the protections afforded nonconforming uses and structures as provided by the first paragraph of MGL, Chapter 40A, Section 6. This chart is intended only as a guide and should not be used as a substitute for your reading of Section 6.

In the next issue of the Land Use Manager, we will review the special protection afforded single and two-family nonconforming structures.

**APPLICATION OF ZONING TO LAWFUL NONCONFORMING USES OR STRUCTURES
AS PROVIDED BY CHAPTER 40A, SECTION 6.**

Protected Extensions and Alterations	Unprotected Changes, Extensions or Alterations	Unauthorized Reconstruction
<ul style="list-style-type: none"> 1. Unsubstantial extension of a use. 2. Alteration of a structure to provide a use not substantially different in purpose from the existing use. 3. Alteration of a structure to provide the same use in a manner which is not substantially different or to a substantially greater extent than the existing use. 4. Alteration, extension, reconstruction or structural change to a single or two-family residential structure if the nonconforming nature of the structure is not increased. 	<ul style="list-style-type: none"> 1. Any change of a use. 2. Substantial extension of a use. 3. Any extension of a structure except single and two-family residential structures. 4. Any structural change to a structure except single and two-family residential structure. 5. Any alteration of a structure to provide a use which is different in purpose from the existing use. 6. Any alteration of a structure to provide the same use but in a substantially different manner or to a substantially greater extent than the existing use. 	<ul style="list-style-type: none"> 1. Any reconstruction of a structure except single and two-family residential structures.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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THE SINGLE AND TWO-FAMILY PROTECTION (Part I)

In the last edition of the Land Use Manager, we explored the limited protection afforded nonconforming structures as provided in the first paragraph of MGL, Chapter 40A, Section 6. Any reconstruction, extension or structural change to a nonconforming structure must comply with the provisions of the zoning ordinance or bylaw. An alteration to a nonconforming structure is permissible under the Zoning Act provided the alteration would not permit the use of the structure for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.

The extent that nonconforming structures may be reconstructed, extended or changed is left to the discretion of the local legislative body. As was determined in Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991), the second sentence of MGL, Chapter 40A, Section 6 does not require that communities authorize the extension, alteration or change of a nonconforming structure after there is a finding that the extension, alteration or change will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

The Zoning Act provides a special protection for nonconforming single or two-family structures. The first paragraph of MGL, Chapter 40A, section 6 provides:

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...a zoning ordinance or by-law shall not apply... to any...alteration, reconstruction, extension or structural change to a single or two-family residential structure [which] does not increase the nonconforming nature of said structure.

Any alteration, reconstruction, extension or structural change to a nonconforming single or two-family structure which does not increase the nonconforming nature of the structure is permitted by the Zoning Act. Although the statute is not crystal clear, it appears that such changes to a single or two-family structure are permitted as a matter of right upon a determination by the zoning enforcement officer that the proposed change will not increase the nonconforming nature of the structure. The first case which looked at the process for determining whether a proposed change to a single-family structure would increase the nonconforming nature was Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985).

The Fitzsimonds owned a summer home in Chatham. The home was originally one of ten similar structures of what was known as a "cottage colony." At one time, the colony was owned by one person who rented the cottages for summer occupancy. The colony was condominiumized and the Fitzsimonds purchased one of the single-family units. At a later date, the town of Chatham amended its zoning bylaw regulating the conversion of cottage colonies to condominiums by requiring that each condominium unit be located on a lot having a minimum lot area of 15,000 square feet. Due to the zoning bylaw amendment, the Fitzsimonds single-family home became a nonconforming structure.

The Fitzsimonds applied for a building permit to add a second story to their home. The Building Inspector granted the building permit. Two months later, the Building Inspector issued a stop-work order and informed the Fitzsimonds that they must obtain a special permit from the Zoning Board of Appeals. The Fitzsimonds applied for a special permit which was denied by the Board of Appeals. On appeal, the court reviewed the statutory framework which authorizes the alteration, reconstruction, extension and structural change of a single or two-family nonconforming structure.

FITZSIMONDS V. BOARD OF APPEALS OF CHATHAM
21 Mass. App. Ct. 53 (1985)

Excerpts:

Kaplan, J. ...

The relevant provisions of the Zoning Act are the first two sentences of G.L. c.40A, s.6,...These are as difficult and infelicitous as other language of the act recently reviewed, but we think it is possible to say the following. An

alteration, reconstruction, extension, or structural change of a nonconforming single-family or two-family residential structure is legitimated under the second "except" clause of the first sentence if it "does not increase the nonconforming nature of said structure"; otherwise (as occurs in certain events in regard to changes of other structures referred to in the language preceding the "except" clause), it must be submitted to the special permit procedure of the second sentence for a determination by the board of the question whether it is "substantially more detrimental than the existing nonconforming use to the neighborhood."

There can be argument that the present case does not fit the "except" clause at all because, for purposes of that text, the structure is still a cottage, or at least not a single-family structure, which ordinarily assumes ownership of some verge of land, with definite bounds, beyond the footprint, and also assumes (though more doubtfully) a right to occupancy year-round. From another angle there can be argument that, if the plaintiffs intended to insist that their alteration was within the "except" clause, they must refrain from applying for a special permit, and await or undertake independent litigation. However, we think it right to proceed on the basis that the plaintiffs' house is a single-family structure in relation to the "except" clause, and that the plaintiffs' application to the board may (and as a matter of procedural economy should) combine a contention that the alteration is validated by the "except" clause with a request failing that contention) that the board grant a special permit after considering "detrimental" effect.

When reviewing the Fitzsimond's petition, the Zoning Board of Appeals went immediately to the issue of whether the proposed addition would be substantially more detrimental to the neighborhood. On remand, the court directed the Board to first consider whether the addition would increase the nonconforming nature of the structure. If the answer to that question was no, presumably the Fitzsimonds would be entitled to a building permit. If the answer to that question was yes, then the Board would have to determine by way of the Section 6 finding process (See Land Use Manager, Vol.8, Edition No. 2, Edition No. 3) whether the proposed addition would be substantially more detrimental to the neighborhood than the existing structure.

The Massachusetts Appeals Court would again deal with a change to a nonconforming single-family structure in Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987). Willard had purchased a single-family home in the town of Orleans. The house had been constructed at a time when there was no minimum setback requirement. At a later date, the Town enacted a twenty-five foot setback requirement. Willard applied for a building permit to construct an addition to his house which would be located partly within the twenty-five foot setback. The Building Inspector denied the application. Willard appealed that decision to the Board of Appeals and also applied to the Board for a special permit to allow the construction of the addition. The Orleans Zoning Bylaw mirrored the finding provision of the Zoning Act by authorizing the Board of Appeals to allow, by special permit, a change to a nonconforming structure upon finding that the change will not be substantially more detrimental to the neighborhood. The Board upheld the decision of the Building Inspector and denied the application for the special permit.

The Board found that the addition proposed by Willard would increase the nonconforming nature of the structure. That particular finding was not suspect because there was evidence presented in the Superior Court from which it could be found that at least one portion of the addition would protrude beyond the footprint of the existing structure. However, when considering whether the proposed change would represent a detriment to the neighborhood, there was some question whether the Board conducted their special permit review pursuant to the finding section of the bylaw or pursuant to the section of the bylaw which contains the general special permit criteria. The Court expressed concern that the Board may have proceeded under the general special permit provisions of the bylaw, so they remanded for further review.

WILLARD V. BOARD OF APPEALS OF ORLEANS
25 Mass. App. Ct. 15 (1987)

Excerpts:

Grant, J. ...

The first paragraph of G.L. c.40A, s.6, contains an obscurity of the type which has come to be recognized as one of the hallmarks of the chapter. ...The first "except" clause of the statute is concerned with the application of zoning ordinances and by-laws to nonconforming "structures or uses," to any change in or substantial extension of such a "use", and to the alteration of such a "structure."

The second "except" clause deals with the alteration, reconstruction, extension or structural change "to [sic] a single or two-family residential structure [which] does not increase the nonconforming nature of [the] structure."...

...As pointed out in *Fitzsimonds v. Board of Appeals of Chatham*, the second "except" clause of the first paragraph of c.40A, s.6, requires a board of appeals in a case such as this one to make an initial determination whether a proposed alteration of or addition to a nonconforming structure would "increase the nonconforming nature of said structure"...This part of the statute is not concerned with the use of the structure or of the land on which it is located. We think the quoted language should be read as requiring a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit under the second "except" clause of G.L. c.40A, s.6, and any implementing by-law. Only if the answer to that question is in the affirmative will there by any occasion for consideration of the additional question in the *Fitzsimonds* case. ...

In the next edition of the Land Use Manager, we will continue our review of the single and two-family zoning protection.

LAND COURT REVIEWS PERIMETER PLAN ISSUE

In a recent case, Costello v. Planning Board of Westport, (Bristol) Misc. Case No. 152765, a Land Court Judge decided that perimeter plans are entitled to an ANR endorsement. In her opinion, Judge Sullivan determined that Section 81P of the Subdivision Control Law provides for such an endorsement. Judge Sullivan summarized that: "Nothing in the statute requires the conclusion that only divisions of land which are deemed by virtue of the provisions of G.L. c. 41, s.81L not to constitute a subdivision were entitled to such an endorsement. The plain language says otherwise, and as it presently reads, a perimeter plan must be endorsed by the Board."

In a previous edition of the Land Use Manager, we reviewed Malden Trust Company v. Twomey, Middlesex Superior Court C.A. No. 87-6574, September 27, 1989 (McDaniel J.). In that case, a Superior Court Judge determined that as a matter of law, perimeter plans are not entitled to an ANR endorsement. It should be noted that neither Costello or Twomey are controlling on the issue as a higher court is not required to follow an opinion written by a lower court. The perimeter plan issues still remains unsolved.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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THE SINGLE AND TWO-FAMILY PROTECTION (Part II)

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In the last issue of the Land Use Manager, we began our review of the single and two-family protection of the Zoning Act which authorizes certain alterations, reconstructions, extensions and structural changes to single or two-family nonconforming structures. In Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985) and Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987), the Massachusetts Appeals Court noted the difficulty in interpreting the first paragraph of Section 6 of the Zoning Act. However, in both the Fitzsimonds and Willard decisions, the court determined that in dealing with an alteration, reconstruction, extension or structural change to a nonconforming single or two-family structure, it must first be determined whether the alteration, reconstruction, extension or structural change will increase the nonconforming nature of the structure. If such activity will increase the nonconforming nature, then the question of detriment must be addressed. Since it was determined in Willard that the proposed addition would increase the nonconforming nature of the structure, the court noted that the Zoning Board of Appeals could consider the factors set out in the special permit section of the zoning bylaw when determining whether the proposed addition would result in a structure substantially more detrimental to the neighborhood than the existing structure.

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In Tweed v. Zoning Board of Appeals of Tisbury, 28 Mass. App. Ct. 1106 (1989), an unpublished decision, the court, in following the rationale explained in both Fitzsimonds and Willard, decided that an extension to a single-family nonconforming structure which would increase an existing nonconformity could be authorized by the issuance of a special permit. Tweed dealt with a situation where a residential structure was built before any zoning regulations were adopted by the town of Tisbury. The court noted that the structure was nonconforming because it did not comply with two setback requirements and because it was situated on a lot lacking the minimum lot area and lot frontage requirements of the existing zoning bylaw. The petitioner applied to the Zoning Board of Appeals for a special permit to construct an addition to the nonconforming dwelling. The proposed addition would have made the structure more nonconforming by further intruding into one nonconforming setback by six and one half feet. However, the addition would have lessened the nonconformity of the other nonconforming setback by approximately thirteen feet. The Zoning Board of Appeals granted a special permit and a group of neighbors appealed their decision.

The principal issue was whether the Zoning Board of Appeals exceeded its authority by allowing an addition to a nonconforming structure which would have increased one nonconformity and diminished another. The neighbors contended that a variance was required to justify the addition to the structure. The court cited the Section 6 finding provision of the Zoning Act (See Land Use Manager, Volume 8, Edition No.2, Edition No.3) and stated that the finding provision can be read as permitting, but not requiring, towns to adopt a zoning provision giving special permit granting authority to a Zoning Board of Appeals. The Tisbury Zoning Bylaw contained such a provision which stated:

Section 07.01.03 The Board of Appeals may, after a public hearing, grant a [p]ermit to allow a preexisting nonconforming use or structure to be expanded in an area where, in the opinion of the [b]oard, such expansion will not be more objectionable to, or detrimental to, the character of the neighborhood than the original preexisting nonconforming use or structure.

The court, in citing Fitzsimonds, concluded that the special permit for the addition was authorized by the Section 6 finding provision and Section 07.01.03 of the Tisbury Zoning Bylaw and that the findings justified the conclusion that the proposed addition would be no more detrimental to the neighborhood than the existing nonconforming structure. The neighbors contended that the Section 6 finding provision should not be read in accordance with the Fitzsimonds case (See Land Use Manager, Volume 8, Edition No.5) because to do so would allow the extension of an already nonconforming structure under the reasonably simple requirements of the special permit procedure, but would subject the extension of a conforming structure to the more stringent requirements of the variance procedure. In arguing that the addition would only be

authorized by variance and not by special permit, the neighbors relied on Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87 (1958). In Wrona, the zoning ordinance authorized the Board of Appeals to grant a special permit for extensions to nonconforming buildings in residential districts if such actions would be "in harmony with the general purposes and intent" of the zoning ordinance. The Board of Appeals granted a special permit authorizing an extension to a building which would have violated an existing setback requirement of the ordinance. The court annulled the Board's decision.

WRONA V. BOARD OF APPEALS OF PITTSFIELD
338 Mass. 87 (1958)

Excerpts:

Spalding, J. . . .

The applicable provision in the enabling statute is as follows: "...Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained." G.L. c.40A, s.4. The ordinance repeats the requirement of harmony with its general purpose and intent without containing any more specific requirements. The board's action, then, is to be measured by this standard.

...The ordinance provides that in R-1-C districts setbacks are required of twenty feet from the street and twenty-five feet from the adjoining lot...The judge found that "...The proposed addition or extension will not be built in compliance with this...requirement"...The board could properly have allowed an extension of the nonconforming use up to the setback lines under the exception. However, when it permitted the extension beyond the very precise setback requirements contained in the ordinance it exceeded its authority. This action cannot be said to be in harmony with the general purposes and intent of the ordinance. Any extension beyond the setback lines constitutes a variance from the ordinance, and must be sought under the variance procedure and not by way of a special permit under an exception.

At the time of the Wrona decision, the State Zoning Act authorized the granting of a special permit when it was found by the granting authority that such permit would be in harmony with the general purpose and intent of the ordinance or bylaw. The court based its decision on that specific requirement and found that a special permit could not meet that standard if it authorized

an activity which would violate existing zoning requirements. Also, the Zoning Act at that time did not contain language authorizing the extension, alteration or change to a nonconforming structure upon the granting of a special permit.

The Massachusetts Appeal Court decided in Tweed that the neighbors' reliance on Wrona was misplaced because the Wrona case was decided before the substantial change to the Zoning Act in 1975 (See St. 1975, c.808, s.3). However, in Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991), the Massachusetts Supreme Judicial Court, in interpreting the Section 6 finding provision, appears to have followed the logic contained in Wrona while silently rejecting the rationale of the Massachusetts Appeals Court as outlined in the Fitzsimonds, Willard and Tweed decisions. In Rockwood, the court found that the Zoning Act permits extensions and changes to nonconforming structures if:

- (1) the extensions or changes themselves comply with the zoning ordinance or bylaw, and
- (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures.

The court further noted that although the Zoning Act may give some special protection to a single or two-family structure, any reconstruction, extension or structural change to a single or two-family structure which will increase the nonconformity or create an additional one is not permitted.

ROCKWOOD V. THE SNOW INN CORP.
409 Mass. 361 (1991)

Excerpts:

O'Connor, J. . . .

We conclude, apparently different from the trial judge, that the first sentence of the quoted portion of s. 6 requires that, in the absence of a variance, any extension or structural change of a nonconforming structure must comply with the applicable zoning ordinance or by-law. Then, if the proposed extension or change conforms to the by-law, the second quoted statutory sentence requires for project approval a finding that the extension or change will not be substantially more detrimental to the neighborhood than the existing nonconforming structures. If the first and second sentences are read together, the statute permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or by-law, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures.

If we were not to construe G.L. c.40A, s. 6, in that way, the provision in the first quoted sentence that a zoning ordinance or by-law "shall apply...to any reconstruction, extension or structural change of [a protected nonconforming structure]" would be meaningless surplusage. Indeed, even as to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that "would intensify the existing nonconformities or result in additional ones." Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 22 (1987).

The analysis by the court in Rockwood limits the ability of a landowner to make changes to a single or two-family structure which have previously been considered acceptable by the Massachusetts Appeals Court. Determining what constitutes an increase in the "nonconforming nature" to a single or two-family structure has become more significant due to the Rockwood decision. Absent a local zoning provision to the contrary, any activity which increases the "nonconforming nature" will require a variance. In the next issue of the Land Use Manager, we will conclude our review of the single and two-family protection of the Zoning Act.

AN ACT RELATIVE TO THE FILING OF ZONING ORDINANCES WITH THE ATTORNEY GENERAL

Chapter 515 of the acts of 1991 amends Section 5 of Chapter 40A by adding a sentence at the end of the seventh paragraph requiring cities to file their zoning ordinances with the Attorney General. The new law provides as follows:

In a municipality which is not required to submit zoning ordinances to the attorney general for approval pursuant to section thirty-two of chapter forty, the effective date of such ordinance or amendment shall be the date passed by the city council and signed by the mayor or, as otherwise provided by ordinance or charter; provided, however, that such ordinance or amendment shall subsequently be forwarded by the city clerk to the office of the attorney general.

Chapter 515 also eliminates the requirement that communities file a copy of their latest effective zoning ordinance or bylaw with the Department of Community Affairs (EOCD) by striking out the first sentence in the eighth paragraph of Section 5 of Chapter 40A. The intent of this new law is to establish a system requiring cities to submit their ordinance to the state so there exists a central file of all zoning regulations at the state level. This new law was approved on January 7, 1992 and will take effect on April 6, 1992.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

Vol. 8, Edition No. 7
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THE SINGLE AND TWO-FAMILY PROTECTION (Part III)

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This issue of the Land Use Manager is the last edition of a three part series dealing with the single and two-family protection provision of the Zoning Act.

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In the past two editions (See Land Use Manager, Vol. 8, Edition No. 5, Edition No. 6), we reviewed Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985); Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987); and Tweed v. Zoning Board of Appeals of Tisbury, 28 Mass. App. Ct. 1106 (1989). In these decisions, the Massachusetts Appeals Court determined that an alteration, reconstruction or structural change to a nonconforming single or two-family structure was permitted provided such activity did not increase the nonconforming nature of the structure. A proposed activity which would increase the nonconforming nature or create a new nonconformity could be authorized by the Section 6 finding provision of the Zoning Act.

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The Massachusetts Appeals Court also determined, in Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991), that the Section 6 finding provision (See Land Use Manager, Vol. 8, Edition no. 2, Edition No. 3) did not require that communities authorize extensions, alterations or changes to nonconforming uses and structures. As was noted in Nichols v. Zoning Board of Appeals of Cambridge, 26 Mass. App. Ct. 631 (1988), MGL, Chapter 40A, Section 6 prescribes the minimum zoning protections afforded to nonconforming uses and structures. The extent that nonconforming uses or structures may be extended, altered

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or changed beyond the minimum protections is left to the discretion of the local legislative body.

Rather than establishing their own regulations or special permit requirements, many communities have inserted into their zoning ordinances and bylaws the Section 6 finding provision of the Zoning Act. The Massachusetts Appeals Court determined in Fitzsimonds and Tweed that the Section 6 finding provision and implementing bylaw allowed the reviewing board to grant a special permit authorizing the extension of a nonconforming structure which would not comply with existing zoning requirements.

Under what conditions can you have a reconstruction, extension or structural change which will not increase the nonconforming nature of a single or two-family structure? In Willard, the court made note of the "footprint" theory. The Zoning Board had found that the proposed addition would increase the nonconforming nature of the structure. The court determined that the Board's finding was not suspect because at least one portion of the addition would protrude beyond the "footprint" of the present structure. There have been lower court decisions that have also recognized the "footprint" theory.

In Lique v. Town of Nahant Zoning Board of Appeals, (Suffolk) Misc. Case No. 124421, July, 1988, a landowner desired to finish the inside of the third floor of his home, make changes to two existing dormers and add a third dormer. The home was a nonconforming structure as it did not meet front and side yard requirements of the zoning bylaw. The changes the landowner wished to make would have been within the vertical space above the footprint of the existing building. The Building Inspector denied the building permit. The judge found that it is only where the proposed addition to a single-family residence is outside the existing footprint that the question of detriment becomes material and that the landowner was entitled to a building permit.

A similar conclusion was reached in Goldhirsh v. Goddard, (Essex) Misc. Case Nos. 131417, 132775, 133029, January, 1990, where a landowner proposed constructing a second story to an existing nonconforming single-family structure. In deciding that the landowner was entitled to a building permit, the judge noted that the proposed addition would be within the existing footprint of the building and would not exceed relevant height restrictions.

In Harrison v. Demers, (Dukes) Misc. Case No. 134666, April, 1990, the judge commented that her decision was based upon the "envelope concept" enunciated by the Appeals Court in Willard. The landowner proposed an alteration to a single-family structure which would result in more of the structure's roof exceeding the maximum height requirement allowed by the zoning bylaw but not exceeding the height of the existing nonconforming structure. The judge ruled that the Zoning Act entitled the landowner to make the alteration. However, it should be noted that the Demers case was decided prior to the Massachusetts Supreme Judicial Court's analysis in Rockwood.

If a proposed addition to a nonconforming single-family or two-family structure is within the existing footprint and does not create a new nonconformity, a landowner is most likely entitled to a building permit. What is less clear from the Land Court decisions is whether a landowner is entitled to a building permit when the proposed addition will extend outside the existing footprint. As the Land Court judge noted in Ligue, it is only when a proposed addition to a single-family residence is outside the existing footprint that the question of detriment becomes material. If this statement is true, then it could be argued that such an addition would not be permitted unless the zoning bylaw authorized a local board to consider the question of detriment.

In Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991), the Massachusetts Supreme Court decided that the Section 6 finding provision only authorizes an extension, alteration or change to a nonconforming structure which complies with existing zoning requirements (See Land Use Manager, Vol. 8, Edition No. 6). Whether this ruling overturns the previous decisions of the Massachusetts Appeals Court concerning alterations and extensions to nonconforming single and two-family structures is unclear since the Rockwood case dealt with an extension to a nonconforming business structure. Absent explicit language in the local zoning ordinance or bylaw, it is debatable whether an addition to a nonconforming single or two-family structure which will extend beyond the existing footprint must conform with existing zoning requirements. It may even be argued that an addition to a nonconforming single or two-family structure which extends beyond the existing footprint and conforms to current zoning requirements is not permitted unless specifically authorized by the local zoning bylaw or ordinance.

If a zoning bylaw authorizes the extension of a nonconforming single-family structure upon a finding that such extension "will be in harmony with the general purpose and intent of the bylaw" and does not contain any more specific requirements, then according to Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87 (1958), such extension would also have to comply with current zoning requirements. (See Land Use Manager, Vol. 8, Edition No. 6).

In Blasco, the court determined that the Section 6 finding provision of the Zoning Act is an optional provision and the extent nonconforming structures may be reconstructed, extended or changed is left to the discretion of the local legislative body. Although the Rockwood court conservatively interpreted the Section 6 finding provision, it did not find that a community lacked the ability to enact more liberal regulations for allowing changes to nonconforming single or two-family structures.

In prior decisions, the court has looked favorably on zoning regulations authorizing deviations from dimensional zoning requirements. In Woods v. Newton, 351 Mass. 98 (1966), the court upheld a zoning regulation which authorized a Board of Aldermen to grant a special permit allowing an increase to the maximum height requirement. In Haynes v. Grasso, 353 Mass. 731 (1968), a zoning

bylaw empowered the Board of Appeals to grant special permits authorizing reductions from minimum lot area and lot frontage requirements. In ruling that the bylaw was valid the court noted that the bylaw must be construed reasonably with regard to both the objectives sought and to the structure of the bylaw as a whole. The court reached the same conclusion in Adams v. Board of Appeals of Concord, 356 Mass. 709 (1970), where the zoning bylaw authorized the Board of Appeals to grant a special permit for apartment developments having less than the minimum frontage requirement of the bylaw. In Emond v. Board of Appeals of Uxbridge, 27 Mass. App. Ct. 630 (1989), the court reviewed a zoning bylaw provision which authorized the Board of Appeals to grant special permits for reductions in lot area and lot frontage requirements. It was argued that the Zoning Act did not authorize special permits for dimensional variations. The court reviewed the history of the Zoning Act and found nothing to suggest an intent by the legislature to curtail the scope of special permits by introducing "a new rigidity into municipal land-use control of a type that serves no appropriate zoning purpose."

In light of the recent cases, it is important that a zoning bylaw is clear as to what is permitted. When authorizing extensions by special permits, it is essential that the zoning bylaw establish specific standards to guide the Special Permit Granting Authority. Standards are crucial as a Special Permit Granting Authority cannot have unabridged discretion when entertaining a special permit application.

RECENT LAND COURT DECISIONS

The authority to regulate the subdivision of land includes the authority to charge reasonable filing fees to compensate Planning Board for the costs occasioned by its review of applications for definitive subdivision plans. Southwest Corp. v. Kirby, (Middlesex) Misc. Case No. 134161, January, 1991.

Planning Board exceeded its statutory authority in rejecting subdivision plan on the grounds that it failed to provide adequate safeguards against blasting damage in neighboring properties where blasting in the Commonwealth is controlled by government agencies other than the Planning Board. Carbone v. Manzi, (Essex) Misc. Case No. 135526, March, 1991.

Board of Appeals did not act unreasonably when it denied a special permit for gravel removal because of concerns relating to noise, traffic, and public safety. The judge ruled that the Board's vote was not invalid merely because only four of the five members voted and two of the voting members had each missed one hearing session. Trust Under Will of Keating v. Bostrom, (Middlesex) Misc. Case No. 124524, June, 1991.

Planning Board member who attended public hearings on original definitive plan but did not attend public hearing on modifications to the previously approved definitive plan was not entitled to vote as he was not present at the public hearing relating to the modified plan. Bergmann v. Hobbs, (Essex) Misc. Case No. 141317, January, 1992.

Zoning bylaw providing that only lots on accepted public ways are buildable is unreasonable and accordingly void. Rogers v. Town of Monson, (Hampden) Misc. Case. No. 150856, September, 1991.

Court decided that the construction of an access drive required site plan approval. Zoning bylaw provided that site plan review is required for a principal business use. Judge found that the use of a parcel of land solely for business access was clearly a principal business use within the meaning of the bylaw and the main or primary purpose of the lot was for an access drive. Zarrow v. Town of Wilmington, (Middlesex) Misc. Case No. 139474, June, 1991.

A city or town may adopt more lenient nonconforming lot provisions than the state statute. Judge found that the Zoning Act provides only a floor and that a municipality is free to grant more liberal treatment to the owner of a nonconforming lot. Desalvo v. Chatis, (Suffolk) Misc. Case No. 149615, September, 1991.

Zoning ordinance provided that a professional medical/dental building was not permitted in a single residence district but was permitted in a general residence district by special permit from the Board of Appeals. Ordinance also provided that off-street parking and loading spaces were permitted in all districts. Owner of a medical office building located in a general residence district sought a building permit to use a neighboring lot in a single residence district for off-street parking. The Building Inspector denied the building permit and the Board of Appeals upheld his denial. The Board of Appeals determined that for parking to be permitted, the principal use it serves must be permitted as of right in the zoning district in which the parking is located. The Judge ruled that such an interpretation ignored the simple language of the ordinance which permitted off-street parking spaces in all districts. It was argued that such a reading of the ordinance meant that if a lot was split, part residential and part industrial, there could be accessory parking on the residential portion serving the industrial use. The Judge agreed and noted that if such a possibility is threatening then relief should come by amending the zoning ordinance. Attleboro Ob-Gyn Realty Associates v. Casey, (Bristol) Misc. Case No. 142325, April, 1991.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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PUBLIC SAFETY AND SUBSIDIZED HOUSING

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Because the problems of finding suitable sites for the construction of housing for persons of low and moderate income were determined to be acute, the General Court enacted Chapter 774 of the Acts of 1969 which amended M.G.L. Chapter 40B and created a local process for granting comprehensive permits for the construction of low and moderate income housing. M.G.L. Chapter 40B, Sections 20-23 (also known as the Comprehensive Permit Act) authorizes Zoning Boards of Appeals to grant comprehensive permits which can override local requirements and regulations.

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When a Zoning Board of Appeals denies a comprehensive permit or imposes conditions which makes the project economically infeasible, a developer may appeal the decision to the state Housing Appeals Committee if that municipality has not met its statutory obligation to provide a certain level of affordable housing. Most of the Housing Appeals Committee's decisions have ruled in favor of the developer.

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A Zoning Board of Appeals may deny a permit for a project which would have serious adverse impacts on the health and safety of a community. If these impacts cannot be mitigated, they can outweigh the community's need for affordable housing and warrant a denial.

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The Housing Appeals Committee has upheld local denials of comprehensive permits where the proposed development presented serious health or safety concerns. Recently, in the case of Hamlet Development Corp. v. Hopedale Zoning Board of Appeals, No. 90-03 (Mass. Housing Appeals Committee, January 23, 1992), the Massachusetts Housing Appeals Committee found that the risk of air crashes precluded construction of subsidized housing immediately at the end of a small public airport.

Hamlet proposed to build a mixed housing development on a 28 acre site. A portion of the parcel was approximately 600 feet from a small privately owned airport which was open to the public. The original proposal was to build 60 single family and duplex houses but this number was reduced to 46 units by eliminating those homes most directly under the flight path. Hamlet applied for a comprehensive permit because the proposed development did not conform to the density and use requirements of the zoning bylaw as well as a number of other local restrictions. The zoning bylaw did not restrict development based upon proximity to an airport. Hamlet contended, that absent local regulations restricting development near the airport, the Zoning Board of Appeals lacked the authority to deny the comprehensive permit due to air safety considerations.

The sole issue before the Housing Appeals Committee was whether the proximity of the proposed development to a local airport rendered it inappropriate in light of concerns for the health and safety of the project's residents due to the danger of aircraft crashes.

HAMLET DEVELOPMENT CORP. V. HOPEDALE ZONING BOARD OF APPEALS
No. 90-03 (Mass. Housing Appeals Committee, January 23, 1992)

Excerpts:

...

...there is no local bylaw, regulation, or other restriction empowering the Board or any other local official to curtail or regulate development based upon proximity to the Hopedale Airport. The developer correctly notes that G.L. c. 90, §§ 40A-40I authorize the town to adopt such a bylaw and regulations, and the Massachusetts Aeronautics Commission has encouraged towns to do so by developing a model bylaw. Hopedale, however, has not availed itself of this opportunity. The developer cites the Committee's decision in Tewksbury, Sheridan Development Co. v., No. 89-46 (Mass. Housing Appeals Committee January 16, 1991), and argues that the Board is not authorized "to act in a general manner to address issues not otherwise regulated at the local level."

...The same logic calls into question the Board's denial of a comprehensive permit due to proximity to an airport when the town, as here, has established no standards or regulations concerning building near airports.

Support for the developer's position can be found in two places. First, limitations on the power of a board of appeals in this case might be inferred from the language of the comprehensive permit statute itself. The board has "the same power to issue permits... as any local board or official who would otherwise act..." ..., and the inference might be drawn that it has no power to act where no local board would have such power, that is, where there is no existing regulation of development based on proximity to the airport.

We believe, however, that chapter 40B must be read differently. The Supreme Judicial Court has noted that "the same power" is to be construed as conferring on the Board the power of other local boards plus "that power otherwise conferred by [chapter 40B]." ... Elsewhere in chapter 40B, in section 20, in defining the most critical term in the statute, "consistency with local needs," the legislature has required, in a very open-ended manner, the balancing or regional housing need against "the need to protect... health or safety...." In light of this, we believe that the statute must be read to permit the Board to review health and safety concerns in a similarly open-ended way.

...We believe that permitting examination of the safety issue is the proper statutory construction of chapter 40B since it conforms both to the actual intent of the legislature and to common sense.

Clearly the legislature did not want local powers limited arbitrarily so that subsidized housing would be built at any cost. Rather, that it established a specialized body, the Housing Appeals Committee, to review these cases de novo indicates its intention that local powers be carefully circumscribed by a process that would insure that each proposed subsidized housing project would be carefully examined on its own merits. Thus, we believe that the legislature intended that a major public health or safety concern such as the one here should be reviewed whether or not it was previously regulated by the town.

This conforms with the common sense idea that if chapter 40B permits a developer to put long established local zoning requirements on the table for renegotiation, then in fairness, local officials should also be permitted to raise all relevant issues.

...We believe, however, that local officials' right to raise previously unregulated issues should not be unlimited. In the case at hand, air safety arises primarily because of the unanticipated nature of the subsidized housing development. Housing in general is not unanticipated in the sense that under current zoning about a dozen houses can be built as of right without regard to air safety. But the greater density of subsidized housing ...creates a situation not contemplated when the zoning was enacted.

...In the present case, ...air safety is a major concern, which, if it is not considered in the context of the comprehensive permit application, is unlikely to be considered at all.

...a board of appeals may not examine every detail of a project, that is, even those for which no exception to existing town regulations are needed or which are unregulated, and thus in effect redesign the project. But, where there is an issue of major public health or safety concern... which is not likely to be dealt with in another forum, and particularly where the issue arises primarily because of the unanticipated nature of the subsidized housing development, it must be addressed.

...The Federal Aviation Agency (FAA) has established a Runway Protection Zone (RPZ) at the end of all runways. ...During testimony this was sometimes confused with the Approach Surface, which is a surface gently sloping up from the end of the runway at a 20 to 1 rate. No object may protrude above this surface. With the exception of the small object Free Area immediately at the end f the runway, there is no prohibition against buildings in the RPZ unless they are tall enough to extend above the Approach Surface. ...The RPZ for the Hopedale Airport extends into the center of the housing development site, though none of the proposed houses is within it. Thus, there is no state or federal law prohibiting this development as proposed. ...We do not believe, however, that the inference can be drawn that because the houses are outside of the RPZ they are safe. Rather, the RPZ boundary is an arbitrary line which confirms for us that air safety is an issue here, but does little to help us decide how great the risk actually is.

More noteworthy is that the U.S. Department of Housing and Urban Development (HUD) has found that HUD assisted projects and their occupants in RPZs are exposed to significant risk of personal injury or property damage from aircraft accidents. HUD's general policy is to prevent incompatible development around civil airports and military airports, ...however, the Hopedale Airport ...is not a civil airport as defined by HUD ...and the HUD regulation is inapplicable. Ultimately, however, we believe that the HUD regulations are some indication that the housing proposed is unsafe, but on their own they are not dispositive.

Finally, the developer argues that the inference can be drawn from the Hopedale zoning bylaws that housing can be built safely on the site. That is, because the site is zoned partly residential and partly commercial, the bylaws reflect a legislative determination that the area is safe for at least some uses. The argument then shifts to whether the density of the proposed housing creates more risk than that for the housing now permitted as of right and whether residential uses generally are more at risk from air crashes than commercial uses. ...The short

answer to all of this is that simply from the layout of the zones ...the more logical inference is that air safety was not considered at all when the bylaws were drafted. ...the town's failure to address air safety issues does not preclude it from raising them in the context of a comprehensive permit, we believe that at least on the facts before us there is nothing to be gained from delving more deeply into what is permitted under existing zoning.

...It is not surprising that this review of the legal framework does not provide a clear-cut answer to the safety issue. Historically, we have found that cases involving public safety are particularly likely to turn on their own specific facts rather than on general principles. Thus, we turn our attention to the purely factual characteristics of this site and the airport adjacent to it.

...The expert's testimony fell into three broad areas: first, general practices with regard to development at the ends of runways; second, previous crashes near the Hopedale Airport; and third, actual aircraft operations, both generally and at the Hopedale Airport. We will address these areas in turn.

As common sense and all the experts have told us, ideally, land at the end of airport runways is left vacant, and housing is generally one of the less compatible uses for such a location. Nevertheless, many airports are surrounded by development, including housing. Some Massachusetts airports even have housing as close to them as is proposed here. The developer introduced evidence of eight such airports. Two of these have subsidized housing near the end of runways, ...

Just because this sort of development has been permitted by local officials in those towns, however, does not necessarily mean that it is safe, nor that such development in Hopedale would be safe. If we had detailed information as to the specific facts considered in each of those towns, we might be able to draw such an inference. But the developer did not provide us with the details, nor, in fairness, did the Board provide us with any specifics as to the danger it claims is associated with dense development. We take this lack of evidence on both sides to be an indication that there are not generally accepted standards within either the aviation or land use communities as to when development at the end of a runway is safe. In general, there seems to be little pattern with regard to development near airports. We are unwilling to draw any inference from these other situations, but rather believe that we must make our own judgement on this issue using the evidence presented in this particular case.

...Previous aircraft crashes at the Hopedale Airport are somewhat more helpful. In the last twenty-five years, there have been a half dozen crashes! ...These incidents show that the site is in an area where there is a real danger of air crashes. Because of their anecdotal nature, though, we must move beyond them to also examine actual aircraft operations.

The Hopedale Airport is by all accounts a generally safe one. ...For a number of reasons, including the slope of the runway, the trees on the development site, the prevailing winds, and the preferences of the pilots, the majority of takeoffs and landings do not occur over the site. To a certain extent, though, for these same reasons, the takeoffs and landings which do occur over the site may be more dangerous. At night, when risks also increase, use of the airport is restricted to aircraft with prior permission, and takeoffs and landings are not usually permitted over the site. These factors, however, are not sufficient to negate the danger of a crash on the site.

Crashes are unpredictable. They can be caused by mechanical failures, weather conditions, or pilot error. Takeoffs and landings, however, are critical times in flight. This is particularly true for the many single engine aircraft that use Hopedale Airport since engine failure can have disastrous consequences. If a crash is to occur, there is a substantial likelihood that it will be on takeoff or landing because of the critical operations being performed by the pilot and because of a number of factors limiting the margin of error or the room for recovery. ...

The danger to houses at the end of a runways was implicitly conceded by the developer's expert. ...The developer's expert testified that originally he could not support the proposal, but that he changed his mind when all of the houses were moved out of the RPZ and the developer accepted his recommendation that all trees be removed along the centerline of the runway through the RPZ. This "grassy area" would in effect create an emergency landing area extending into the site, which would permit a plane without power to continue straight ahead and land safely.

Unfortunately, there is no evidence before the Committee that the developer actually changed its proposal to incorporate such a grassy area. In fact, since much of the area where trees would have to be removed is wetlands, it is very likely that the Wetlands Protection Act would prohibit such a change. ...We believe that it is a fair inference from the expert's testimony that the project, without the grassy area, is unsafe.

On balance, based upon the above factual analysis, and, to a lesser extent, upon the guidance provided by the HUD regulations regarding Runway Protection Zones, we find that the risk of air crashes in this case outweighs the need for housing.

The Zoning Board of Appeals may deny a comprehensive permit for a proposed development which presents severe adverse impacts on the health and safety of a community and which cannot be mitigated by imposing reasonable conditions. Such impacts must pose a severe threat to the environment or to public safety.

In a few rare cases where a proposed development presented serious health or safety concerns, the Housing Appeals Committee has upheld the local denial of a comprehensive permit. For example, in one case the denial was upheld where the proposed development involves the potential for a catastrophic propane gas explosion, traffic hazards and railroad noise. In another case, the Housing Appeals Committee upheld the local denial where the proposed development presented severe fire protection problems.

However, municipalities that are concerned about development near airports, should not rely on the Hopedale decision. The Housing Appeals Committee clearly decided this case on the particular facts presented, rather than on any general principles relating to air safety. Under different circumstances, the Housing Appeals Committee might override the local denial and approve the housing development.

The Massachusetts Aeronautics Commission has encouraged communities to regulate development in the vicinity of airports. Municipalities are authorized to do so by M.G.L. Chapter 90, Sections 40A-40I. The Massachusetts Aeronautics Commission has also prepared a model bylaw. Communities should review their local zoning regulations as the Hopedale decision serves as a reminder that uses that are permitted to locate near airports may pose significant safety hazards. A community which has made a thorough and conscientious effort to deal with air safety issues will be likely to have its assessment upheld, whereas a municipality which has not done so is likely to have its decision carefully scrutinized by the state, with unpredictable results.

We wish to thank Werner Lohe, Counsel for the Housing Appeals Committee, for his advice and input in the preparation of this Land Use Manager. Questions concerning the comprehensive permit process or the Low and Moderate Income Housing Law should be directed to Mr. Lohe at (617) 727-7078.

In the next issue of the Land Use Manager we will look at yet another case by the Massachusetts Appeals Court dealing with the single and two-family protection provisions of the Zoning Act.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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FOOTPRINT THEORY OVERTURNED

A

Over the last few years, there have been a number of Land Court cases that have decided that a landowner was entitled to the issuance of a building permit based on the so-called footprint theory. In those cases, the Land Court held that an extension, alteration or change within the existing footprint of a nonconforming single-family structure was permitted as a matter of right provided such extension, alteration or change did not create any new zoning violation. See Land Use Manager, Volume 8, Edition No. 7.

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In Goldhirsh v. McNear, 32 Mass. App. Ct. 455 (1992), the Massachusetts Appeals Court overturned the footprint theory and decided that the Zoning Enforcement Officer must refer requests for extensions, alterations or changes to nonconforming single-family structures to the Zoning Board of Appeals. In this important land use case, the court has also clarified that unlike other nonconforming structures, a nonconforming single and two-family structure can increase or create a new nonconformity without obtaining a variance provided the local review board finds that the extension, alteration or change will not be substantially more detrimental than the existing nonconforming structure to the neighborhood.

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The first paragraph of Chapter 40A, Section 6 of the Zoning Act has to rate as one of the most difficult provisions of state law to interpret. Although the Goldhirsh decision clarifies a few more gray areas, it has exposed a few more difficult issues. Let us take a closer look.

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M A N A G E R

In the late nineteenth century, a carriage house was built on an estate in Manchester. It was situated only a few feet from a side lot line. In 1945, Manchester adopted a zoning bylaw. The property was zoned for single-family residential use. By definition, an accessory use did not include dwellings. However, a garage or stable could be used as living quarters for an employee of the owner of the house to which the garage or stable was accessory. The carriage house did not meet the new side yard requirements and was, therefore, a nonconforming structure.

In September, 1952, the carriage house was conveyed out from the main estate. The structure was converted to a single-family dwelling sometime between 1952 and 1953. In 1953, a variance from the street setback requirements was granted so that a one-car garage and a "wind-way" could be built.

In 1955, the owner decided to sell the property but the buyer was concerned about whether the structure could be used lawfully as a single-family residence. The Zoning Board of Appeals granted a variance allowing the carriage house to be used as a private dwelling in its present location. The McNear family purchased the property.

In 1987, McNear filed an application with the Building Inspector seeking to replace existing dormers with a full second level to the carriage house. Reasoning that this work would be a vertical expansion of the carriage house within its original footprint, the Building Inspector granted the application. After many of the improvements had been undertaken, Goldhirsh, an abutter, requested that the Building Inspector enforce the zoning bylaw. Upon further review, the Building Inspector determined that since the property had been the subject of a variance in 1955, McNear would need a variance before he could continue with the work. The Zoning Board of Appeals decided that McNear had the right to expand vertically within the structure's original footprint as a matter of right.

The Land Court judge concluded that since the carriage house could have been legally used for residential purposes under the 1945 zoning bylaw, even if not enlarged, the 1955 variance was immaterial because it was the structure and not the use which was nonconforming. The judge also ruled that McNear was entitled to make the changes as a matter of right because the additions and alterations were within the preexisting footprint.

THE VARIANCE ISSUE

Goldhirsh claimed that the carriage house was not entitled to be treated as a nonconforming single-family structure. He argued that in order for a single-family structure to obtain nonconforming status, the Zoning Act and the Manchester Zoning Bylaw required that a structure must be used as a residence at the time of the enactment of the zoning regulation which makes the structure nonconforming. Since there was no evidence to show that anyone resided in the carriage house in 1945, Goldhirsh concluded that the carriage house could not thereafter be used lawfully as a dwelling without a variance. Citing Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527 (1990), Goldhirsh argued that the

1955 variance did not afford the carriage house protection as a nonconforming structure.

In Mendes, the owners of a certain parcel of land were granted use variances to erect a construction building and operate a storage yard for construction materials. The parcel was located in a residential zone where such uses were not permitted. After the use variances were granted, the town of Barnstable amended its zoning bylaw to prohibit use variances in certain areas of the community. The construction building and storage yard were located in such an area. The owners of the construction business wished to add a building to their existing use. Because of the zoning change, they were unable to petition the Zoning Board of Appeals for a use variance. However, the owners applied for a special permit pursuant to a provision of the zoning bylaw authorizing the Board to grant a special permit for an increase in the size of an existing nonconforming building or an extension of a nonconforming use on the same lot. This particular provision expanded on the Section 6 "finding" provision of the Zoning Act. The owners argued that their business was a lawful nonconforming use.

The Appeals Court disagreed and noted that the flaw in the owners' argument was the failure to appreciate the statutory meaning of the phrase "nonconforming use." The Court found that "a use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it." Since the use of the parcel for the construction business began after the locus was already zoned for residential use, the Court concluded that the business was not entitled to be treated as a nonconforming use. Simply put, the grant of a use variance does not create a nonconforming use.

The Court, in Goldhirsh, concluded that the issuance of the 1955 variance was immaterial. That the carriage house might not have been occupied as a residence in 1945 did not change the fact that the property was in a district zoned for residential use. If the structure had been situated farther back from the side lot line, its use as a residence would have been lawful without a variance. The Court noted that the Mendes case was not applicable since the building in Mendes was not in existence when the bylaw was adopted and the variance allowed the owners to construct a commercial building in a residential zone. The Court took the variance issue one step further. They noted that even if the carriage house could not have been used as a single-family residence without the granting of a use variance, the carriage house would still be entitled to be treated as a nonconforming residential structure. In determining whether a single-family structure is entitled to be treated as a nonconforming structure, the Court concluded that the appropriate focus is not how or when the nonconforming building came to be used as a single-family dwelling but whether the proposed changes to the nonconforming structure will increase its nonconforming nature.

The Goldhirsh case was the first opportunity the Appeals Court had to review the single and two-family nonconforming protection issue since the Massachusetts Supreme Judicial Court decided Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991). In Rockwood, the Court

determined that extensions or changes to nonconforming structures must comply with current zoning requirements. Snow Inn was a nonconforming structure because it did not comply with the setback requirements of the Harwich Zoning Bylaw. Snow Inn proposed a project which would have increased its building lot coverage. The Harwich Zoning Bylaw contained a maximum lot coverage provision restricting building coverage to no more than fifteen percent of the lot. The proposed changes and extensions resulted in the Inn exceeding the Zoning Bylaw's lot coverage requirement. The Harwich Zoning Bylaw mirrored the Section 6 finding provision of the Zoning Act and authorized the Zoning Board of Appeals to grant a special permit allowing a change to a nonconforming structure provided such change would not be substantially more detrimental to the neighborhood than the existing nonconforming structure. At issue before the Court was whether the Zoning Act or the Harwich Zoning Bylaw authorized the issuance of a special permit when the proposed change would violate existing zoning requirements.

The Supreme Court decided that the first and second sentence of the first paragraph of Section 6 of the Zoning Act "permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or by-law, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures... ." The Court went on further to state that "[A]s to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that would intensify the existing nonconformities or result in additional ones."

After the Rockwood decision, it was unclear whether any reconstruction, extension or change which would increase the nonconforming nature of a single or two-family structure would be permissible, absent a variance from the Zoning Board of Appeals. Did Rockwood prohibit a Zoning Board of Appeals from making a finding or granting a special permit under the Section 6 finding provision for a reconstruction, extension or change which would violate current zoning requirements? Could such activity only be authorized if it met the harsh criteria for the grant of a variance?

The Appeals Court, in Goldhirsh, restated its position that a reconstruction, extension or change to a single or two-family nonconforming structure which would not comply with existing zoning requirements could be authorized by a finding or special permit. Citing Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987), the court noted that an application for changes to a single or two-family nonconforming structure requires "a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. Should the board conclude that there will be no intensification or addition, the applicant will be entitled to the issuance of a special permit. If the conclusion is otherwise, the applicant will be required to show that the change will not be

substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

The Appeals Court appears to have given Zoning Boards of Appeals a special permit power that is not expressly stated in the Zoning Act. If a Zoning Board of Appeals determines that a certain activity will not increase the nonconforming nature of a single or two-family structure, they must issue a special permit. The good news is that a change to a nonconforming single family structure can be authorized by special permit. A finding or special permit finding may authorize a change which does not comply with existing zoning requirements. The bad news is that all changes to nonconforming single family structures must be reviewed by the Zoning Board of Appeals.

THE FOOTPRINT THEORY

Prior to Goldhirsh, the Land Court decided in a number of decisions that if a proposed change to a nonconforming single or two-family structure was within the existing footprint and did not create any new zoning violation, the landowner was entitled to a building permit as a matter of right. It was only where the proposed addition to a nonconforming single or two-family structure was outside the existing footprint that the landowner needed to seek approval from the Zoning Board of Appeals. In Goldhirsh, both the Board of Appeals and the Land Court Judge determined that McNear had a right to expand vertically within the structure's original footprint. The rationale for such determination was since the vertical expansion was within the preexisting foundational footprint, the change could not result in an increase in the structure's nonconformity. The Court did not agree.

The Appeals Court reviewed the Willard decision where they had found that an addition which would protrude beyond the existing footprint constituted an increase in the nonconforming nature of the structure. The Court remarked that Willard does not support the proposition that there will never be an increase in a structure's nonconforming nature where the proposed alterations are confined to the existing footprint. In reaching this conclusion, the Court stated that whether "the addition of a second level to the carriage house will intensify the nonconformity is a matter which must be determined by the board in the first instance. The fact that there will be no enlargement of the foundational footprint is but one factor to be considered in making the necessary determinations or findings." The case was remanded to the Board of Appeals for further proceedings.

The Goldhirsh decision will, in many communities, dramatically increase the workload of the Zoning Board of Appeals. Except for alterations which do not intensify or change the use of a nonconforming single or two-family structure, any change will require a Zoning Board of Appeal's review. Communities may wish to consider amending their local zoning regulations to permit certain changes as a matter of right. Clarifying what will constitute an "increase in the nonconforming nature" would appear not to be inconsistent with the Court's decision in McLaughlin v. City of Brockton, 32 Mass. App. Ct. 930 (1992).

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor

Mary L. Padula, Secretary

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L

PROCESS FOR APPROVING BUILDING LOTS LACKING ADEQUATE FRONTAGE

A

Frequently a landowner wishes to create a building lot which would not meet the minimum frontage requirement of the local zoning bylaw. As a Building Inspector, or member of a Planning Board or Zoning Board of Appeals, you have probably been asked by a local property owner what he or she must do to get approval for a building lot which does not meet the frontage requirement specified in the local zoning bylaw.

N

Recently, in Seguin v. Planning Board of Upton, 33 Mass. App. Ct. 374 (1992), the Massachusetts Appeals Court reviewed the process for approving building lots lacking the necessary frontage.

D

The Seguins wished to divide their property into two lots for single family use. One lot had the required frontage on a paved public way. The other lot had 98.44 feet of frontage on the same public way. The Seguins applied for and were granted a variance from the 100 foot frontage requirement of the Upton Zoning Bylaw. Upon obtaining the variance, the Seguins submitted a plan to the Planning Board seeking the Board's endorsement that approval under the Subdivision Control Law was not required. The Planning Board denied endorsement on the ground that one of the lots shown on the plan lacked the frontage required by the Upton Zoning Bylaw. Rather than resubmitting the plan as a subdivision plan for approval by the Planning Board pursuant to Section 81-U of the Subdivision Control Law, the Seguins appealed the Planning Board's denial of the ANR endorsement.

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E

M A N A G E R

Whether a plan requires approval or not rests with the definition of "subdivision" as found in MGL, Chapter 41, Section 81-L. A "subdivision" is defined in Section 81-L as the "division of a tract of land into two or more lots," but there is an exception to this definition.

A division of land will not constitute a "subdivision" if, at the time it is made, every lot within the tract so divided has the required frontage on a certain type of way. MGL, Chapter 41, Section 81-L states that a subdivision is:

"the division of a tract of land into two or more lots...[except where] every lot within the tract so divided has frontage...of at least such distance as is then required by zoning...ordinance or by-law if any...and if no distance is so required, such frontage shall be of at least twenty feet."

The only pertinent zoning requirement for determining whether a plan depicts a subdivision is frontage. The Seguins argued that the words "frontage...of at least such distance as is then required by zoning...by-law" should be read as referring to the 98.44 foot frontage allowed by the Zoning Board's variance, with the result that each lot shown on the plan had the required frontage. In making their argument that their plan was entitled to an ANR endorsement, the Seguins relied on previous court cases which had held that the required frontage requirement of the Subdivision Control Law is met when a special permit is granted approving a reduction in lot frontage from what is normally required in the zoning district.

In Haynes v. Grasso, 353 Mass. 731 (1968), the court reviewed a zoning bylaw provision which had been adopted by the town of Needham. The bylaw empowered the Board of Appeals to grant special permits authorizing a reduction from the minimum lot area and frontage requirements of the bylaw. Before granting such special permits, the Board of Appeals had to make one of the following findings:

a. Adjoining areas have been previously developed by the construction of buildings or structures on lots generally smaller than is prescribed by (the bylaw) and the standard of the neighborhood so established does not reasonably require a subdivision of the applicant's land into lots as large as (required by the bylaw).

b. Lots as large as (required by the bylaw) would not be readily saleable and could not be economically or advantageously used for building purposes because of the proximity of the land to

through ways bearing heavy traffic, or to a railroad, or because of other physical conditions or characteristics affecting it but not affecting generally the zoning district.

The Board of Appeals granted a special permit which authorized the creation of two lots having less lot area and frontage than normally required by the zoning bylaw. On appeal, it was argued that the creation of the two lots was a matter within the jurisdiction of the Planning Board because the division of land creating lots lacking the necessary frontage was governed by the Subdivision Control Law. The court ruled that the Planning Board did not have jurisdiction as there was no subdivision of land requiring approval under the Subdivision Control Law. The court found that the requirement that each lot has frontage of at least such distance as required by the zoning bylaw was met by the granting of the special permit. The court further noted that this was not a variance from the zoning law but a special application of its terms.

The court reached the same conclusion in Adams v. Board of Appeals of Concord, 356 Mass. 709 (1970), where the Concord Zoning Bylaw authorized the Board of Appeals to approve garden apartment developments having less than the minimum frontage requirement of the bylaw. The court found that a lot, having less frontage than normally required by the zoning bylaw but which has been authorized by special permit, met the frontage requirement of the zoning bylaw and the Subdivision Control Law. Since the reduced frontage for the garden apartment plan had been approved by special permit, the Planning Board was authorized to endorse the plan approval not required.

The distinction in the Seguin case was that the Seguins received a variance to create a lot lacking the frontage normally required by the zoning bylaw. The court found that a plan showing a lot having less than the required frontage, even if the Zoning Board of Appeals had granted a frontage variance for the lot, was a subdivision plan which required approval under the Subdivision Control Law. In holding that the Seguins' plan was not entitled to an approval not required endorsement from the Planning Board, the court noted its previous decision in Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981). In that case, the court analyzed the authority of a Planning Board to waive strict compliance with the frontage requirement specified in the Subdivision Control Law.

Landowners, in Arrigo, wished to create a building lot which would not meet the minimum lot frontage requirement of the zoning bylaw. The minimum lot frontage requirement was 200 feet, and the minimum lot area requirement was 40,000 square feet. They petitioned the Zoning Board of Appeals for a variance and presented the Board with a plan showing two lots, one with 5.3 acres and 200 feet of frontage, and the other lot with 4.7 acres and 186.71 feet of

frontage. The Board of Appeals granted a dimensional variance for the lot which had the deficient frontage. Upon obtaining the variance, the landowners applied to the Planning Board for approval of a plan showing the two lot subdivision.

The Planning Board waived the 200 foot frontage requirement for the substandard lot pursuant to the Subdivision Control Law and approved the two lot subdivision. MGL, Chapter 41, Section 81-R, authorizes a Planning Board to waive the minimum frontage requirement of the Subdivision Control Law provided the Planning Board determines that such waiver is in the public interest and not inconsistent with the intent and purpose of the Subdivision Control Law. As stated earlier, the minimum frontage requirement of the Subdivision Control Law is found in MGL, Chapter 41, Section 81-L, which states that the lot frontage is the same as is specified in the local zoning bylaw, or 20 feet in those cases where the local zoning bylaw does not specify a minimum lot frontage.

In deciding the Arrigo case, the Massachusetts Appeals Court had the opportunity to comment on the fact that the Planning Board and the Zoning Board of Appeals are faced with different statutory responsibilities when considering the question of creating a building lot lacking minimum lot frontage. Although MGL, Chapter 41, Section 81-R gives the Planning Board the authority to waive the frontage requirement for the purposes of the Subdivision Control Law, the court stressed that the authority of the Planning Board to waive frontage requirements pursuant to 81-R should not be construed as authorizing the Planning Board to grant zoning variances. The court noted that there is indeed a significance between the granting of a variance for the purposes of the Zoning Act and approval of a subdivision plan pursuant to the Subdivision Control Law. On this point, the court summarized the necessary approvals in order to create a building lot lacking minimum lot frontage.

In short, then, persons in the position of the Mercers, seeking to make two building lots from a parcel lacking adequate frontage, are required to obtain two independent approvals: one from the planning board, which may in its discretion waive the frontage requirement under the criteria for waiver set out in G.L. c. 41, s. 81R, and one from the board of appeals, which may vary the frontage requirement only under the highly restrictive criteria of G.L. c. 40A, s. 10. The approvals serve different purposes, one to give marketability to the lots through recordation, the other to enable the lots to be built upon. The action of neither board should, in our view, bind the other, particularly as their actions are based on different statutory criteria.

Absent a zoning bylaw provision authorizing a reduction in lot frontage by way of the special permit process, an owner of land wishing to create a building lot which will have less than the required lot frontage needs to obtain approval from both the Zoning Board of Appeals and the Planning Board. A zoning variance from the Zoning Board of Appeals varying the lot frontage requirement is necessary in order that the lot may be built upon for zoning purposes. It is also necessary that the lot owner obtain a frontage waiver from the Planning Board for the purposes of the Subdivision Control Law.

In the Arrigo case, the landowners had submitted a subdivision plan to the Planning Board. The court noted that without obtaining the frontage waiver the plan was not entitled to approval as a matter of law because, although it may have complied with the Planning Board's rules and regulations, it did not comply with the frontage requirements of the Subdivision Control Law. After the Arrigo decision, it was debatable as to the process a landowner had to follow in obtaining a frontage waiver from the Planning Board. Rather than submitting a subdivision plan, another view was that a landowner could submit a plan seeking an approval not required endorsement from the Planning Board and at the same time petition the Board for a frontage waiver pursuant to 81-R. If the Planning Board granted the frontage waiver and noted such waiver on the plan, then the Board could endorse the plan approval not required.

The Sequin case leaves no doubt as to the process that must be followed when a landowner seeks a frontage waiver from the Planning Board. If a lot shown on a plan lacks the frontage required by the zoning bylaw, then the plan shows a subdivision and must be reviewed under the approval procedure specified in Section 81-U of the Subdivision Control Law. The Planning Board must hold a public hearing before determining whether a frontage waiver is in the public interest and not inconsistent with the Subdivision Control Law. A notation that a frontage waiver has been granted by the Planning Board should either be shown on the plan or on a separate instrument attached to the plan with reference to such instrument shown on the plan. It is unclear whether a Planning Board must allow the Board of Health 45 days to comment on the plan when the only issue before the Planning Board is the frontage waiver. We would recommend that Planning Boards consider amending their rules and regulations providing for a shorter review period when a landowner is only seeking a frontage waiver from the Planning Board. A Planning Board may also want to specify a fee and any relevant information that should be submitted with the plan.

In determining whether to grant a frontage waiver, a Planning Board should consider if the frontage is too narrow to permit easy access or if the access from the frontage to the buildable portion of the lot is by a strip of land too narrow or winding to permit easy access. In the Sequin case, the court noted that the lot appeared to present no problem and indicated that the Planning Board would be acting unreasonably if the Seguins submitted a subdivision plan and the Board did not approve the plan.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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THE ANR PUZZLE ADEQUACY OF PUBLIC WAYS

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E

Basically, the court has interpreted the Subdivision Control Law to impose three standards that must be met in order for lots shown on a plan to be entitled to an endorsement by the Planning Board that "approval under the Subdivision Control Law is not required."

1. The lots shown on such plans must front on one of the three types of ways specified in MGL, Chapter 41, Section 81-L.
2. The lots shown on such plan must meet the minimum frontage requirement as specified in MGL, Chapter 41, Section 81-L.
3. A Planning Board's determination that the vital access to such lots as contemplated by MGL, Chapter 41, Section 81-M, otherwise exists.

The necessity that the Planning Board determines that the vital access exists to the lots shown on the plan before endorsing an ANR plan is not expressly stated in the Subdivision Control Law. The vital access standard has evolved from court decisions. The decisions were concerned whether proposed building lots have practical access and have focused on the following two issues:

1. Adequacy of the way on which the proposed lots front; and
2. Adequacy of the access from the lots onto the way.

M A N A G E R

In Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), the court applied the adequacy of way standard to a public way. Perry submitted a two lot ANR plan to the Planning Board. Both lots had the required zoning frontage on Oakland Street which was a way that had appeared on town plans since 1927. The County Commissioners of Nantucket, by an order of taking registered with the Land Court in 1962, took an easement for the purposes of a public highway. The public way had never been constructed. The Planning Board decided that the plan constituted a subdivision because the lots did not front on a public way as defined in the Subdivision Control Law. The court agreed.

We conclude that whatever status might be acquired by ways as "public ways" for purposes of other statutes by virtue of their having been "laid out," such ways will not satisfy the requirement of the "public way" exemption in Section 81-L ... of the subdivision control law, unless they in fact exist on the ground in a form which satisfies the ... goals of Section 81-M

Relying on the Perry decision, among others, the Hingham Planning Board, in Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), denied endorsement of a plan where all the lots shown on the plan abutted an existing public way. Hutchinson proposed to divide a 17.74 acre parcel on Lazell Street in Hingham into five lots. Lazell Street was a paved way which was used by the public and maintained by the town of Hingham. Each lot met the Hingham zoning bylaw requirements. The Planning Board was concerned about traffic safety and contended that the plan was not entitled to an ANR endorsement for the following reasons:

1. Lazell Street did not have sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land.
2. The frontage did not provide safe and adequate access to a public way.

Lazell Street was twenty to twenty-one feet wide which was about the same width as other streets in the area. The court found that Lazell Street satisfied the purposes of the Subdivision Control Law and that the Planning Board exceeded its authority in refusing to endorse the plan.

In sum, where there is access that a public way normally provides, that is, where the "street is of sufficient width and suitable to accommodate motor vehicle traffic and to provide access for fire-fighting equipment and other emergency vehicles," ... the goal of access under 81M is satisfied, and 81P endorsement is required.

For the last few years, the Perry and Hutchinson decisions represented the parameters for determining the adequacy of a public way for the purposes of an ANR endorsement. Under Perry, if proposed lots shown on a plan abutted an unconstructed public way (paper street), the plan was not entitled to an endorsement. If proposed lots shown on a plan abutted a paved public way, in line with the Hutchinson decision, then the plan was most likely entitled to an endorsement. What remained unclear was whether a plan showing lots which abutted an existing substandard or unpaved public way was entitled to an ANR endorsement. In previous decisions, the court had stated that Planning Boards are authorized to withhold ANR endorsement in those unusual situations where the "access implied by the frontage is illusory." The court, however, had not had the opportunity to consider the "illusory" standard in relation to a public way existing on the ground which was either unpaved or not properly maintained.

Recently, in Sturdy v. Planning Board of Hingham, 32 Mass. App. Ct. 72 (1992), the court had to determine whether a public way having certain deficiencies provided suitable access within the meaning of the Subdivision Control Law. Sturdy presented a plan to the Planning Board requesting an approval not required endorsement. The Planning Board denied endorsement and Sturdy appealed. The proposed lots shown on the plan abutted Side Hill Road which was a public way. A Superior Court judge found that Side Hill Road was a passable woods road of a dirt substance with some packed gravel. It was approximately eleven to twelve feet wide, muddy in spots and close to impassable during very wet portions of the year. The road was wide enough for only one car and it would be very difficult for large emergency vehicles to turn onto Side Hill Road at either end.

Whether Sturdy's plan was entitled to an ANR endorsement depended on whether the access that Side Hill Road afforded was, in fact, illusory. The Superior Court judge determined that the plan was entitled to the ANR endorsement notwithstanding any deficiencies in the way. The Massachusetts Appeals Court agreed.

... a planning board may withhold the ANR endorsement (where the tract has the required frontage on a public way) only where the access is "illusory in fact."

Deficiencies in a public way are insufficient ground for denying the endorsement. The ANR endorsement for lots fronting on a public way, provided for in G.L. c.41, s. 81L, is a legislative recognition that ordinarily "lots having such a frontage are fully accessible, and as the developer does not contemplate the construction of additional access routes, there is no need for supervision by the planning board on that score." ... Moreover, since municipal authorities have the obligation to maintain such ways, there is already public control as to how perceived deficiencies, if any, in such public ways are to be corrected.

Another interesting issue discussed in the Sturdy decision was the responsibility of a municipality to repair and maintain public ways so they are reasonably safe and provide access for emergency vehicles. MGL, Chapter 84, Section 15 provides:

If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair ... upon a way, and such injury or damage might have been prevented, or ... might have been remedied by reasonable care and diligence on the part of the ... town ... he may, if such ... town ... had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair ... recover damages therefor from such ... town

Sturdy brought an action against the town to require the town to repair and make Side Hill Road reasonably safe and provide access for emergency vehicles. The judge ruled that such relief was not appropriate where no specific criteria exist as to the standard to which the public way must conform. The court agreed.

STURDY v. PLANNING BOARD OF HINGHAM
32 Mass. App. Ct. 72 (1992)

Excerpts:

Dreben, J. ...

the judge, as noted earlier, based his decision to deny discretionary relief in the nature of mandamus on the absence of any specific criteria for maintaining a public way. ... the "standard of duty [to keep a way in repair] is not an absolute or inflexible one, but should be given an application which is related to the character of the way and to the kind and amount of travel at the location of the alleged defect." The judge correctly noted that the "width, surface, drainage, ingress and grades of any public way will vary dependent upon the usage of said way by travelers in a particular community." Much discretion must be afforded the town in this regard, particularly because of the heavy financial pressures on local government ... and we see no abuse of discretion in the judge's declining to issue an order to the town.

The parties assumed that abutters as well as injured persons who come within G.L. c. 84, s. 15, have a private right of action against a municipality failing to make repairs. We do not reach the question but note that the validity of that assumption is not clear.

... The Commonwealth, pursuant to G.L. c. 84 , s. 22, ... may bring an action against a town, ... and, in addition , under G. L. c. 84, s. 7, surveyors of highways and road commissioners have the burden to see that the town performs its duty of repair. These specific remedies afforded by the statute suggests that an additional private remedy for abutters is not implied. There appears here no special legislative concern for an identifiable interest of a group of which the plaintiff is a member but rather a concern for travelers and the public generally. ... The cases cited by the plaintiff are inapposite, as they either involve contractual obligations ... or different statutes. We have been directed to no case permitting an abutter to require a municipality to repair a street under G. L. c. 84, s. 1. The cases suggesting that abutters may bring mandamus for the construction of ways ... were brought under the predecessors of G.L. c. 82 and similar statutes, and not of G. L. c. 84.

If a public way exists in some form and is passable, according to Sturdy, then a plan showing lots abutting such a way is entitled to ANR endorsement. If a public way has never been constructed (i.e., paper street) or access is in fact illusory (i.e., way is not passable), a plan showing lots abutting such a way would not be entitled to ANR endorsement.

A public way which is passable but may be temporarily unusable at certain times of the year may pass the adequacy of access test. In Sturdy, the Superior Court judge noted that the way was close to impassable during very wet portions of the year. We assume from the decision that, although more difficult, the way was still passable during the wet season. However, in Long Pond Estates Ltd. v. Planning Board of Sturbridge, 406 Mass. 253 (1989), the court decided that the principal access to a lot can be temporarily unavailable provided that adequate access for emergency vehicles exists on another way. The plan showed three lots, each of which had adequate frontage on a public way. However, a portion of the way was within a flood easement held by the United States Army Corps of Engineers, and was periodically closed due to flooding. Between 1980 and 1988, the Corps of Engineers closed the affected portion of the public way on an average of 33 1/2 days a year. The court found that the plan was entitled to ANR endorsement because adequate access to the proposed lots was available via ways in a neighboring town during the time when a portion of the public way was closed due to flooding. In order to meet the Long Pond variation, a landowner must show that the public way meets the vital access standard and a second means of access is also available which will provide adequate access for the purposes of the Subdivision Control Law.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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L

THE ANR PUZZLE PRACTICAL ACCESS TO BUILDING LOTS

A

As we noted in the last edition of the Land Use Manager, a Planning Board, before endorsing a plan "approval under the Subdivision Control Law not required" (ANR), must determine that practical access exists to the lots shown on such plan. Whether proposed building lots have practical access is dependent on the following two issues:

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1. Adequacy of the way on which the proposed lots front; and
2. Adequacy of the access from the lots onto the way.

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In the last issue of the Land Use Manager, we examined a recent court decision dealing with the adequacy of the existing public way. In this edition of the Land Use Manager, we will review a few court decisions dealing with the adequacy of the access from the lot onto the way.

Case law has established the principle that each lot shown on an ANR plan must be able to access onto the way from the designated frontage. Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978), was the first case where the court had the opportunity to consider this issue. Gifford dealt with a most unusual plan which technically complied with the requirements of the Subdivision Control Law so as to be entitled to an ANR endorsement.

E

M A N A G E R

The Nantucket Zoning Bylaw required a minimum lot frontage of seventy-five feet. An owner of a forty-nine acre parcel of land submitted a plan to the Planning Board showing forty-six lots and requested ANR endorsement. Each of the forty-six lots abutted a public way for not less than the required seventy-five feet of frontage. However, the connection of a number of the lots to the public way was by a long, narrow neck turning at acute angles in order to comply with the seventy-five foot frontage requirement.

One lot had a neck which was 1,185 feet long, having seven changes of direction before it reached the public way. The neck narrowed at one stage to seven feet. Another lot had a neck which was 1,160 feet long, having six changes of direction before it reached the public way at a twelve degree angle. Of all the lots shown on the plan, the necks ranged from forty to 1,185 feet in length. Twenty-nine necks were over three hundred feet, sixteen were over five hundred feet, and five were over one thousand feet. Thirty-two necks changed direction twice or more, while nine changed three times, one four times, five five times, one six times, and two seven times. Three necks narrowed to ten feet or less and six to not more than twelve feet.

In deciding the case, the court looked at the purposes of the Subdivision Control Law as stated in MGL, Chapter 41, Section 81M and noted that "a principal object of the law is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." The court noted that the purpose of the frontage requirement in the Subdivision Control Law is to make certain that each lot "may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare."

Under ordinary circumstances, Planning Board approval is not required when the lots have the required frontage, are fully accessible, and the developer does not contemplate the construction of additional access routes. However, in Gifford, the court was not dealing with an ordinary plan. In reviewing the plan, it was found that it would be most difficult, if not impossible, to use a number of the necks so that there was no practical vehicular access to the main or buildable parts of the lots. The court concluded that the plan was an obvious attempt to circumvent the purpose and intent of the Subdivision Control Law and that the lots shown on the plan did not have sufficient frontage as contemplated by the Subdivision Control Law.

Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979), was the first case after Gifford which dealt with the practical access issue. Hrenchuk submitted a plan to the Planning Board requesting an ANR endorsement. All the lots shown on the plan abutted Interstate 95, a limited access highway. There was no means of vehicular passage between the highway and any of the lots. The lots could only be reached by use of a thirty foot wide private way which led to another public way upon which one of the nine lots shown on the plan fronted. The court determined that Hrenchuk was not entitled to an ANR endorsement, and his plan required approval under the Subdivision Control Law.

One of the more interesting cases dealing with the question of whether proposed building lots have practical access from the way to the lot was McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980). McCarthy submitted a plan to the Planning Board for an ANR endorsement. The lots shown on the plan had at least one hundred feet of frontage on a public way which was the minimum frontage requirement of the Edgartown Zoning Bylaw. However, the Martha's Vineyard Commission (MVC) had adopted certain road access requirements which were applicable in the town of Edgartown. The pertinent MVC access regulation required that "any additional vehicular access to a public road must be at least 1,000 feet measured on the same side of the road from any other vehicular access." The Planning Board denied the requested endorsement.

McCarthy claimed that the plan did not show a subdivision because every lot had one hundred feet of frontage on a public way as required by the Edgartown Zoning Bylaw. The court found that the MVC requirement deprived McCarthy's lots of vehicular access to the public way so the lots did not have frontage for the purposes of the Subdivision Control Law.

Shortly after the McCarthy decision, the Appeals Court had another opportunity to define practical access in Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980). The Gallitanos submitted a plan to the Planning Board requesting ANR endorsement. The plan showed four lots, each meeting the zoning requirements for a buildable lot. The zoning ordinance did not specify any minimum frontage requirement. In such cases where a zoning ordinance or bylaw does not specify any frontage requirement, MGL, Chapter 41, Section 81L of the Subdivision Control Law requires that proposed lots must have a minimum of twenty feet of frontage in order for such lots to be entitled to an ANR endorsement. Each of the lots shown on the plan had at least twenty feet of frontage on a public way. One lot had twenty feet of frontage and was no wider (or narrower) than twenty feet for a distance of seventy-six feet where it widened to permit compliance with the width and yard requirements for a buildable lot. This was the lot that raised the most concern with the Planning Board. The Planning Board denied endorsement of the plan apparently inspired by the analysis in the Gifford case.

The Planning Board sought to establish that despite literal compliance with the lot frontage requirements of the zoning ordinance, the lots would be left without access (or without easy access) to municipal services. The Planning Board supported its arguments with affidavits from city officials responsible for fire and police protection, traffic control, and public works. The affidavits claimed that certain lots intersected the public way at so acute an angle as to make entrance by vehicle difficult or impossible. The access was said to be "blind to oncoming traffic," thus creating a traffic hazard. However, the court noted that a zoning ordinance which, like Waltham's, requires building lots to be one hundred feet wide, but allows them to have as little as twenty feet of frontage, contemplates that some degree of development will be permissible on back lots exempt from Planning Board control. "Such is the choice made by a municipality which fails to expand the twenty foot minimum frontage requirement" of

the Subdivision Control Law. In deciding against the Planning Board, the court established a general rule to guide Planning Boards in determining whether access exists from the way to the lot.

The Gifford case does preclude mere technical compliance with frontage requirements in a manner that renders impossible the vehicular access which frontage requirements are intended in part to ensure; it does not create a material issue of fact whenever municipal officials are of the opinion that vehicular access could be better provided for. As a rule of thumb, we would suggest that the Gifford case should not be read as applying to a plan, such as the one before us, in which the buildable portion of each lot is connected to the required frontage by a strip of land not narrower than the required frontage at any point, measured from that point to the nearest point of the opposite sideline.

In Gifford, the court noted that a plan is entitled to ANR endorsement if the lots shown on the plan are fully accessible and the developer does not contemplate the construction of additional access routes. If each lot has practical access from the way to the lot, the fact that a landowner may propose to construct a common driveway is not a reason to deny ANR endorsement. In Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987), the court held that a proposed common driveway was not relevant in determining ANR endorsement. Fox owned a parcel of land which abutted the Neponset Valley Parkway. He submitted a plan to the Planning Board for an ANR endorsement. The plan showed the division of his parcel into four lots. Each lot abutted parkway land for a distance of 150 feet which was the minimum frontage requirement of the Milton Zoning Bylaw. The proposed lots were separated from the paved portion of the parkway by a greenbelt which was approximately 175 feet wide. Fox had obtained an access permit from the Metropolitan District Commission for a "T" shaped common driveway connecting, at the base, to the paved road and, at the top, to the four lots where they abutted the greenbelt. The proposed common driveway was shown on the ANR plan. The Planning Board denied endorsement ruling that the plan showed a subdivision. In the Board's view, the lots shown on the plan lacked access as they were effectively blocked from the paved roadway by the greenbelt. The Planning Board contended that the common driveway should be subject to their regulations governing the construction of roads in subdivisions.

As to the question of access, the court found that Fox had rights of access to the Neponset Valley Parkway. Chapter 288 of the Acts of 1894 authorized the Metropolitan Park Commissioners to take land for the construction of parkways and boulevards. Pursuant to this authority, the Metropolitan Park Commissioners took land in 1904 to construct the Neponset Valley Parkway. In Anzalone v. Metropolitan District Commission, 257 Mass. 32 (1926), the court ruled that in contrast to roadways constructed within public parks, roadways constructed under the 1894 statute were public ways to which

abutting owners had a common-law right of access. Anzalone also noted if land, adjacent to roadways which were constructed under the authority of the 1894 statute, was divided into separate ownership lots, then each lot owner would have a right of access from his lot to the roadway. The court found that access from the parkway to the lots shown on the plan was not impaired or limited by the substantial intervening greenbelt. Since each lot shown on the plan had practical access to the parkway, the court concluded that the construction of a common driveway rather than four individual driveways was not a reason to deny ANR endorsement.

Since the Gifford decision, there had been no case on point whether a Planning Board could consider topographical issues when reviewing an ANR plan until the Massachusetts Appeals Court decided Corcoran v. Planning Board of Sudbury, 26 Mass. App. Ct. 1000 (1988). In that case, the Appeals Court ruled that a Planning Board could consider the presence of wetlands, which are subject to the Wetlands Protection Act, when reviewing an ANR plan. The Massachusetts Supreme Court [see 406 Mass. 248 (1992)] reversed the decision of the Appeals Court.

Corcoran had submitted a six lot ANR plan to the Planning Board. Each lot had the required frontage on a public way. The plan showed wetland areas between the buildable portion of some of the lots and the public way. The plan also showed a twenty-five foot wide common driveway. Presumably, the proposed driveway would provide access to those lots shown on the plan. The Planning Board argued that even though Corcoran's plan met the statutory requirements for an ANR endorsement, such technical compliance alone was not enough. The Planning Board claimed that Corcoran was not entitled to an endorsement because the presence of wetlands on the lots prevented practical access to the buildable areas of some of the lots. The Planning board maintained that this case was governed by Gifford and other decisions which have held that technical compliance with the frontage requirement of the Subdivision Control Law does not in itself entitle a plan to ANR endorsement. The SJC disagreed that the rationale contained in Gifford and subsequent cases was applicable to Corcoran's plan.

The guiding principle of Gifford and its progeny is that planning boards are authorized to withhold "ANR" endorsement in those unusual situations where the "access implied by [the] frontage is...illusive in fact."...We conclude that the existence of interior wetlands, that do not render access illusive, is unlike the presence of distinct physical impediments to threshold access or extreme lot configurations that do. ...

After Corcoran, it was unclear as to what would constitute a distinct physical impediment that would prohibit practical access. Would a plan be entitled to ANR endorsement if a distinct physical impediment existed that prevented practical access but could be removed at a later date so that each lot would have practical access to the public way? The court, in Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), shed some light on this issue.

Poulos owned a parcel of land which abutted a paved public way in the town of Braintree. He submitted a plan to the Planning Board requesting that the Board endorse the plan "approval under the Subdivision Control Law not required." The plan showed twelve lots, each of which contained the minimum fifty feet of frontage as required by the Braintree Zoning Bylaw. There was a guardrail located within the street right-of-way which was approximately seven feet from the boundary of the lots shown on the plan. This guardrail extended for about 659 feet between the paved way and the frontage of eight lots shown on the plan. The State Department of Public Works had installed the guardrail due to the existence of a steep downward slope between the public way and portions of the property owned by Poulos. The Board denied the requested endorsement and Poulos appealed to the Land Court.

The Land Court judge found that the policy of the State Department of Public Works is to remove guardrails when the reason for their installation has been extinguished. Neither State nor local approval would be required for Poulos to regrade and fill his property so as to eliminate the slope. An order of conditions authorizing such filling had been issued to Poulos by the Braintree Conservation Commission. The judge was satisfied that there was adequate access from the public way to the several lots in question. He concluded that neither the slope nor the guardrail constituted an insurmountable impediment to a finding that adequate access existed from the public way to the lots. He based his decision on the fact that there was nothing to prevent Poulos from filling and regrading his property which would result in the removal of the slope and therefore eliminate any need for the guardrail. The Planning Board appealed and the Massachusetts Appeals Court reversed the decision of the Land Court judge. The Massachusetts Supreme Court allowed further appellate review and agreed with the Appeals Court.

POULOS v. PLANNING BOARD OF BRAINTREE
413 Mass. 359 (1992)

Excerpts:

O'Connor, J. ...

Planning boards may properly withhold the type of endorsement sought here when the "access implied by the frontage is...illusory in fact." ... The plaintiff argues that the access is not illusory in this case because, as the judge determined, the plaintiff could regrade the slope, and regrading would result in the DPW's removal of the guardrail, which would no longer be needed. The plaintiff also argues that, subject to reasonable restrictions, he has a common law right of access from the public way to his abutting lots that would require the DPW to remove the guardrail if it were not to do so voluntarily. ...

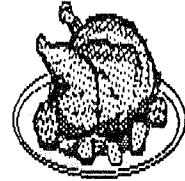
We conclude, as did the Appeals Court, that c. 41, §§ 81L & 81M, read together, do not permit the endorsement sought by the plaintiff in the absence of present adequate access from the public way to each of the plaintiff's lots. It is not enough that the plaintiff proposes to regrade the land in a manner satisfactory to the DPW and that the DPW may respond by removing the guardrail. In an analogous situation, the Appeals Court upheld the refusal of a planning board to issue an "approval not required" endorsement where the public way shown on the plan did not yet exist, even though the town had taken the land for future construction of a public street. The Appeals Court concluded that public ways must "in fact exist on the ground" to satisfy the adequate access standard of c. 41, § 81M. Perry v. Planning Bd. of Nantucket, supra at 146, 150-151. While Perry dealt with nonexistent public ways, and this case deals with nonexistent ways of access, the principle is the same. There should be no endorsement in the absence of existing ways of access.

In addition, we reject the argument, based on Anzalone v. Metropolitan Dist. Comm'n, supra, that, at least after regrading, the plaintiff would have a common law right of access that would entitle him to the requested endorsement. It is not a right of access, but rather actual access, that counts. In Fox v. Planning Bd. of Milton, supra at 572-573, the Appeals Court held that abutting lots had adequate access to a Metropolitan District Commission (MDC) parkway, not merely because the abutter possessed a common law right of access, but because, in addition, the MDC had granted the landowner a permit for a common driveway to run across an MDC green belt bordering the parkway. In the present case, the plaintiff has not received such an approval.

In order for a plan to be entitled to an ANR endorsement, each lot shown on the plan must have practical access from the public way. Practical access from the public way to the lot must exist at the time of ANR endorsement. Based on the Poulos decision, severe topographical conditions which prevent practical access from the public way to the lot is sufficient basis to deny ANR endorsement.

According to the Fox decision, a proposed common driveway is not relevant in determining whether a plan is entitled to ANR endorsement when each lot shown on the plan has practical access to the public way. An issue not addressed in Fox is whether a common driveway shown on an ANR plan is buildable under the provisions of the local zoning bylaw. An ANR endorsement gives the lots no standing under the zoning bylaw. See Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980).

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



William F. Weld, Governor
Mary L. Padula, Secretary

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L

CHANGING LOT LINES ON APPROVED SUBDIVISION PLANS

A

Under the Subdivision Control Law, one method for amending a previously approved subdivision plan is found in MGL, Chapter 41, § 81W, which provides in part that:

N

"A planning board, on its own motion or on the petition of any person interested, shall have the power to ... amend ... its approval of a plan of a subdivision All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the ... amendment ... of such approval and to a plan which has been changed under this section."

D

Another method for amending a previously approved subdivision plan can be found in MGL, Chapter 41, § 81O which provides in part that:

U

"After the approval of a plan ... the number, shape and size of the lots shown on a plan so approved may, from time to time, be changed without action by the board, provided every lot so changed still has frontage on a public way or way shown on a plan approved in accordance with the subdivision control law for at least such distance, if any, as is then required ... and if no distance is so required, has such frontage of at least twenty feet."

S

M A N A G E R

The process for amending a subdivision plan pursuant to § 81W is the same process that a Planning Board must follow when approving the original subdivision plan. Rather than going through the public hearing process, Section 81O allows a developer/landowner, as a matter of right, to change the number, shape and size of lots shown on a previously approved subdivision plan. A developer/landowner may also submit an ANR plan when changing the number, shape, and size of lots shown on a previously approved subdivision plan. What must a Planning Board consider when reviewing an ANR plan where the proposed lots abut a way shown on a plan that has been previously approved and endorsed by the Planning Board pursuant to the Subdivision Control Law ?

Before endorsing an ANR plan where the lots shown on a plan abut such a way, the court has determined that a Planning Board should consider the following:

1. Are the approved ways built or is there a performance guarantee in place, as required by MGL, Chapter 41, § 81U, that they will be built?
2. Was there a condition placed on the previously approved subdivision plan which has not been met or which would prevent further subdivision of the land?

MGL, Chapter 41, § 81U provides several techniques for enforcement of the Subdivision Control Law. A Planning Board, before endorsing its approval of a subdivision plan, is required to obtain an adequate performance guarantee to insure that the construction of the ways and the installation of municipal services will be completed in accordance with the rules and regulations of the Planning Board. The court has decided that a plan is not entitled to an ANR endorsement unless the previously approved subdivision way shown on the ANR plan has been built or there is a performance guarantee assuring that the way will be built.

In Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980), the Board of Selectmen, acting as an interim Planning Board, approved a 26 lot subdivision. The Selectmen did not specify any construction standards for the proposed ways, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee. Eighteen years after the approval of the subdivision plan by the Board of Selectmen, Richard submitted an ANR plan to the Planning Board. During the 18 year period, the locus shown on the ANR plan had been the site of gravel excavation so that it was now 25 feet below the grade of surrounding land. The Planning Board refused to endorse the plan. The central issue before the court was whether the lots shown on the ANR plan had sufficient frontage on ways that had been previously approved in accordance with the Subdivision Control Law. The court found that to be entitled to the ANR endorsement, when

a plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards. Since there was no performance guarantee, Richard's plan was not entitled to ANR endorsement.

A Planning Board, when approving a subdivision plan, has the authority to impose reasonable conditions. A Planning Board may impose a condition which can result in the automatic rescission of a subdivision plan. A Planning Board may also impose a condition which can limit the ability of a developer/landowner to further subdivide the land shown on the plan without modifying or rescinding the limiting condition through the § 81W process. Therefore, in reviewing an ANR plan where the proposed lots abut a previously approved subdivision way, a Planning Board should check for the following:

1. Has the previously approved subdivision plan expired for failure to meet a specific condition?
2. Does the previously approved subdivision plan contain a condition which prevents the land shown on the plan from being further subdivided?

The issue of an automatic rescission of a previously approved subdivision plan was discussed in Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971). In that case, the Planning Board approved a subdivision plan on the condition that the developer complete all roads and municipal services within a specified period of time or else the Planning Board's approval would automatically be rescinded. The Board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant which contained the following language:

The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two years from date. Failure to so complete shall automatically rescind approval of the plan.

After the expiration of the two-year time period, the landowner submitted a plan to the Planning Board requesting an "approval not required" endorsement. The plan showed a portion of the lots that were shown on the previously approved definitive plan which abutted a way which was also

shown on the plan. The landowner's position was that he was entitled to an ANR endorsement since the lots shown on this new plan abutted a way that had been previously approved by the Planning Board pursuant to the Subdivision Control Law. The Planning Board denied endorsement. The court found that the automatic rescission condition was consistent with the purposes of the Subdivision Control Law and that the Planning Board could rely on that condition when considering whether to endorse a plan "approval not required". Since the ways and installation of municipal services had not been completed in accordance with the terms of the conditional approval, the court held that the plan before the Board constituted a "subdivision" and was not entitled to the ANR endorsement. A similar result was also reached in Campanelli, Inc. v. Planning Board of Ipswich, 358 Mass. 798 (1970).

In SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), the Planning Board approved a definitive subdivision plan with the notation stating that "All building units will be detached as covenanted" and a covenant to that effect was executed. At a later date, the landowner submitted a plan for ANR endorsement showing building lots abutting ways that were shown on the previously approved subdivision plan. The lots shown on the ANR plan were of such a size to accommodate a multi-family housing development. The Planning Board denied ANR endorsement.

SMI INVESTORS(DELAWARE), INC. V. PLANNING BOARD OF TISBURY
18 Mass. App. Ct. 408 (1984)

Excerpts:

Armstrong, J. ...

... the 1973 [definitive] plan was approved subject to a condition that all dwellings erected on the lots shown thereon be detached. The imposition of that condition was not appealed, and its propriety is not now before us. ... The 1981 [ANR] plan showed the same roads but altered lot lines. The plan also showed that the lots are designed to serve multi-family dwellings. The plaintiff asked the planning board to disregard the proposed use, but this it could not demand as of right.

... The application for the § 81P endorsement was necessarily predicated on the approval of the 1973 plan, which remained contingent on acceptance of the condition. As the 1981 plan does

not contemplate compliance with the condition, it is, in effect, a new plan, necessitating independent approval. We need not consider whether the plaintiff might have been entitled to a § 81P endorsement if each lot shown on the plan had been expressly made subject to the condition on the 1973 plan ... The record in the case before us makes clear that the plaintiff did not seek such a qualified endorsement

It follows that the judge did not err in ruling that the planning board was correct in refusing the § 81P endorsement.

Recently, in Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993), the court held that the Planning Board did not modify or waive a condition imposed on a previously approved subdivision plan by endorsing a subsequent plan "approval not required." In Hamilton, the Beverly Planning Board approved a five lot definitive plan on the stated condition that "This subdivision is limited to five (5) lots unless a new plan is submitted to the Beverly Planning Board which meets their full standards and approval." Seven years later, Hamilton, an owner of one of the lots shown on the 1982 definitive plan, submitted an ANR plan to the Planning Board. He wished to divide his lot into two lots which would meet the current lot area and lot frontage requirements of the Beverly Zoning Ordinance. The Planning Board endorsed the plan. Thereafter, Hamilton applied for a building permit to erect a single-family residence on one of the newly created lots. The Building Inspector was made aware of the condition noted on the 1982 definitive plan that had limited the subdivision to five lots. On the strength of that limitation, the Building Inspector declined to issue the building permit. On appeal, Hamilton argued that the "approval not required" endorsement superseded the limiting condition imposed on the 1982 definitive plan.

HAMILTON V. PLANNING BOARD OF BEVERLY
35 Mass. App. Ct. 386 (1993)

Excerpts:

Kass, J. ...

Approval of a subdivision plan involves procedures, including a public hearing (G. L. c. 41, § 81T) as well as open sessions of the planning board at which the proposed division of a tract of land into smaller lots is carefully reviewed so as to meet design criteria and certain policy objectives relating to streets (with emphasis on

maximizing traffic convenience and minimizing traffic congestion), drainage, waste disposal, catch basins, curbs, access to surrounding streets, accommodation to fire protection and policing needs, utility services, street lighting, and protecting access to sunlight for solar energy. ...

The number of lots in a subdivision has a bearing on those considerations. What might be an adequate access road or waste disposal system for five lots is not necessarily adequate for seven or ten. For that reason a planning board may limit the number of lots in a subdivision. ... If it does so, the board must, as here, note the lot number limitation on the approved plan, which becomes a matter of record. Otherwise, under G.L. c. 41, § 81O, the number, shape and size of the lots shown on a plan may be changed as a matter of right, provided every lot still has frontage that meets the minimum requirements of the city or town in which the land is located.

Under G.L. c. 41, § 81W, a person having a cognizable interest may petition the planning board for modification of an approved subdivision plan. Action by a planning board on such a petition for modification incorporates all the procedures attendant on original approval, including, therefore, a public hearing. Section 81W also provides that no modification may affect the lots in the original subdivision which have been sold or mortgaged.

The provisions built into §§ 81T and 81W, which are designed to protect purchasers of lots in a subdivision and the larger public, would be altogether - and easily - subverted if an approved plan could be altered by the simple expedient of procuring a § 81P "approval not required" endorsement. All that is required to obtain such an endorsement is presentation to a planning board of a plan that shows lots fronting on a public street or its functional equivalent, see G.L. c. 41, § 81L, with area and frontage that meet local municipal requirements. The endorsement of such plan is a routine act, ministerial in character, and constitutes an attestation of compliance neither with zoning requirements nor subdivision conditions. ... Restrictions in an approved subdivision plan are binding on a building inspector.

The limited meaning which may be ascribed to a § 81P endorsement and the ministerial nature of the endorsement defeat the argument of the plaintiffs that the endorsement constituted a waiver of the five-lots limitation - prescinding from the question whether the board, for reasons we have discussed, could waive the limitation, thus altering the plan, without a public hearing. ...

As Judge Kass noted in Hamilton, restrictions in an approved subdivision plan are binding on a building official. Specifically, MGL, Chapter 41, § 81Y provides that a building inspector cannot issue a building permit until satisfied that:

"... the lot on which the building is to be erected is not within a subdivision, or that a way furnishing the access to such lot as required by the subdivision control law is shown on a plan recorded or entitled to be recorded ... and that any condition endorsed thereon limiting the right to erect or maintain buildings on such lot have been satisfied, or waived by the planning board,

....

MGL, Chapter 41, § 81P further provides that a statement may be placed on an ANR plan indicating the reason why approval is not required under the Subdivision Control Law. As was noted by the court in SMI Investors, if a Planning Board believes its endorsement may tend to mislead buyers of lots shown on a plan, they may exercise their powers in a way that protects persons who will rely on the endorsement. Before endorsing a plan "approval not required" where the proposed lots abut a way shown on a previously approved and endorsed subdivision plan, the Planning Board should review the subdivision plan to see if there is any limiting condition which would prevent the land shown on the subdivision plan from being further subdivided. If no such condition exists but there were other conditions imposed, it may be prudent to place a notation on the ANR plan indicating that the lots shown on the plan abut a way which has been conditionally approved by the Planning Board pursuant to the Subdivision Control Law. Hopefully, this notation will alert a building official to review the previously approved subdivision plan to determine if there is any condition which would prevent the issuance of a building permit. If the subdivision way shown on the ANR plan has not been constructed, the Planning Board should check to make sure that there exists a performance guarantee as required by the Subdivision Control Law. If the construction of such way is secured by a covenant, the Planning Board may want to consider placing a statement on the ANR plan which will alert a future buyer of any lot shown on the plan to the existence of such a covenant. A Planning Board should check with municipal counsel if there is any question concerning the applicability of the covenant to the lots shown on the ANR plan.

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William F. Weld, Governor
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APPROVAL OF ZONING FRONTAGE BY A PLANNING BOARD

In determining whether a proposed building lot has adequate frontage for the purposes of the Subdivision Control Law, MGL, Chapter 41, § 81L provides that the proposed building lots must front on one of three types of ways:

- (a) a public way or a way which the municipal clerk certifies is maintained and used as a public way,
- (b) a way shown on a plan approved and endorsed in accordance with the Subdivision Control Law, or
- (c) a way in existence when the Subdivision Control Law took effect in the municipality having, in the opinion of the Planning Board, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use and for the installation of municipal services to serve such use.

In determining whether a lot has adequate frontage for zoning purposes, many zoning bylaws contain a definition of "street" or "way" which includes the types of ways defined in the Subdivision Control Law. The fact that a lot may abut a way which has been approved by the Planning Board pursuant to the Subdivision Control Law does not mean the lot complies with the frontage requirement of the local zoning bylaw.

E M A N A G E R

Recently, the court decided that when a zoning bylaw allows lot frontage to be measured along a way which has been approved under the Subdivision Control Law, the way must exist on the ground. As Judge Armstrong so succinctly opined in Shea v. Board of Appeals of Lexington, 35 Mass. App. Ct. 519 (1993), "A fire truck cannot drive on a plan."

In 1913, before the Subdivision Control Law was adopted in the town of Lexington, a subdivision plan was recorded in the Middlesex Registry of Deeds. One of the ways depicted on this plan was Rockville Avenue. Four adjacent lots shown on that 1913 plan and fronting on Rockville Avenue were conveyed to a Mr. Shea by deed in 1978. In 1978, an ANR plan was submitted to the Planning Board combining the four adjacent lots shown on the 1913 plan into two lots numbered lot 1 and lot 2, with lot 2 having 125 feet of frontage on Rockville Avenue. The plan, for some unexplained reason, received an ANR endorsement from the Planning Board. In 1991, Mr. Shea conveyed lot 1 and was granted registration of lot 2 by decree of the Land Court.

Shea was denied a building permit for lot 2. The Building Commissioner denied the building permit on the ground that Rockville Avenue, on which the lot fronted, was not a street as defined in the Lexington Zoning Bylaw. A portion of Rockville Avenue was a paved road which included the first ten feet in front of lot 2. The paving stopped at that point, and Rockville Avenue became a path, some fifteen feet in width, wooded on both sides, with boulders and ledge outcroppings, descending at an increasingly steep slope. The unpaved section of Rockville Avenue that bordered lot 2 was not suitable for vehicular traffic, except perhaps by four-wheel drive, all-terrain vehicles during nonwinter months.

Shea's argument was that the 125 feet of frontage on Rockville Avenue was frontage on a "street", as required by the Lexington Zoning Bylaw, because Rockville Avenue was a way shown on an approved subdivision plan.

The Lexington Zoning Bylaw required frontage on a "street." A "street" for the purposes of the zoning bylaw was defined as follows:

- (a) a public way,
- (b) a way shown on a previously approved subdivision plan, or
- (c) a way that predates subdivision control that has, in the planning board's opinion, width, grades, and construction suitable and adequate for vehicular traffic and the installation of utilities.

Although the Planning Board had endorsed the ANR plan in 1978, the Board never approved a definitive subdivision plan pursuant to Section 81U of the Subdivision Control Law which incorporated the portion of Rockville Avenue which Shea claimed constituted street frontage for lot 2. Shea raised an interesting argument. He claimed that Rockville Avenue had the status of a way shown on an approved subdivision plan once the Land

Court granted registration of lot 2 in 1991 because of the provisions found in Section 81FF of the Subdivision Control Law. With respect to registered land, Section 81FF provides in part that:

... the land court shall not register or confirm a plan of a subdivision ... which has been filed on or after February first, nineteen hundred and fifty-two, unless it has first verified the fact that the plan filed with it has been approved by the planning board, or would otherwise be entitled if it had related to unregistered land, to be recorded in the registry of deeds. The land court shall have jurisdiction in so far as affects land registered or to be registered or confirmed under chapter one hundred and eighty-five, to determine whether the subdivision control law has been complied with, and shall verify before registering or confirming any plan ..., that the plan ... is entitled to be recorded in accordance with the subdivision control law, and every plan heretofore or hereafter registered or confirmed by the land court pursuant to said chapter one hundred and eighty-five shall for the purposes of the subdivision control law be deemed to be, and shall be invested with all the rights and privileges of, a plan approved pursuant to said law.

Shea contended that since Section 81FF states that when a plan which has been registered or confirmed by the land court is deemed to have all the rights and privileges of a plan approved pursuant to the Subdivision Control Law, then, when he registered his lot, shown as bounded by Rockville Avenue, his plan must be treated as a plan approved under the Subdivision Control Law. If his plan is treated as an approved subdivision plan, then Rockwood Avenue is a way shown on a previously approved subdivision plan which meets the definition of "street" as defined in the Lexington Zoning Bylaw.

SHEA V. BOARD OF APPEALS OF LEXINGTON
35 Mass. App. Ct. 519 (1993)

Excerpts:

Armstrong, J. ...

... the court is required under § 81FF to verify only that a plan of subdivision either has been approved by the planning board "or would otherwise be entitled ... to be recorded in the registry of deeds." A plan endorsed "approval not required" under § 81P is entitled to recordation If, as the plaintiff argues, registration elevates a § 81P endorsement to the level of a § 81U [definitive plan] approval, it is clear from the express language of § 81FF that it does so only "for the purposes of the subdivision

control law." At most, then, a registration under § 81FF, like a § 81P endorsement, gives the lots shown on the plan no standing as lawful lots under a zoning code. Even for purposes of the Subdivision Control Law, a planning board acts "properly [in] deny[ing] an 81P endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in § 81M. *Perry v. Planning Bd. of Nantucket*, 15 Mass. App. Ct. 144 (1983) (plan showing frontage on two paper ways, one an unconstructed "public way," the other shown on a Land Court plan but not constructed on the ground).

Not only for the good of the homeowner, but also for the safety of the public, a town can insist that homes not be built on lots lacking adequate access for fire trucks and emergency vehicles. Even if the plaintiff's argument is accepted and Rockville Avenue is in legal contemplation "a way shown on a plan previously approved and endorsed in accordance with the subdivision control law," ... the section on which the plaintiff's lot fronts does not exist in fact. A fire truck cannot drive on a plan. A zoning bylaw which requires frontage on a way shown on an approved plan must be understood, if the purpose of the by-law is not to be undermined, to require an actual way, constructed on the ground, not just a depiction of a way on a plan. The planning board's approval may have legal significance under the zoning by-law's definition of "street" if the way depicted on an approved plan has been constructed as approved (Rockville Avenue is shown on the assertedly approved plan as a way forty feet in width) but not where it has never been constructed at all.

The building commissioner and the board of appeals were correct in withholding a building permit for the plaintiff's lot so long as the section of Rockville Avenue on which it fronts remains unconstructed.

The Shea decision has raised an interesting question. Is an applicant entitled to a building permit for a lot fronting on a way which has been approved by the Planning Board under the Subdivision Control Law, where the way has not been constructed but an adequate performance guarantee exists which ensures that the roadway will be constructed?

The court looked at this issue when deciding whether lots shown on a plan had adequate frontage for the purposes of the Subdivision Control Law. In Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1993), the Board of Selectmen, acting as an interim Planning Board, approved a subdivision plan. The Selectmen did not specify any construction standards for the ways shown on the plan, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee. At a later date, Richard submitted an ANR plan to the Planning Board where the proposed building lots fronted on ways shown on the previously approved

subdivision plan. The Planning Board refused to endorse the plan. The court found that to be entitled to an ANR endorsement, when the plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards. Although the Shea decision said that in order to have zoning frontage the way must be constructed on the ground, the decision did not address the issue whether there is zoning frontage when there is a performance guarantee in place which will ensure that the way will be constructed. An argument could be made, based on the Richard case, that zoning frontage exists where future construction of the way has been secured by an adequate performance guarantee obtained by the Planning Board pursuant to the Subdivision Control Law. However, a community may want to address this issue by amending its zoning bylaw or ordinance.

Where a zoning bylaw allows lot frontage to be measured along a way which in the opinion of the Planning Board has sufficient width, suitable grades, and adequate construction for vehicular traffic, there must be a specific determination by the Planning Board that the way meets such criteria. In Corrigan v. Board of Appeals of Brewster, 35 Mass. App. Ct. 514 (1993), the court determined that a lot abutting such a way does not have zoning frontage unless the Planning Board has specifically made that determination.

In Corrigan, the Planning Board had given an ANR endorsement to a plan of land showing the lot in question. At the direction of the Land Court, the Planning Board noted on the ANR plan that "No determination of compliance with zoning requirements has been made or is intended." At a later date, the Building Inspector denied a building permit because the lot lacked frontage on a "street" as defined in the Brewster Zoning Bylaw. The Brewster Zoning Bylaw defined a "street" in the following way:

- (i) a way over twenty-four feet in width which is dedicated to public use by any lawful procedure;
- (ii) a way which the town clerk certifies is maintained as a public way;
- (iii) a way shown on an approved subdivision plan; and
- (iv) a way having in the opinion of the Brewster Planning Board sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed uses of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.

The Building Inspector denied the building permit because the lot did not abut a public way which is over twenty-four feet in width as noted in (i) above. The Building Inspector's decision did not discuss whether the definition of street as defined in (iv) above was applicable to the lot in question.

On appeal to the court, Corrigan argued that the previous ANR endorsement by the Planning Board constituted a zoning determination by the Planning Board that the way shown on the plan had sufficient width, suitable grades, and adequate construction as required by the Brewster Zoning Bylaw. Corrigan's argument was that the Planning Board could not have given its ANR endorsement unless the Board determined that the lots shown on the plan fronted on one of the three types of ways specified in the Subdivision Control Law. Since the way shown on the ANR plan was not (a) a public way or, (b) a way shown on a plan approved and endorsed by the Planning Board in accordance with the Subdivision Control Law, Corrigan concluded that the Planning Board must have determined that the way was in existence prior to the Subdivision Control Law and had suitable width and grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land and that determination also constituted the favorable determination by the Planning Board required by the Brewster Zoning Bylaw.

CORRIGAN V. BOARD OF APPEALS OF BREWSTER
35 Mass. App. Ct. 514 (1993)

Excerpts:

Gillerman, J. ...

The argument is appealing. If the Planning Board has in fact decided that a lot has adequate frontage on a "street" under § 81L of the Subdivision Control Law because it is adequate in all material respects for vehicular traffic, then it is wasteful, if not silly, not to extend that decision to the resolution of the same issue by the same board applying the same criteria under the Brewster zoning by-law.

Previous decisions of this court, nevertheless, have repeatedly pointed out that a § 81P endorsement does not give a lot any standing under the zoning by-law. See *Smalley v. Planning Bd. of Harwich*, 10 Mass. App. Ct. 599, 603 (1980). There we said, "In acting under § 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision."... *Smalley*, however, involved a lot with less than the minimum area requirements, ... and we rightly rejected the argument that a § 81P endorsement would constitute a decision that the unrelated requirements of the Harwich zoning code had been met. ...

Another decision of major importance is *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802 (1981). There we held that § 81L is not merely definitional, but imposes a substantive requirement that each lot have frontage on a "street" for the distance specified in the zoning by-law, or absent such specification, twenty feet, and that § 81R gives the planning board the power to waive strict compliance with the frontage requirements

of § 81L, whether that requirement is twenty feet or the distance specified in the zoning by-law . We also held in that case that the waiver by the planning board under § 81R was valid only for the purposes of the Subdivision Control Law and did not operate as a variance by the zoning board of appeals under the different and highly restrictive criteria of G.L. c. 40A, § 10. **Arrigo**, too, is different from the present case: there the criteria for the grant of the § 81R waiver by the planning board were different from the criteria for the granting of a § 10 variance, In **Arrigo**, there was no reason whatsoever to make the action of one agency binding upon the other.

Here, unlike **Smalley** and **Arrigo**, the subject to be regulated is the same for both the Subdivision Control Law and the Brewster zoning by-law (the requirement that the lot have frontage on a "street"), the criteria for a "street" are the same for both (a determination of the adequacy of the way for vehicular traffic), and the agency empowered to make that determination is the same (the Brewster planning board). The difficulty, however, is that the judge found - and we find nothing to the contrary in the record before us - that the Brewster planning board never in fact determined that the way relied upon by the plaintiffs was a "street" within the meaning of § 81L; the record is simply silent as to the route followed by the board in reaching its decision to issue a § 81P endorsement. Given the variety of possible explanations, we should not infer what the planning board did - as the plaintiffs would have us do - and certainly we will not guess as to the board's reasoning.

The last sentence of MGL, Chapter 41, § 81P provides that a statement may be placed on an ANR plan indicating the reason why approval under the Subdivision Control Law is not required. The endorsement of an ANR plan is a prerequisite to recordability of the plan and, as a practical matter, to marketability of the lots shown on the plan. As was noted by the court in SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), if a Planning Board believes its endorsement may tend to mislead buyers of lots shown on the plan, they may exercise their powers in a way that protects persons who will rely on the endorsement.

Placing a statement on an ANR plan stating the reason for endorsement takes on added importance where a local zoning bylaw authorizes frontage to be measured on a "street" or "way" which in the opinion of the Planning Board provides suitable access. As was noted in Corrigan, in such situations a record must exist that clearly indicates that the Planning Board has made such a determination. Before endorsing such a plan, we would suggest that a Planning Board make a determination that the way shown on the plan provides suitable access and then place a statement on the ANR plan indicating that they have made such a determination.

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SUBDIVISION PLANS AND SEPARATE LOT PROTECTION

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For many years, zoning legislation in Massachusetts has provided a zoning protection for separately held substandard building lots. The first separate lot protection was inserted into the Zoning Enabling Act in 1958. See St. 1958, c. 492. Presently, MGL, Chapter 40A, Section 6, fourth paragraph, provides the following separate lot protection:

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use **which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land**, conformed to then existing zoning requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

As was noted in Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989), the purpose of the separate lot protection is to protect a once valid lot from being rendered unbuildable for residential purposes but only if there is compliance with all the statutory conditions. The imprecise language of the separate lot protection provision which has caused the most confusion is the requirement that the lot "at the time of recording or endorsement, whichever

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occurs sooner was not held in common ownership with any adjoining land.”

When must the lot be in separate ownership in order for the lot to enjoy the zoning protection currently afforded separate lots?

The Massachusetts Appeals Court first looked at this issue when it decided Sieber v. Zoning Board of Appeals, Wellfleet, 16 Mass. App. Ct. 985 (1983). The court found that if the lot was in separate ownership prior to the town meeting vote which made the lot substandard then the lot could be built upon for single or two-family use. Later, in Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985), the Massachusetts Supreme Judicial Court interpreted the separate lot provision by responding to three questions which had been posed by the United States Court of Appeals for the First Circuit. The Court agreed with the Sieber decision and reached the following conclusions:

1. the word “recording” as appearing in the separate lot provision means the recording of any instrument, including a deed;
2. the statute looks to the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought; and,
3. a lot meets the statutory requirement of separate ownership if the most recent instrument of record prior to a restrictive zoning change reveals that the lot was separately owned, even though a previously recorded subdivision plan may reveal that the lot was at one time part of land held in common ownership.

By filing a definitive subdivision plan, a landowner can protect the land shown on such plan from the application of new and more stringent zoning requirements imposed by an amendment to a zoning ordinance or bylaw which occurs after the submission of the definitive plan provided the subdivision plan is subsequently endorsed by the Planning Board. A preliminary plan will also protect the land from future zoning changes provided a definitive plan is submitted within seven months from the date of submission of the preliminary plan. The duration of the definitive plan zoning freeze has had a history of ups and downs, though mostly ups. It began as a three year freeze in 1957 and in 1961 the freeze was increased to five years. In 1965 the freeze was set at seven years but descended once again to five years in 1975. In 1982 the freeze period went up to eight years. See St. 1957, c. 297; St. 1961, c. 435, s. 2; St. 1965, c. 366; St. 1975, c. 808, s. 2; St. 1982, c. 185.

Presently, MGL, Chapter 40A, Section 6 affords the following eight year zoning freeze to land shown on a subdivision plan which has been approved by the Planning Board pursuant to the Subdivision Control Law.

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board ... and written notice of such submission has been given to the city or town clerk ... **the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law**, if any, **in effect at the time of the first such submission** while such plan or plans are being processed under the subdivision control law, and, if such definitive plan ... is finally approved, **for eight years from the date of endorsement of such approval** except ... where such plan was submitted or submitted and approved before January first, nineteen hundred seventy-six, for seven years from the date of endorsement of such approval.

What happens if within the eight year period a community increases its minimum lot area, lot frontage or yard requirements? All lots shown on an approved definitive subdivision plan are all initially in common ownership. Can a lot be conveyed into separate ownership after the increased zoning requirement and still gain the benefit of the separate lot protection? The answer is no.

When the legislature rewrote the Zoning Act in 1975, they eliminated some key language from the separate lot protection provision. Prior to the 1975 rewrite, the language of the Zoning Act provided, in relevant part, the following separate lot protection.

) Any lot lawfully laid out by plan or deed duly recorded, as defined in section eighty-one L of chapter forty-one, or any lot shown on a plan endorsed with the words "approval under the subdivision control law not required" or words of similar import, ... which complies at the time of such recording or such endorsement, whichever is earlier, with the minimum area, frontage ... requirements, if any, of any zoning ... bylaw in effect in the ... town ... notwithstanding the adoption or amendment ... of a zoning ... bylaw in such ... town imposing minimum area, frontage, ... or yard requirements ... in excess of those in effect at the time of such recording or endorsement ... may thereafter be built upon for residential use if, at the time of the adoption of such requirements or increased requirements, **or while building on such lot was otherwise permitted**, whichever occurs later, such lot was held in ownership separate from that of adjoining land located in the same residential district

Under the above provision, a lot would qualify for separate lot protection if it was in separate ownership prior to the effective date of the more restrictive zoning requirement or if it was conveyed into separate ownership during the definitive plan zoning freeze because during that time

building on the lot was otherwise permitted. However, in order for lots to be conveyed into separate ownership within the definitive plan freeze period and be eligible for separate lot protection, the definitive plan had to be recorded prior to the effective date of the increased zoning requirement.

In Wright v. Board of Appeals of Falmouth, 24 Mass. App. Ct. 409 (1987), the court had an opportunity to review the old and existing separate lot protection provisions and their application to lots shown on a previously approved subdivision plan. A preliminary plan had been submitted to the Planning Board prior to the town increasing the minimum lot area requirement. After the effective date of the increased lot area requirement the Planning Board **approved and endorsed** a definitive subdivision plan. Prior to the expiration of the definitive plan zoning freeze, which at that time was seven years, all seventy six lots shown on the definitive plan were conveyed into separate ownership. At a later date, one of the lot owners applied to the Building Inspector to construct a single family home on her separately held lot. The building permit application was denied by the Building Inspector and on appeal the Zoning Board of Appeals upheld the Building Inspector's decision.

The landowner argued that when the Planning Board endorsed the definitive plan, the zoning in effect at the time the plan was first submitted governed the land shown on the plan for seven years. The landowner further argued that the separate lot protection provision of the Zoning Act in effect prior to the 1975 rewrite by the legislature allowed the lots to be conveyed into separate ownership within that seven year period. The court found that the lot owner was not entitled to that protection because the subdivision plan was **endorsed by the Planning Board after the effective date of the increased zoning requirements**. If the definitive plan had been recorded prior to the effective date of the increased zoning requirements then the lots could have been conveyed into separate ownership within the seven year period and such lots would have had the benefit of the separate lot protection.

The court also reviewed the current separate lot protection provision and concluded that in order to be eligible for such protection the lot must be in separate ownership at the time of the increased zoning requirement. Therefore, the current definitive plan zoning freeze is a build protection. Building permits for lots shown on an approved definitive plan, which do not have separate lot protection, should be issued prior to the expiration of the eight year freeze period. As was noted in Falcone v. Zoning Board of Appeals of Brockton, 7 Mass. App. Ct. 710 (1979), the mere filing of a building permit application will not toll the running of the zoning freeze period. In Falcone, the landowner did not apply for a building permit until the last day before the freeze period expired making it impossible to secure the approvals necessary for the issuance of the building permit before the expiration of the zoning freeze period. The court held that the filing of the building permit application gave the landowner no vested rights and the denial of the building permit was controlled by the zoning regulations in effect at the time the decision on the building permit application was made by the building official. However, if the building permit application is filed in a timely manner, the zoning protection will not be lost due to a local officials inaction. In Green v. Board of Appeals of Norwood, 2 Mass. App. Ct. 393 (1974), the landowner had applied for a building permit approximately fourteen months before the expiration of the zoning freeze period. Approximately two and a half years later the application for the building permit was denied. The

court held that the zoning freeze period afforded by the Zoning Act could not be lost through a local official's inaction.

The condition that a lot be separately held from any adjoining land is based on the longstanding zoning principle that a landowner should not be allowed to create a dimensional nonconformity if he can use his adjoining land to avoid or diminish the nonconformity. In order to perpetuate a zoning freeze for residential subdivision lots, landowners have engaged in the practice of "checkerboarding" subdivision lots. "Checkerboarding" refers to a practice where a landowner conveys lots so that the pattern of ownership places each lot in separate ownership. However, the court has looked unfavorably on last minute conveyances which attempt to qualify lots for the separate lot protection. In Sorenti v. Board of Appeals of Wellesley, 345 Mass. 348 (1963), the court held that a landowner could not take advantage of a local zoning bylaw grandfather protection by putting part of his property in the name of a straw the day before the town voted to increase the minimum lot frontage requirement of the zoning bylaw. The court found that the lot owner had adjoining land available despite the fact that the adjoining land stood in the name of the straw.

In Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989), aff'd 406 Mass. 1008 (1990), the Serenas, in anticipation of a zoning bylaw amendment which would prevent use of their vacant land as two separate building lots effected a transfer of title with the intent of securing separate lot protection for their two adjoining lots. The Serenas transferred title to one lot to themselves as tenants by the entirety and to the adjoining lot to themselves as trustees of Parker Realty Trust. The Serenas were the sole beneficiaries of the trust. The attempt to secure separate lot protection for both lots failed because the Serenas could still use the two lots as one. The court found that the question in determining separate ownership is "not the form of ownership, but control: did the landowner have it "within his power", i.e., within his legal control, to use the adjoining land so as to avoid or reduce the nonconformity?"

In DiStefano v. Stoughton, 36 Mass. App. Ct. 642 (1994), a developer attempted to place lots, which were shown on a previously approved definitive plan, into separate ownership sixteen days before the expiration of the definitive plan zoning freeze. A&A Contracting, Inc. the record owner of all the lots in the subdivision conveyed twelve lots to Albert N. DiStefano, as trustee of A.N.D. Realty Trust, five lots to Albert individually, and four lots to Anna M. DiStefano, who was Albert's wife. The remaining lots remained with A&A Contracting, Inc. In reviewing the conveyances the court determined that Albert DiStefano retained the master hand as to all the lots in the subdivision. He was the sole director and officer of A&A Contracting, Inc., and was the sole trustee and had plenary power to make conveyancing decisions for A.N.D. Realty Trust. The court also determined that the lots conveyed to Anna were in fact under Albert's control because the group of lots transferred to her were "sold" for a nominal consideration of \$100 and there was no evidence that the \$100 was ever paid. Anna acceded to Albert's control in the corporation; and Albert filed a revised subdivision plan at a later date for all the lots in the locus with no participation by Anna. In determining separate ownership the court noted that they "may disregard the shell of purportedly discrete legal persons engaged in business when there is active and pervasive control of those legal persons by the same controlling person and there is a confusing intermingling of activity among the purportedly separate legal persons while engaging in a common enterprise."

Land Use Manager

Land Court Looks At Common Driveways

The Land Court has not looked favorably upon the use of land for a common driveway where the zoning bylaw does not expressly authorize such use. In Litchfield Company, Inc. v. Board of Appeals of the City of Woburn, Misc. Case No. 199971 (August 5, 1997), a landowner argued that a common driveway was a permitted use because the zoning ordinance did not require that driveway access to a lot must come directly from the legal frontage of a lot. The landowner also argued that there was no prohibition in the zoning ordinance against the use of land for a so-called common driveway. The city maintained that the zoning ordinance did not provide for common driveways and noted that the ordinance specifically stated that a use of land not specified in the ordinance is not permitted.

Judge Lombardi came to the conclusion that if the intent was to permit residential driveways to access streets from lot lines other than the front one, the ordinance could have been so written. In the absence of such a regulation, the provision in the zoning ordinance stating that a use of land not specified in the ordinance is not permitted prevented the use of land for a common driveway. In his decision, Judge Lombardi noted that he was aided in his

interpretation by provisions contained elsewhere in the ordinance. The city had also enacted regulations concerning the design and layout of required parking facilities. The ordinance specifically required a minimum width for entrance and exit driveways. It also defined a "Lot Line, Front" as the line separating a lot from the right-of-way of a street. With no other provisions addressing the question of the proper location of a residential driveway, Judge Lombardi considered

INSIDE

- 1 Lapsed Variances
 - a) Old Variances and the Lapse Provision
 - b) Exercising Variance Rights
- 2 Infectious Invalidity
- 3 New Format for Land Use Manager

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT



Argo Paul Cellucci, Governor
Jane Wallis Gumble, Director

the previous noted regulations significant. He concluded that the drafters of the ordinance had clearly indicated that a driveway for residential land use had to have a certain width measured from the front lot line.

In RHB Development, Inc. v. Duxbury Zoning Board of Appeals, Misc. Case No. 237281 (September 19, 1997) a landowner wished to construct a common driveway. RHB argued that access over another lot was permissible because the definition of "frontage" contained in the zoning by-law did not explicitly require that each lot must access over its own frontage. They brought to the court's attention the fact that the Town had failed to pass an amendment to its zoning by-law which would have explicitly required that lots could only be accessed from frontage. RHB also argued that zoning by-laws in nearby communities required that lots be accessed from their frontage. Judge Green found these arguments unpersuasive and responded that rather than looking solely at the definition of frontage, the question of whether a common driveway is a permitted use must be considered in the context of the by-law as a whole.

In reviewing the by-law, Judge Green concluded that "it strains credulity past the breaking point to suggest that common driveways are permitted as an accessory use to a residential use, as a matter of right and without limitations, where (i) such a common driveway is not expressly authorized anywhere in the by-law, (ii) accessory uses to a residential use are required to be 'on the same lot,' (iii) common driveways for 'cluster' developments require a special permit and are limited to serving no more than two dwellings, and (iv) driveways serving as part of mandated parking facilities are required to be on the same lot."

In this case the court footnoted a previous edition of the Land Use Manager where we concluded that a common driveway is a use of land which must comply with the zoning by-law. We also noted that if the local zoning by-law remained silent relative to the use of land for a common driveway, the zoning enforcement officer would have to make a determination whether a common driveway would be an allowable accessory use. In order to make this interpretation we believe, as a minimum, each lot would have to have access over its own frontage. Communities enact minimum frontage requirements to control access to the lot and to regulate density.

In 1967, the Legislature ordered the Legislative Research Council to study and investigate the feasibility and implications of restricting the zoning power of municipalities with particular emphasis on the possibility that smaller communities were utilizing their zoning power in an unjust manner with respect to minority groups (see 1967 Senate Bill No. 933). The Legislative Research Council undertook such a study and reported its findings to the Legislature (see 1968 Senate Bill No. 1133). In its report, the Council explained why communities enact minimum frontage requirements. Specifically, the Council found that:

The primary purposes of such frontage requirements for residential lots are: (a) *to assure adequate access of these lots to the street which faces them;* (b) *to promote a rational pattern of lot sizes and dimensions with reference to topography, the municipal street system, public utilities and over all municipal development;* and (c)

to supplement the population density control policy inherent in the locality's minimum lot size requirement.

The Massachusetts Supreme Court, in MacNeil v. Avon, 386 Mass. 339 (1982), was called upon to consider the constitutionality of a frontage requirement. The main question was whether a 200 foot frontage requirement for lots with three or more dwelling units was unreasonable and arbitrary. In reaching its decision the court identified some of the reasons for the enactment of lot frontage requirements.

We make no attempt to enumerate all of the considerations that might reasonably lead the citizens of a town to conclude that such a requirement promotes the legitimate objectives of zoning. By way of example, however, we are satisfied that a multiplicity of dwelling units may reasonably be thought to increase the amount and size of firefighting equipment required to respond to fire, and to require more frontage to accommodate it than is required by a single family unit. ... The citizens of the town may reasonably have concluded that, as the number of dwelling units increases, the number of motor vehicles entering and leaving the premises and parking along the frontage also increases, creating congestion and interfering with access by emergency vehicles.

Considering MacNeil, the Legislative Research Council's report and the numerous cases dealing with the adequacy of access for the purpose of approval not required endorsement by the planning board, we believe a minimum frontage requirement is an access requirement. However, in Dunbar v. Dennis Zoning Board of Appeals, Misc. Case No. 237276 (January 8, 1998), Judge Green concluded that a residential driveway on the same lot as the principal use did not have to access over the lot's legal frontage.

In Dunbar, the landowner applied to the building inspector for a permit to construct a residence with one driveway crossing over the lot's legal frontage and a second driveway accessing from another street line to a garage at the rear of the property. The lot had a 110 feet of frontage on a public way and 25.85 feet on a private way. The by-law required a minimum "lot frontage" of fifty feet and defined "lot frontage" as "continuous portions of the street line over which automobiles have legal and physical access from the lot." The building inspector determined that the second driveway did not conform to the by-law because access was not over the legal frontage. The zoning board of appeals upheld the building inspector's decision.

Judge Green determined that neither the definition of "lot frontage" nor any other provision of the by-law required, explicitly or implicitly, that all driveways accessing a residential lot cross the lot line that serves as the lot's legal frontage, or another lot line that has more than the fifty feet of frontage. This decision is limited in scope. It is not a common driveway case. It dealt with the construction of a second driveway on the same lot as the principal use. Also, another driveway crossed over the lot's legal frontage providing automobiles with physical access from the lot.

Lapsed Variances

The last paragraph of MGL, Chapter 40A, Section 10, presently provides that the rights authorized by a variance shall lapse if not exercised within one year of the date of grant of the variance. This lapse provision was inserted into the statute when the Legislature rewrote the Zoning Act in 1975 (see St. 1975, c. 808, s. 3). Prior to the 1975 rewrite, the zoning statute did not contain a lapse provision.

Over the years, a number of questions have arisen relative to the lapse provision. One issue is whether the existing lapse provision of the Zoning Act can reach back and affect variances that were granted under the provisions of the old zoning statute. The Massachusetts Appeals Court avoided the question in Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985), but discussed the issue of the retroactivity of the lapse provision.

The notion that variances more than one year old, and remaining unexercised by the effective date of the new statute, are destroyed wholesale by a retroactive application of section 10, would appear quite drastic, and hardly matches the text of that provision. A milder contention might take the form that section 10 should extend to cancel variances, granted well before the effective date of the new statute, which have not been exercised within a year after that date. Even that proposition might put a great and insupportable strain on the statutory language. ...

In holding that the variance at bar did not lapse but on the contrary has been sufficiently availed of, we do not mean to reflect in any way upon the possibility that an old variance, long unexercised, may lose its force by reason of radically changed conditions at the locus, including changes brought about by revisions of a zoning ordinance or by-law. ...

Judge Karyn Scheier of the Land Court has concluded that old variances are subject to the lapse provision. In Alroy v. World Realty and Development Co., Misc. Case No. 230584 (December 22, 1997), a landowner owned a lot which was in full compliance with the zoning ordinance. The landowner applied for a variance to allow a single-family home to be constructed on an adjoining lot that did not meet the lot frontage and lot area requirements of the zoning ordinance. This variance was granted in 1972. Relying on that variance, the building inspector issued a building permit in 1996 for the construction of a single-family home on the lot. An abutter appealed the issuance of the building permit and the zoning board of appeals denied the appeal.

Both parties in this case agreed that the issuance of the building permit was dependent upon the continued validity of the 1972 variance. The Alroys argued that the building permit should not have been issued because the 1972 variance had lapsed. The Alroys further argued that the lapse provision should invalidate the variance either within one year from its date of issuance or within one year from the date the lapse provision took effect in the

City of Newton. Whether the existing lapse provision of the Zoning Act could be applied to the 1972 variance became an important issue because Judge Scheier determined that the variance had not been exercised. Judge Scheier agreed with the Alroy's position and ruled that:

... G.L. c. 40A, section 10, may be applied prospectively to the 1972 variance, allowing for exercise of the variance within one year after the effective date of The Zoning Act in the City of Newton. I find and rule that there was not sufficient exercise of the variance ... to prevent the variance from lapsing within that period. Indeed, the variance remains unexercised two and one half decades later.

In determining that the variance had not been properly exercised, Judge Scheier reviewed the Hogan case and two previous decisions of the Land Court. In Hogan, a variance had been granted which allowed the owner of two adjacent lots to divide the lots so that she could sell one lot with an existing house and garage and build a small residence on the other lot. As a result of such division neither lot complied with the zoning ordinance. It was decided that the sale of the lot with the existing house was sufficient exercise of the variance. The court noted that "... Even though the variance had not been fully carried out by actually building, we think it was sufficiently (and irrevocably) exercised."

Judge Kilborn of the Land Court, in Laberis v. Gandolfo, Misc. Case No. 205878 (July 11, 1994), held that a variance authorizing the division of a parcel of land had been exercised in a timely manner where the landowner had recorded 1) the variance, 2) the approved plan, 3) two partial releases from outstanding mortgages; and, 4) two deeds effectuating a land exchange contemplated by the variance, all within the time period before the variance would have lapsed. Judge Kilborn also found, in Buttaro v. Board of Appeals of the City of Woburn, Misc. Case No. 221206 (May 9, 1996), that three variances permitting the creation of three adjacent undersized lots had been exercised before Woburn adopted The Zoning Act. By that date 1) title to the three lots had been conveyed, 2) building permits had been issued for two of the lots; and 3) construction of a house had commenced on at least one of the lots.

In Alroy, a landowner owned two adjoining parcels. One parcel complied with the zoning ordinance (990 Centre Street) and the other parcel (the Locus) was five feet short of the then required 80 foot frontage requirement and 254 square feet less than the then required 10,000 square foot minimum lot requirement. The zoning board of appeals granted a lot frontage and lot area variance for the substandard parcel. Within the year, both properties were conveyed to different parties. Judge Scheier determined that the variance had not been exercised.

A common thread in *Laberis*, *Buttaro*, and *Hogan* which is not shared by the present case is that in the former cases, landowners were granted variances to enable each owner to subdivide one parcel into two or more nonconforming parcels, each of which was benefitted and legitimized by the variance. The transfer of any one of the parcels would not have been possible but for the variances,

and each grantor conveyed a lot in reliance on the application of the variance to the remaining lot(s). Thus, the cases stand for the proposition that when the holder of a variance substantially changes his or her position in reliance upon the variance, it will be deemed to have been "exercised" for the purposes of G.L. c. 40A, s.10. In the present case, the variance applied only to Locus and the variance was not necessary in order [to] divide Locus from adjoining 990 Centre Street, which was in full compliance with the zoning ordinance.

Further, the 1972 variance was not exercised when Locus was later conveyed before The Zoning Act was enacted. The mere transfer of title, without further action, was not legally significant to the validity of the variance.

Judge Scheier noted that the variance was not necessary in order to divide the Locus from the conforming parcel. If the Locus was held in common ownership with the adjoining lot at the time of the zoning change, we would suggest that the variance might have been necessary in order for the landowner to convey the conforming parcel based upon the "infectious invalidity" theory.

Infectious Invalidity

Infectious invalidity? Honestly, we did not make this term up but it is an important concept to keep in mind. In a nutshell, you can have a lot which complies with local zoning requirements but it is not entitled to a building permit if the complying lot, when conveyed, creates a zoning violation or another lot which does not conform to the zoning by-law.

This concept was first identified in Alley v. Building Inspector of Danvers, 354 Mass. 6 (1968), where Alley tried to pull a fast one in the town of Danvers. In Alley, there were two existing lots each having a house on it. Each lot had more than the required lot area of 10,000 square feet. The two lots were divided in ownership in such a way that the front portion of each lot was left with a house on it but with less than the required area. The rear portions of the two lots were combined to make a third vacant lot under one ownership and having the required area. The zoning bylaw prohibited the reduction to an area of less than 10,000 square feet of existing house lots that conformed to the lot area requirement. The building inspector denied a building permit for the vacant lot. The court agreed that the vacant lot was not entitled to a building permit because the reduction in area of the two original house lots violated the zoning by-law.

Judge Peter Kilborn reached a similar conclusion in Bouffard v. Peabody Zoning Board of Appeals, Misc. Case No. 199217 (December 1, 1995). In Bouffard, there were three lots (lots 76,77 and 78) which were held in common ownership. Lot 76 contained 4,472 square feet and 50 feet of frontage. Lot 77 contained 2,387 square feet and 40 feet of frontage.

Lot 78 contained 2,656 square feet and 40 feet of frontage. In 1979, lots 77 and 78 were conveyed to another party. The seller of those lots retained ownership of Lot 76 and rebuilt a fire-damaged dwelling. The zoning in effect at the time of the conveyance required a minimum area of 5,000 square feet and 50 feet of frontage for a single-family lot. The zoning ordinance defined a lot as a "parcel of land ... available for use as the site of one or more buildings ... in one ownership" In 1993 the building inspector denied a building permit to build a structure on lots 77 and 78 because the City's building department still considered lots 76, 77 and 78 as one lot. Judge Kilborn found the 1979 conveyance to be "infectious".

Plaintiff concedes "[l]ot 76 became nonconforming as to minimum frontage, side yard and lot area requirements upon conveyance of Lots 77 and 78" ... in 1979 Implicit in that concession is an agreement that before the conveyance ... lots 76, 77 and 78 formed a single lot.

That is the position taken by the building inspector, which I find justified under the definition of "lot". That being so, the conveyance ... violated the prohibition in section 5.1.1 of the ordinance that "no lot ... shall be changed in size so as to violate the provisions of this ordinance with respect to size of lots or yards.

Lots 77 and 78, together, are a conforming single family lot, if their history could be ignored. The problem for plaintiff is that the violation of section 5.1.1 cannot be ignored. It bars lots 77 and 78 according to *Alley v. Building Inspector of Danvers*, 354 Mass. 6 (1968). Lots 77 and 78 suffer from "infectious invalidity", to use the jargon.

New Format For Land Use Manager

We're back. It has been awhile since the last publication (April, 1995). However, we plan to continue the Land Use Manager series at least on a quarterly basis. If you have an issue or question that you think can be addressed as part of a Land Use Manager please do not hesitate to drop us a line.

Land Use Manager

Changing Nonconforming Uses & Structures

Anonconforming structure or use is a structure or use which was lawfully in existence prior to the enactment of the zoning regulation with which the structure or use does not comply. Since 1920, the zoning statute has contained language protecting the right to continue a nonconforming use or maintain a nonconforming structure. The court noted its concern to protect nonconforming uses or structures in Opinion of the Justices, 234 Mass. 597 (1920), where they stated that "rights already acquired by existing uses or construction of buildings in general ought not to be interfered with."

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MGL, Chapter 40A, Section 6 deals with nonconforming uses and structures. The first sentence of Section 6 prescribes the minimum zoning protections afforded nonconforming uses and structures. The second sentence provides a method whereby nonconforming uses or structures may be extended, altered or changed if a finding is made by the applicable finding authority. This sentence states that "... nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be

permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood."

INSIDE

- Community Response Line
- The 81L Exemption
- Hiring Outside Consultants
- Citizen Planner Training
- Collaborative
- Looking at the Land Court

This "finding" provision has been the center of much confusion and controversy. To render the statute

intelligible, the court, in Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987) was forced to add the words "structure or" so that the concluding portion of this sentence would read "shall not be substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

Rather than establishing their own criteria regarding nonconforming structures or uses, many communities have inserted the Section 6 finding provision into their zoning ordinance or by-law. If a zoning ordinance or by-law mirrors or refers to the Section 6 finding provision then any extension, alteration or change to a nonconforming structure or use must comply with the current provisions of the zoning ordinance or by-law.

This narrow interpretation of the Section 6 finding provision was first expressed by the court in Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991). Snow Inn was a nonconforming structure because it did not comply with the setback requirements of the Harwich zoning by-law. Snow Inn proposed a project which would have increased building lot coverage from 64,740 square feet to 85,865 square feet. The zoning board of appeals granted a special permit and Rockwood, an abutter, appealed the zoning board's decision.

The Harwich zoning by-law contained a maximum lot coverage provision restricting building coverage to no more than fifteen percent of the lot. The proposed changes resulted in the Inn exceeding the zoning by-law's lot coverage requirement. The Harwich zoning by-law mirrored the Section 6 finding provision and authorized the zoning board of appeals to grant a special permit allowing a change to a nonconforming structure provided the change would not be substantially more detrimental to the neighborhood than the existing nonconforming structure. The issue before the court was whether the Zoning Act or the Harwich zoning by-law authorized the zoning board of appeals to grant a special permit when the proposed change would not comply with existing zoning requirements.

The court decided that the zoning board of appeals exceeded its authority in granting the special permit and concluded that the Zoning Act only allows an extension, alteration or change to a nonconforming structure where:

- (1) the extension, alteration or change complies with the current requirements of the zoning by-law and,
- (2) there is a finding by the finding authority that the extension, alteration or change will not be substantially more detrimental to the neighborhood than the preexisting nonconforming structure.

In Cox v. Board of Appeals of Carver, 42 Mass. App. Ct. 422 (1997), the Massachusetts Appeals Court determined that the finding provision contained in the State Zoning Act does not authorize a change or extension to a nonconforming use unless the change or extension complies with the current requirements of the zoning by-law. In Cox, Commercial Design Associates operated a 22.67 acre mobile home park which contained sixty units. Commercial entered into a purchase and sale agreement to buy a 2.53 acre tract of land which was located across the street from the existing mobile home park. Commercial filed a special permit application with the board of appeals to use the 2.53 acres for eight additional mobile homes and as a beach area for all the residents of the mobile home park.

The Carver zoning by-law required a minimum of a 100 acres for the operation of a mobile home park and a special permit from the board of appeals.

The board of appeals granted the requested special permit and Patrick Cox, an abutter, appealed the decision. The court found that the board of appeals lacked the authority to grant the special permit and concluded that the Zoning Act does not authorize a change or extension to a nonconforming use unless:

- (1) the change or extension complies with the current requirements of the zoning by-law and,
- (2) there is a finding by the finding authority that the change or extension will not be substantially more detrimental to the neighborhood than the existing nonconforming use.

Municipal officials should review the nonconforming use and structure provisions of their local zoning by-law. You may find that your local zoning by-law severely limits the ability of a landowner to make any extension, alteration or change to a nonconforming structure. You may also find that no change or extension to a nonconforming use is permitted unless the proposed change or extension complies with the current requirements of the bylaw.

Community Response Line

The Department of Housing and Community Development has initiated a new service for municipal officials called the Community Response Line (CRL). This new service addresses an ongoing need expressed by communities for a single point of contact on municipal assistance programs within state government. The CRL provides information and referral services to municipal officials and community leaders on local issues that state government can help address.

The CRL is designed to handle questions and requests for information on such municipal issues as economic development, planning, municipal management, and community revitalization. The CRL also provides information on funding, training and technical assistance opportunities available through the Department and other state agencies.

Callers to the CRL's toll-free number, 1-(877) CRL-DHCD or 1-(877) 275-3423, will receive either an immediate response to their question or within a short period of time a follow-up call with additional information. Assistance provided may include printed materials, community profile information, referrals to a community which has dealt with a similar issue or problem, referrals to or information from an internet site, or specific name and phone number referrals for our Department and other state programs.

Community Response Line service is available Monday through Friday from 10 a.m. to 4 p.m. Questions may also be e-mailed to: cresponse@hotmail.com.

The 81L Exemption

Whether a plan is entitled to be endorsed "approval under the Subdivision Control Law not required" is determined by the definition of "subdivision" found in MGL, Chapter 41, Section 81L. Basically, the court has decided that this definition imposes three standards that must be met in order for a plan to be endorsed "approval not required" by a planning board.

- (1) The lots shown on the plan must front on one of the three types of ways specified in the definition;
- (2) The lots shown on the plan must meet the minimum frontage requirement of the zoning by-law or if there is none, twenty feet; and,
- (3) A planning board determination that vital access exists to each lot as contemplated by the Subdivision Control Law.

However, included in the definition of "subdivision" is the following exemption:

... the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one such building remains standing, shall not constitute a subdivision.

The original versions of the Subdivision Control Law, as appearing in St. 1936, c. 211, and St. 1947, c.340, did not contain this exemption. It was added in a 1953 general revision of the law by St. 1953, c. 674, s.7. The purpose of the exemption is not clear but the Report of the Special Commission on Planning and Zoning, 1953, House Doc. No. 2249, at 54, shows that the drafters were aware of what they were doing, although it does not explain their reasons. It is our guess that the legislature wanted to limit planning board involvement in such situations on the assumption that adequate access already existed to each substantial building prior to the Subdivision Control Law taking effect in the community.

Although this exemption entitles a landowner to an "approval not required" endorsement from the planning board, this endorsement does not relieve a landowner from complying with current zoning requirements. This exemption is only for the purposes of the Subdivision Control Law. In Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the court noted that the recording of an "approval not required" plan showing a zoning violation does not preclude enforcement of the local zoning by-law. Later, in Citgo Petroleum v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987), the court stated that "... just because a lot can be divided under this exception does not mean that the resulting lot will be buildable under the zoning ordinance." Owners of such lots may have to obtain a variance or buy abutting land to bring the lot or structure into compliance with the zoning by-law.

To assist individuals who, in good faith, processed plans before the planning board and subsequently made conveyances, obtained building permits and obtained mortgages, the Town of Westport recently enacted the following zoning provision to deal with the 81L exemption.

Any lot shown on a recorded plan which has been endorsed by the Planning Board under General Laws, Chapter 41, Section 81P because the plan depicted a division of land on which two or more substantial buildings were standing when the Subdivision Control Law went into effect in the Town into separate lots, on each of which one such buildings remained standing on the date the plan was endorsed, shall hereafter be treated for all purposes hereunder as a lawful, pre-existing non-conforming lot. No such lot shall hereafter be changed to create a new violation of any provisions of these By-laws, or increase or change an existing non-conformity with these By-laws.

Although the above provision appears only to address lot nonconformity and is silent on other types of zoning irregularities, amending your zoning by-law to deal with the 81L exemption makes a lot of sense to us.

Hiring Outside Consultants

Chapter 593 of the Acts of 1989, "An Act Relative to the Establishment of Special Accounts for Certain Municipal Boards", amended the municipal finance laws by adding to MGL, Chapter 44 a new Section 53G. This section of the General Laws authorizes planning boards, zoning boards of appeals, special permit granting authorities and boards of health to establish special accounts for the collection and expenditure of reasonable review fees. These review fees are for the hiring of outside consultants to assist the applicable municipal board in reviewing a proposed project. These review fees are paid by the applicant.

Prior to this legislation, municipal boards had the authority to collect reasonable review fees but these fees had to be deposited into the municipality's general fund. A municipal board could not expend review fees without an appropriation by town meeting or city council. Section 53G only authorizes the expenditure of funds for outside consultants. Communities can still charge review fees to cover the cost of municipal employees involved in the review process but these fees must be deposited into the general fund.

Section 53G does not authorize conservation commissions to establish a special account for the collection and expenditure of review fees. However, recently the Legislature enacted Chapter 10 of the Acts of 1998 authorizing the town of Burlington's conservation commission to collect and expend reasonable review fees in accordance with Section 53G. We think all conservation commissions as well as site plan approval boards should have the ability to hire outside consultant pursuant to Section 53G.

Citizen Planner Training

The Citizen Planner Training Collaborative (CPTC) was formed in 1995 for the purpose of creating a mechanism for the development and presentation of training programs to local land use officials. Represented on the Board of Directors are the Department of Housing and Community Development, University of Massachusetts, Massachusetts Federation of Planning and Appeals Boards, Massachusetts Chapter of the American Planning Association, Massachusetts Association of Planning Directors and the Massachusetts Association of Regional Planning Agencies. These agencies constitute the Collaborative. A 17 member Advisory Board assists the Board of Directors.

CPTC has delivered training to planning and zoning boards of appeals for the past three years. This initiative has generated enthusiasm among local boards, state agencies, private non-profit groups and professional planners. Recently, 416 registrants took part in the CPTC spring training programs which were offered in nine sites throughout the Commonwealth.

In the past, training for local land use officials has been provided on an irregular basis by a variety of organizations and professionals. Though often successful, such training has not achieved the scale and coordination necessary to support the approximately 6,000 officials whose statutory authority and routine decisions affect the land use, economic development and environmental conditions of their community.

Given the great demand on the time of planning and zoning board members, CPTC realizes that its training program must be focused and structured so that participants gain a clear sense of accomplishment. In this regard, the CPTC is presently in the process of developing a set of 12 core courses for local planning and zoning boards.

The CPTC has also developed its own web page titled "Help in Planning" (HIP). HIP is a clearing house of information for the Massachusetts planning community. The goal is to provide comprehensive access to state-wide planning information for citizen and professional planners. With the help of local planners and municipal officials, CPTC hopes to consolidate planning information to make finding information more efficient and effective. To get HIP, visit the CPTC web site at <http://www.umass.edu/masscptc>.

For more information concerning the CPTC call Gisela Walker of the University of Massachusetts Extension at (413) 545-2188, Nancy Cahill of the Massachusetts Federation of Planning and Appeals Boards at (781) 246-4681 or Don Schmidt of the Department of Housing and Community Development at (617) 727-7001 x482.

Looking at the Land Court

The Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court are not required to follow an opinion written by a judge in the Land Court. However, we feel it is helpful for municipal officials to be aware of the Land Court's views on land use issues because a Land Court decision can still be a persuasive authority. In each edition of the Land Use Manager we will dedicate some space to highlight Land Court decisions that may be of interest to planning and zoning boards of appeal. A resource for reviewing land court decisions is the Land Court Reporter published by Massachusetts LandLaw. LandLaw's phone number is 1-800-637-6330.

All Special Permit Zone

The Massachusetts Appeals Court, in SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984), decided that Braintree's zoning by-law which conditioned all uses in a business district on the grant of a discretionary special permit was invalid. The court concluded that an all special permit zone was inconsistent with the uniformity requirement found in Section 4 of the Zoning Act. Later, in Gage v. Egremont, 409 Mass. 345 (1991), the Massachusetts Supreme Court, in citing SCIT, noted that a zoning by-law must permit at least one use in each zoning district as a matter of right.

In Boch v. Planning Board of Tisbury, Misc. Case No. 199441 (1997); 5 LCR 16 (1997), Judge Scheier of the land Court decided that overlay districts are subject to the same test and found no merit in the Town's argument that the waterfront overlay districted adopted by the town was valid because uses exempted by Section 3 of the Zoning Act were permitted as a matter of right. Judge Scheier noted, however, that overlay districts are appropriate if they are consistent with the Zoning Act and the Constitution; their designations are not arbitrary or capricious; and they further a legitimate end of the zoning power.

Spacing Requirement for Special Permit Use is not Spot Zoning

Only the legislative body of a community can decide what uses will be permitted within a zoning district. This is accomplished by an amendment to the zoning by-law or ordinance.

The town of Middleton's zoning by-law allowed auto repair shops by special permit provided that no such shop could be located within 2,000 feet of an existing auto repair shop. In Hammond v. Town of Middleton, Misc. Case No. 230688 (1997); 5 LCR 33 (1997), a landowner argued that the 2,000 foot spacing requirement had the effect of creating a floating zone. A floating zone is a zone where use requirements or regulations within a zoning district change without legislative action by the community.

Judge Lombardi of the Land Court decided that the 2,000 foot spacing requirement was consistent with Section 3 of the Zoning Act because it did not change the boundary line of the zoning district. He concluded that the spacing and other requirements contained in the zoning by-law put landowners on notice that the drafters of the by-law were establishing criteria for the Board of Appeals to apply in deciding whether to grant a special permit.

Land Use Manager

SJC Limits Zoning Appeals

MGL, Chapter 40A, Section 17 authorizes any person aggrieved by a decision of a zoning board of appeals or a special permit granting authority to go to court to challenge the decision. Section 17 also provides that any municipal officer or board may appeal a decision of a zoning board of appeals or a special permit granting authority. Unlike an aggrieved party, the statute does not require that a municipal officer or board show that its interests have been harmed by the board's decision. Also, the statute does not specifically limit the right of appeal to any particular class of municipal officer or board.

There are many public officers of a municipality who could be classified as municipal officers such as a police officer, firefighter, superintendent of streets and sealer of weights and measures. The court noted in Carr v. Board of Appeals of Medford, 334 Mass. 77 (1956), that it is hardly conceivable the Legislature could have intended to allow all municipal officials the right to appeal a decision of a zoning board of appeals. To interpret the statute as giving the right of appeal to all municipal officers and boards would greatly impair the effective operation of the statute. In Carr, an individual member of the city council appealed a decision of the zoning board of appeals. The court decided that the right of appeal was limited to municipal officers or boards who have duties to perform in relation to the building code or zoning. The court concluded that an individual member of a city council has no such duty and therefore is not eligible to appeal a decision of the zoning board. Later, in Planning Board of Springfield v. Board of Appeals of Springfield, 338 Mass.

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT



Argeo Paul Cellucci, Governor
Jane Wallis Gumble, Director

INSIDE

New Separate Lot Protection
Legislation for Wilmington

Voting Without Attending
Public Hearing

Peer to Peer Program

Looking at the Land Court

160 (1958), it was decided that a planning board clearly has such duties and is authorized to appeal the decision of a zoning board of appeals.

In Planning Board of Marshfield v. Zoning Board of Appeals of Pembroke, 427 Mass. 699 (1998), the court had the opportunity to decide whether the planning board of one community could appeal the decision of a zoning board of appeals in an adjacent community. The zoning board of appeals in Pembroke granted a special permit, variance and site plan approval for a ten-screen, 1600-seat cinema. The planning board of Marshfield appealed the board's decision. The board was concerned about traffic and the lack of parking spaces.

The court restated its position that the zoning act only allows municipal officers or boards that have duties to perform in relation to the building code or zoning to appeal a decision of a zoning board of appeals. The planning board of Marshfield did have zoning duties within the town of Marshfield. The board was the special permit granting authority regarding uses within the water resource protection district, but the court noted that water was not an issue in this case. The planning board produced no evidence that it had duties with respect to zoning in Pembroke. This fact was critical and the court concluded that Section 17 "grants standing only to those municipal boards that have duties relating to the building code or zoning within the same town as the subject land. Because the planning board has no such duties in Pembroke, it does not have standing."

Separate Lot Protection

For many years, zoning legislation in Massachusetts has provided zoning protection for separately held substandard building lots. The first separate lot protection was inserted into the zoning statute in 1958 (see St. 1958, c. 492). Presently, MGL, Chapter 40A, Section 6, fourth paragraph provides the following separate lot protection:

Any increase in area, frontage, width, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing zoning requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

As was noted in Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989), the purpose of the separate lot protection is to protect a once valid lot from being rendered unbuildable for residential purposes but only if there is compliance with all the statutory conditions. The Massachusetts Appeals Court first looked at the issue of when a protected lot must be held in separate ownership from adjoining land when it decided Sieber v. Zoning Board of Appeals of Wellfleet, 16 Mass. App. Ct. 901 (1983). The court found that if the lot was in separate ownership prior to the town meeting vote which made the lot

nonconforming, then the lot may be built upon for single or two-family use. The separate lot protection also requires that the lot:

- (1) conformed to existing zoning when legally created, if any;
- (2) has at least 5,000 square feet and fifty feet of frontage; and,
- (3) is in an area zoned for single or two-family use.

In reviewing the separate lot provision, much attention has focused on the protection from future increases in minimum lot area and frontage requirements. It should be noted however, that the protection afforded separate lots by the Zoning Act also extends to future increases in minimum yard requirements. In deciding Sieber, the court upheld the construction of a single-family home on a separate lot which did not meet the current front, rear and side yard requirements of the zoning by-law. A lot that is entitled to separate lot protection and existed prior to the enactment of a zoning by-law does not have to comply with current yard requirements.

The town of Wilmington recently had special legislation approved by the Legislature which exempts the town from the separate lot provisions of the Zoning Act. Chapter 139 of the Acts of 1998, An Act relative to construction of certain dwellings in the town of Wilmington provides as follows:

Notwithstanding any general or special law to the contrary, no dwelling shall be constructed on any lot in the town of Wilmington containing less than 10,000 square feet of land or having less than 100 feet of frontage; provided, that the planning board may authorize by special permit construction of one single family dwelling on such a lot, which does not conform with the area or frontage requirements of the zoning but which contains at least 5,000 square feet and has at least 50 feet of frontage, provided that such lot met any applicable requirements for area and frontage at the time such lot was recorded or endorsed and that such lot has not been held in common ownership with any adjacent land since the date of nonconformance with area or frontage requirements, upon a finding, after consideration of all pertinent factors, including the provisions for the disposal of waste, that construction and maintenance of a single family dwelling on such lot will be consistent with public health, safety, and welfare and without any substantial detriment to the public good.

Unlike the Zoning Act, this legislation allows the planning board to impose yard requirements in approving construction of a single family home on a grandfathered lot. It does not permit the construction of a two-family dwelling on a substandard lot. Under this legislation, a grandfathered lot loses its separate lot protection if the lot is commonly held with any adjacent land after the date the separate lot became substandard.

In the absence of state-wide legislation, this seems like a reasonable approach in dealing with the issue of separate lot protection. Local officials should contact their state

legislators if they are interested in reviewing construction on substandard residential lots in the same manner as Wilmington.

Voting Without Attending Hearing

What happens if a member of a zoning board of appeals or special permit granting authority, who was not present at the public hearing, casts a vote which is essential to the decision?

Most state courts have allowed a member to vote though the member did not attend the public hearing (see Rathkopf, *The Law of Zoning & Planning*, s. 22.01, Fourth Edition). A case in support of the majority view is Family Consultation Service v. Howard, 176 N.Y.S. 2d 707 (1958), where the court found that an absent member of a board of appeals who had access to and actual knowledge of the facts and issues in the case, and who had a transcript of the public hearing available, would be qualified to vote, although not present at the public hearing. However, in Massachusetts, a member must be present at the public hearing in order to vote on the particular matter.

The necessity that a member must attend the public hearing was first expressed in Sesnovich v. Board of Appeals of Boston, 313 Mass. 393 (1943). The court, in interpreting the terms of the Boston statute, decided that since the statute required a unanimous decision of the five member zoning board in order to grant a variance, all five members had to be present at the public hearing. A public hearing must be held by a quorum of a board. That is, the same number of members necessary to make a favorable decision on a particular matter must be present at the public hearing.

In Perkins v. School Committee of Quincy, 315 Mass. 47 (1943), the applicable statute authorized a seven member school committee to dismiss a school teacher by a two-thirds vote of the whole committee. A public hearing was held by five members of the school committee. Unlike the situation in Sesnovich, a quorum of the committee was present at the public hearing. After the public hearing, six members of the committee voted for dismissal. Two of the members who voted for dismissal were not present at the public hearing. The court concluded that in order to be eligible to vote on a teacher's dismissal, the statute required that the member be present at the public hearing. However, the court noted that their decision did not imply "that under a statute or valid rule, different from the statute here involved, a reading of a stenographic report of evidence and arguments may not furnish a legally sufficient basis for a decision."

True to its word, in McHugh v. Board of Zoning Adjustment of Boston, 336 Mass. 682 (1958), the court determined that the statute allowed a member who was not present at the public hearing to participate in the decision. The Boston statute authorized a twelve member board of zoning adjustment to change a zoning district boundary line by a decision of not less than four-fifths of its members. The statute authorized a majority of the board to conduct a public hearing but required four-fifths of the board to sign the decision. A public

hearing on an application for a boundary line change was held by nine members. The written decision was signed by ten members including two members who did not attend the public hearing. The court concluded that the members who did not attend the public hearing could act and sign the decision because the statute only required a majority of the board to be present at the public hearing.

In Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983), the court decided that when a special permit granting authority is considering a special permit application in accordance with the provisions of the State Zoning Act, such proceedings are adjudicatory in nature and only those members of the board who attend the public hearing are entitled to vote. In Mullin, the planning board granted a special permit for a planned unit development. Two of the members who voted to grant the special permit were not at the public hearing. Because it was decided that two members were ineligible to vote, the court concluded a new hearing and vote were required and remanded to the board for further proceedings. The planning board also argued that the special permit had been constructively granted because of the board's invalid hearing and vote. The court found that:

A petition for a special permit will be constructively granted only when an authority fails to take final action on an application within the ninety day period The board in this case did take final action by filing its initial decision with the town clerk well within the statutory period. . . . The subsequent invalidation of the board's vote has no effect on the finality of the board's action.

In Mullin, the public hearing was opened and closed in one evening. It is not uncommon, however, for a public hearing to be continued for several sessions. Is a board member who missed one of the public hearing sessions still eligible to vote? The court, in Barbaro v. Wroblewski, 44 Mass. App. Ct. 269 (1998), indicated that "ordinarily the same . . . members of the board who act in a judicial or quasi judicial capacity and who are to join in the decision must be present at each hearing. . . ."

Planning boards and zoning boards of appeals are volunteer boards. Members are citizens of the community who have family and employment that consume a major portion of their daily activity. Considering all the demands on their time, missing a public hearing is not an uncommon occurrence. If a public hearing continues for multiple sessions, the problem of maintaining the required number of voting members increases dramatically. The ability of a board to take a valid vote can be in jeopardy in situations where a board member who had attended the public hearing is unable to act or a new member joins the board after the public hearing. Boards can be faced with taking questionable votes to avoid automatic approvals and based upon the court's reasoning in Mullin, appealing the board's decision may only result in a remand.

Considering the voluntary nature of planning and zoning boards as well as the problems associated with extraordinary voting requirements, it would seem reasonable to amend the Zoning Act authorizing a majority of the board to conduct a public hearing. This process would be similar to the statutory procedures reviewed by the court in McHugh. Allowing a majority of the board to conduct a public hearing would give a member who was not

present at the public hearing, or one of the continued hearing sessions, an opportunity to vote. Before voting, a member could become sufficiently informed on the issues raised by reviewing all the evidence and information presented at the public hearing.

Peer to Peer

Does your community have a current need for short term problem solving or technical assistance? Could you benefit from the expertise of another community that has dealt with a similar issue or problem? If so, the Department of Housing and Community Development (DHCD) can provide assistance to municipalities through its Peer to Peer Technical Assistance Program.

The Peer to Peer program taps into the varied skills and abilities of local officials by making their talents available to aid their peers in local government. Peer to Peer accomplishes this by providing small grants to municipalities. A grant of up to \$850 per municipality can provide 30 hours of technical assistance.

The Peer program has provided assistance for such projects as: capital planning and budgeting, the development of personnel bylaws, grant management, economic development planning, zoning and subdivision regulation review.

To apply for Peer assistance, a municipal body writes a request letter describing a problem which they think the assistance of an official in another community could help them solve. This letter should also include the name of a suggested Peer if the community is aware of a person who could provide the requested technical assistance. The municipal body must get a vote from the Board of Selectmen supporting the request or a letter of support from the Mayor or Manager. The request letter should then be sent to the Department of Housing and Community Development.

DHCD reviews the request to ensure that the proposal (1) does not give an unfair advantage to one community over another in a competitive situation, i.e. preparing grant applications or recruiting a specific business; and (2) does not propose use of a municipal official or official from a regional planning agency who is a municipal official within the requesting community. If the letter suggests a peer, DHCD will refer to its current list of peer officials. If the suggested peer is not listed, the Department will contact the person to see if he or she would be willing to serve as a peer. If no peer is suggested, the Department will select a suitable peer from its current peer list.

For further information regarding the Peer to Peer program, contact DHCD at (617) 727-7001, ext. 445. The staff is also available by appointment to provide assistance with applications.

Looking at the Land Court

The Zoning Act Prohibits Site Plan Review for Child Care Facilities

The Zoning Act provides a zoning protection for child care facilities. Section 3 of Chapter 40A prevents a municipality from enacting a zoning regulation which would prohibit, or require a special permit for, the use of land or structures for the primary or accessory purpose of operating a child care facility. A municipality may, however, impose reasonable regulations concerning the bulk and height of structures, yard size, lot area, setbacks, open space, parking and building coverage.

Section 3 also contains a similar zoning protection for religious and certain educational uses. In Bible Speaks v. Town of Lenox, 8 Mass. App. Ct. 19 (1979), the court concluded that the religious and educational protection prevents a community from imposing site plan review regulations on such uses.

In Cartwright v. Town of Braintree, Misc. Case No. 236228 (1997); 5 LCR 238 (1997), the Town of Braintree had enacted zoning regulations which required site plan review for child care facilities. Judge Green of the Land Court concluded that the Zoning Act also prevents a community from enacting zoning regulations which would require a child care facility to undergo site plan review.

Eminent Domain Taking Can Create an Unbuildable Lot

In Helmer v. Town of Billerica, Misc. Case No. 228924 (1997); 5 LCR 150 (1997), the Massachusetts Department of Public Works took, by eminent domain, a certain portion of land leaving a remaining parcel containing approximately 5,727 square feet. At the time of the taking, the zoning bylaw required a minimum lot area of 7,500 square feet in order to construct a single family home.

The parcel had been held in separate ownership since the occurrence of the taking. Helmer was denied a building permit to construct a single family home on the parcel. Helmer argued that his parcel was entitled to protection under the Zoning Act as a grandfathered lot, because the parcel was rendered nonconforming by the eminent domain action of the Commonwealth, and not by any voluntary conveyance by a landowner. Judge Green ruled that the Zoning Act provides no such protection.

The Billerica zoning bylaw contained a provision which prohibited any reduction in a lot which would cause the remaining lot not to comply with the dimensional requirement of the bylaw. Exempted from this requirement was any reduction which was the result of an eminent domain taking or conveyance for a public purpose. This provision was not in effect in 1952 when Helmer's parcel became substandard as a result of the eminent domain action by the Commonwealth.

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT



Argo Paul Cellucci, Governor
Jane Wallis Gumble, Director

October 22, 1998

Ouida C.M. Young
Associate City Solicitor
City Hall
1000 Commonwealth Avenue
Newton Centre, Massachusetts 02459

RE: Voting Without Attending Public Hearing

Dear Ouida:

Thank you for your letter concerning our recent edition of the Land Use Manager. It was interesting to learn of your experience in Newton regarding the above noted issue. In retrospect, I should have mentioned the ability of a city council to appoint a committee to hold the public hearing. However, in writing that article I was focusing on small town Massachusetts. Based on the 1990 census, there are 125 communities in the Commonwealth with a population of less than 5,000.

The fact that a city council can appoint a committee supports the position that the Zoning Act should be amended to allow a majority of a board to conduct the public hearing. For the next legislative session, the Department is recommending that the Governor support legislation which would amend Chapter 40A, Section 11 by adding a new sentence stating that a majority of the permit granting authority or special permit authority shall constitute a quorum for all public hearings which require notice and publication by that section.

Again, thank you for taking the time to write.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald J. Schmidt".

Donald J. Schmidt
Principal Land Use Planner

LAW DEPARTMENT



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October 13, 1998



Donald J. Schmidt, Editor
Land Use Manager
Department of Housing and Community Development
100 Cambridge Street
Room 1803
Boston, Massachusetts 02202

RE: "Voting Without Attending Public Hearing"
Land Use Manager
Edition No. 3, July-September, 1998

Dear Don:

I read with interest the above referenced article which appeared in your most recent edition and thought that you might find the enclosed of interest. The article did not mention the provision in §9 of c. 40A which authorizes city councils which function as special permit granting authorities to delegate the public hearing to a committee. Given how few municipalities can take advantage of this provision, it's not surprising that the article didn't mention this provision of §9. However, Newton is one of the few municipalities in the Commonwealth which can, and does, take advantage of this delegation provision.

When the *Mullen* decision first came out, I remember thinking that there would be a challenge to Newton's delegation of the public hearing to a committee, since almost by definition, delegation to a committee means that members of the special permit granting authority who didn't attend the public hearing will be voting on the special permit. The challenge came in 1995. When I looked closely at both *Mullen* and *Sesnovich*, I concluded that Judge Rose (who wrote the decision for a panel which included Hale and Brown) went too far and was simply wrong as to what *Sesnovich* required.

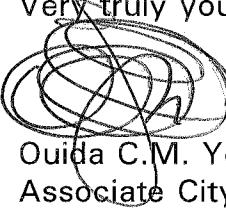
When Newton moved for partial summary judgment in the Land Court case which challenged a special permit denial on the grounds, among others, that members of Newton's special permit granting authority had voted on the petition without attending the public hearing, I wrote the enclosed brief expecting that we'd need to appeal this issue up the line. However, Judge Lombardi agreed with Newton's arguments. While Newton clearly had an express statutory authorization for delegating the public hearing to a committee, I think that Judge Lombardi found merit in the broader due process argument.

I've enclosed my brief as well as Judge Lombardi's Order for your reading amusement. I agree that it's time the Legislature amended c. 40A to permit members who miss one or more of the public hearing sessions to vote on the land use petition. As you may know, New Jersey has an interesting procedure that has the absent member file a written certification concerning how he/she has gained information about the petition prior to his/her vote.

Exactly how one gets any amendment made to c. 40A, however, remains a mystery to me. This is hardly the only provision of c. 40A which needs work; how one settles a §17 challenge to a zoning decision also needs attention. Hope to see you at some future meeting of City Solicitors and Town Counsel Association.

Thank you.

Very truly yours,



Ouida C.M. Young
Associate City Solicitor

Land Use Manager

Split Lot Entitled to Separate Lot Protection

MGL, Chapter 40A, Section 6, contains a separate lot protection which provides in pertinent part that "[a]ny increase in area, frontage, width, yard or depth requirements of a zoning ... by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage."

In Boulter Brothers Construction Company, Inc. v. Zoning Board of Appeals of Norfolk, 45 Mass. App. Ct. 283 (1998), the court treated an amendment to a zoning bylaw requiring lot area to be calculated solely within the town boundaries as an increase in the bylaw's minimum lot area requirement. The Boulter Brothers owned a lot containing approximately 5 acres which was shown on a 1984 recorded plan. Of the total area, 33,401 square feet was located in the town of Norfolk and the remainder of the lot was located in the neighboring town of Millis. The portion of the lot located in Norfolk was in a residential zoning district which required a minimum lot area of 55,000 square feet. At all relevant

INSIDE

**Automatic Rescission
Subdivision Plan Does Not
Lose Zoning Freeze**

**Bylaw Interpretation
Uses Not Listed Deemed
Prohibited**

Looking at the Land Court

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT



Argeo Paul Cellucci, Governor
Jane Wallis Gumble, Director

times, the Norfolk zoning bylaw required a minimum lot area of 55,000 square feet. On November 22, 1993, the town amended its zoning bylaw requiring the Norfolk portion of the lot to meet the minimum lot area requirement. Prior to the 1993 amendment, the Norfolk zoning bylaw was silent on the question of whether land outside the borders of Norfolk could be included in calculating the minimum lot area requirement. The

Boulter Brothers were denied a building permit and appealed the denial arguing that their split lot was entitled to the Section 6 separate lot grandfathering protection.

The court found that, prior to the 1993 amendment, the Boulter Brothers could use land in the neighboring town to meet the minimum lot area requirement since the Norfolk bylaw was silent on the question of whether land outside the borders of Norfolk could be used for the purpose of calculating dimensional requirements. The court also thought it was significant that, prior to the 1993 amendment, a lot was defined as "a parcel of land occupied or intended to be occupied by one building or use." The bylaw specifically excluded from that definition land area "within the boundaries of a street" but did not exclude land located outside the boundaries of Norfolk.

Prior to the 1993 amendment, Boulter Brothers had a buildable lot because they could use land in the neighboring town to meet the minimum lot area requirement in Norfolk. After the 1993 amendment the lot could not comply with the minimum lot area requirement in Norfolk. Since the bylaw change amounted to an increase in the minimum lot area requirement, the court concluded that lot was entitled to the separate lot protection of the Zoning Act. A similar result was reached in Schofield v. Tolosko, Misc. Case No. 153570 (1992). A zoning bylaw contained a requirement that at least 25% of the area of a lot be buildable and contiguous. The bylaw was amended by increasing the "buildable and contiguous" requirement from 25% to 50%. Judge Cauchon of the Land Court ruled that the amendment represented an increase in the minimum lot area requirement.

In deciding that the Boulter Brothers' lot was entitled to grandfather protection, the court reviewed previous decisions that have examined the split lot issue. In determining what type of activity can occur on a particular portion of a split lot, the court has made an important distinction between a passive use of land versus an active use of land. In a nutshell, when land in the more restricted zoning district is used to comply with a yard requirement or a similar dimensional requirement in the less restrictive zoning district, such passive use of land has been considered permissible in the more restricted district. When the land in the more restricted zoning district is used for an active use, such as parking or an access roadway, such active use of land has been found to be prohibited in the more restrictive zone.

For example, in Tofias v. Butler 26 Mass. App. Ct. 89 (1988), the court dealt with a split lot which was partly in a residential district and partially in a commercial district. The landowner proposed to construct a commercial structure entirely within the commercially zoned portion of the lot. The zoning ordinance contained a 20% maximum lot coverage provision which was applicable in both the commercial and residential district. An abutter argued that only the commercial portion of the lot could be taken into account when calculating lot coverage. The court disagreed and concluded that the land in the residential zone could be included when calculating lot coverage. As to the future use of the residentially zoned land that was used in determining maximum lot coverage for the commercial building, the court ruled that "... such residential land cannot be subsequently built on or counted towards the lot coverage requirement of another structure, but rather must be left as open space ..."

An example of a prohibited active use of a split lot can be found in Dupont v. Town of Dracut, 41 Mass. App. Ct. 293 (1996). In this case, Dupont sought to build a 14 unit housing project for the elderly on a lot located in both the city of Lowell and the town of Dracut. The structure would be situated on the Lowell portion of the lot where such use was a permitted use. The access and most of the required parking for the proposed use would be situated on the Dracut portion. The Dracut portion of the lot was located in a business zoning district which allowed business use and prohibited residential use. Dupont argued that the town of Dracut did not have the right to deny the use of land for parking and access to a residential facility located in Lowell because Dracut's zoning bylaw did not expressly regulate split lots.

The court noted that whether in the same or two different municipalities, if a lot is located in two different zoning districts, a town may prohibit the portion in one district from being used to serve a principal use not allowed in that district. The court ruled that while Dracut's zoning bylaw did not explicitly regulate split lots, the existence of such a provision is not determinative. The determining factor is whether the accessory use conforms to "the principle that, ordinarily, a municipality ought to be accorded the right to carry out the policies underlying its zoning ordinance or by-law with respect to the actual uses of land within its borders."

Automatic Rescission

The automatic rescission of a previously approved subdivision plan was first discussed in Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971). In that case, the planning board approved a subdivision on the condition that the developer complete all roads and municipal services within a specified period of time or else the planning board's approval would automatically be rescinded. The planning board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant which contained the following language:

The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two years from date. Failure to so complete shall automatically rescind approval of the plan.

The court found that the Subdivision Control Law authorized the planning board to impose such a condition. The Costanza decision also noted that since the planning board's approval was conditional, the automatic rescission was not subject to the provisions of Section 81W of the Subdivision Control Law.

Heritage Park Development Corp. v. Town of Southbridge, 424 Mass. 71 (1997), dealt with the issue of whether the automatic rescission of a definitive plan under the Subdivision Control Law extinguishes the eight year zoning protection afforded land shown on an

approved subdivision plan as provided in Chapter 40A, Section 6 of the Zoning Act. Before endorsing a definitive plan, Heritage Park and the planning board executed a covenant which provided that no lot could be used or conveyed, or built upon until completion of the required groundwork. The covenant further provided that the board's approval of the plan would be automatically rescinded if the groundwork was not completed on or before March 20, 1991. In the meantime, the town of Southbridge had amended its zoning bylaw, increasing the area and frontage requirements. Under the amended bylaw, the lots shown on Heritage Park's definitive plan would be too small.

By March 20, 1991, the ground work called for in the covenant had not been completed. According to Heritage, this was due to the time required to obtain permits, a downturn in the economy, and the developer's normal rate of work on a development the size of the Heritage plan. Twenty-two months after the date of automatic rescission, Heritage appeared before the board and requested an extension of the covenant's deadline. The board denied the request. At that time Heritage raised the possibility of resubmitting a subdivision plan which complied with the old zoning requirements. The planning board told Heritage that any resubmitted plan would have to comply with current zoning requirements.

The court concluded that the automatic rescission of the board's approval did not deprive Heritage of the eight year zoning protection.

"We conclude that in 1989 Heritage secured the benefits of an eight-year statutory zoning freeze for its Woodstock Heights subdivision. We conclude further that the automatic rescission of the board's approval of that subdivision did not deprive Heritage of that vested protection. ..."

Once a definitive subdivision plan is 'finally approved,' ... the eight-year zoning freeze is secure. Nothing in the statute suggests that the continued vitality of a freeze is coextensive with subdivision approval. We caution against confusing the rights and obligations of a planning board under the subdivision control law and its rights and obligations under the zoning laws. Whatever subdivision control the board may exercise cannot operate to deprive Heritage of the zoning protection it secured in 1989. ..."

Does a landowner have to resubmit the same subdivision plan in order to maintain the eight year zoning freeze? Although not deciding the question, the court ,in Heritage , noted that:

"... G.L. c. 40A, section 6, ninth par., provides that a landowner may submit an amended plan or a further subdivision of all or part of the land at any time after an initial filing, and that the later submission will not constitute a waiver of a zoning freeze secured when a plan was filed initially, nor will it extend the freeze. It would be anomalous to conclude that a zoning freeze terminated where, as here, a developer must refile a plan, (perhaps the same plan) because approval of the plan was rescinded, while a developer who chooses to submit one or more different plans continues to have the protection of the zoning freeze. See *Chira v. Planning Bd. of Tisbury*, 3 Mass. App. Ct. 433, 439 (1975)."

In Chira, a landowner submitted a conventional subdivision plan and a cluster development plan to protect his land from a zoning amendment increasing the minimum lot area requirement. The court determined that both plans were not subject to the zoning amendment and that the planning board exceeded its authority in disapproving a plan because the applicant never intended to implement it.

"Our attention is directed to nothing in the Subdivision Control Law preventing an owner from engaging in the fruitless exercise of filing subdivision plans which he intends never to utilize."

In order to maintain the eight year zoning freeze where a definitive plan has been rescinded, the Heritage decision noted that a landowner must refile a plan. In Massachusetts Broken Stone Company v. Town of Weston, 45 Mass. App. Ct. 748 (1998), the court determined that a landowner cannot just file any plan. To maintain the zoning freeze the landowner must refile the subdivision plan that triggered the zoning freeze.

"Our courts have consistently held that the 'freeze' ... may be utilized to advance a definitive subdivision plan through the subdivision approval process, and to preserve an approved subdivision. We have been directed to no case where the use of those statutory provisions has been approved for purposes outside that process, In *Heritage Park*, ... the court held that the eight - year zoning freeze inured to the benefit of the developer 'for its ... subdivision' under the freeze provisions of section 6, ... it is the subdivision plan that is protected by the zoning freeze, and only incidentally, the land. The freeze attaches to existing zoning provisions which are 'applicable' to the plan, and preserves them throughout the subdivision approval process, plus an additional eight years if the subdivision plan is approved."

MGL, Chapter 41, Section 81U provides that once a definitive plan has been properly submitted and until final action by the planning board is taken, the rules and regulations governing the plan will be the rules and regulation in effect at the time of the submission of the plan. If a preliminary plan is filed, Section 81U further provides that the definitive plan evolved from the preliminary plan will be governed by the rules and regulations in effect at the time of the submission of the preliminary plan. However, the definitive plan must be submitted within seven months from the submission date of the preliminary plan.

The submission of a subdivision plan can freeze existing zoning for eight years. Under the Costanza decision, an approved subdivision plan can be subject to an automatic rescission if the installation of the infrastructure and the construction of the roadways are not completed within a specified period of time. The resubmission of a rescinded plan will still have the benefit of the eight year zoning freeze but must comply with existing subdivision control rules and regulations adopted by the planning board. See Antonelli v. Planning Board of North Andover, Misc. Case Nos. 204631 and 204940 (1996); 4 LCR 67 (1996).

Bylaw Interpretation

Once an area has been zoned for certain purposes, only those uses which are specifically allowed are permitted within the zoning district. A zoning bylaw need not be both permissive and prohibitive in form. It is a familiar principle when interpreting zoning bylaws that the express mention of one matter excludes by implication other similar matters not mentioned. If a zoning bylaw enumerates certain permitted uses and contains no express prohibition or restriction as to other uses, the uses which are not specifically authorized in a zoning district as being permitted are deemed to be prohibited.

In Leominster Materials Corp. v. Board of Appeals of Leominster, 42 Mass. App. Ct. 458 (1997), Leominster Materials Corporation (LMC) appealed the decision of the city's zoning board of appeals upholding the decision of the zoning enforcement officer. The zoning enforcement officer determined that LMC's proposed use of its land for excavation and removal of stone and general quarrying activity was not a permitted use.

The zoning ordinance expressly permitted the removal of sand, loam and gravel in all zoning districts subject to the provisions of the ordinance regulating such removal. The removal of stone and rock was not mentioned in the ordinance.

The court concluded that the absence of a general or zoning ordinance prohibiting the removal of stone within the municipality did not make such activity a lawful use.

"Since the removal of sand, loam, and gravel is an expressly permitted use in all zoning districts, the exclusion of rock and stone removal from the list of permissible uses was presumably deliberate and not an oversight. The court cannot read into the ordinance an unexpressed exception."

Looking at the Land Court

Failure to Obtain Curb Cuts Does Not Constitute a Distinct Physical Impediment

In Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), the court held that a planning board can withhold ANR endorsement where the "access implied by the frontage is illusory." The court also found that the planning board should consider the conditions which exist at the time the plan is presented and not the conditions which might exist in the future. In Poulos, the court determined that a plan was not entitled to ANR endorsement where the existence of a guardrail installed on a public way between the way and the downward slope of abutting property prevented adequate access from the way to the lots shown on the plan.

In Hobbs Brook Farm Property Company Limited Partnership v. Planning Board of Lincoln, Misc. Case No. 238655 (1998); 6 LCR 142 (1998), a landowner submitted a five lot ANR plan. All five lots had frontage along Route 2 and each lot met the minimum 120 foot lot

frontage requirement of the zoning bylaw. Four of the lots shown on the plan had a portion of their frontage obstructed by metal guardrails or concrete jersey barriers. However, each of the four lots had unobstructed frontage along Route 2 to the buildable area of the lot for the following distances: (i) lot 2 - 30 feet; (ii) lot 3 - 61 feet; (iii) lot 4 - 87 feet; and (iv) lot 5 - 22 feet. The zoning bylaw did not require that the frontage be unobstructed for the full required minimum distance of 120 feet. The planning board denied endorsement because all the lots shown on the plan did not have 120 feet of unobstructed frontage. Judge Green of the Land court ruled that access to each of the lots was sufficiently wide to allow vehicular traffic onto the lots and annulled the decision of planning board denying ANR endorsement.

The planning board had also denied ANR endorsement because the petitioner had not obtained curb cut permits from the Massachusetts Highway Department for each of the lots. Judge Green ruled that it was not necessary to obtain curb cuts before endorsement of an ANR plan which shows existing unobstructed access to each lot sufficiently wide to permit passage of all types of vehicles.

No Left Turns

In Jiffy Lube International, Inc. v. Alper, Misc. Case No. 233059 (1998); 6 LCR 268 (1998), the Winchester zoning board of appeals granted a special permit for the operation of an automotive lubrication and car wash facility. Jiffy Lube appealed one of the conditions imposed by the board which required Jiffy Lube to take all reasonable steps to ensure that vehicles exiting both the car wash and lubrication facility make right turns onto the street. The board required Jiffy Lube to erect two signs at the exit for the facility stating "Right Turn Only."

In imposing this condition, the zoning board of appeals identified concerns regarding the effects of the proposed facility on traffic conditions. The board's traffic concerns were supported by evidence. Jiffy Lube disagreed with the board's view of the degree of traffic and the condition imposed by the board to deal with that concern. Judge Green noted that the condition imposed by the board is not the only approach that the board might have taken to address the traffic issue but found that the condition falls within the board's proper range of administrative discretion. Where a special permit is denied or conditioned based upon concerns supported by the evidence and identified as a reason for the board's decision, it is the board's evaluation of the seriousness of the problem, not the judge's which will prevail.

Judge Green noted that this case was one in which reasonable people may differ both on the effects of the proposed facility on the traffic situation, and on the best means to address those effects. "In such circumstances the board's decision was not arbitrary and must prevail."

Land Use Manager

Regulating Sexually Oriented Businesses

Municipalities cannot prohibit sexually oriented businesses from locating within their community. However, the United States Supreme Court has ruled that cities and towns can enact zoning requirements regulating such uses provided the regulations: (1) further a substantial public purpose; (2) do not eliminate reasonable alternative locations; and, (3) are not enacted to prevent sexually explicit free speech.

The United States Supreme Court upheld the validity of adult use regulations in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

In Young, the operators of two adult motion picture theaters challenged a 1972 Detroit zoning ordinance. The ordinance prohibited an adult theater from locating within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. In addition to adult theaters, the term "regulated uses" included adult bookstores, cabarets, bars, and hotels. The ordinance defined an adult theater as a theater that presented material with an emphasis on matter depicting "Specified Sexual Activities" or "Specified Anatomical Areas."

INSIDE

Zoning Notices/ New Address

Citizen Planner Training
- Spring Training Programs

Subdivision Plans & Zoning

Delaying ANR Endorsement

Looking at the Land Court

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT



Argeo Paul Cellucci, Governor

Jane Swift, Lieutenant Governor

Jane Wallis Gumble, Director

Both these terms were defined in the ordinance. The 1972 zoning ordinance amended an "Anti-Skid Row Ordinance" which had been adopted ten years earlier by the city. At that time, the Detroit common council had made a finding that some uses of property were especially injurious to a neighborhood when concentrated in limited areas. The decision to add adult motion picture theaters and adult bookstores to the list of regulated uses was, in part, a

response to the significant growth in the number of such establishments. A police department memorandum stated that since 1967 there had been an increase in the number of adult theaters in Detroit from 2 to 25, and a comparable increase in the number of adult bookstores and other adult-type businesses. In the opinion of urban planners and real estate experts who supported the ordinance, the location of sexually oriented businesses in the same neighborhood "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."

Although five members of the court did not agree on a single rationale for its decision, the court held that Detroit's zoning ordinance did not violate the First and Fourteenth Amendments. The court noted that the First Amendment will not tolerate the total suppression of erotic materials and that the outcome would have been quite different if the ordinance had the effect of suppressing, or greatly restricting, access to lawful speech. It was also important to the court that: (1) there was a factual basis for the city's conclusion that a concentration of adult movie theaters causes areas to deteriorate and become a focus of crime; and, (2) that the zoning ordinance was aimed at eliminating these harmful secondary effects and was not an attempt to prevent the dissemination of "offensive" speech.

In May of 1980, the mayor of Renton suggested to the Renton city council that it consider enacting a zoning ordinance dealing with adult entertainment uses. No such uses existed in the city at that time. The city council referred the matter to the city's planning and development committee which reviewed the experiences of Seattle and other cities. The committee also received a report from the city's attorney advising them as to developments in other cities. The city council, acting on the basis of the planning and development committee's recommendations, enacted a zoning ordinance prohibiting any adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school.

In describing Renton's zoning ordinance as a time, place, and manner regulation, the court noted that these so-called "content-neutral" regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

The court found that the ordinance furthered substantial governmental interests as it was designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life. The court also found that it was not necessary for a municipality to conduct new studies or produce evidence independent of that already generated by other communities, so long as whatever information the municipality relies upon is relevant to the problem that the municipality is attempting to address. The record in this case revealed that Renton had relied heavily on the experience and studies produced by the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood.

The Renton ordinance left 520 acres available for adult theater sites. A substantial part of the 520 acres, which was about five percent of the city's total land area, was already occupied by existing businesses or not available for sale or lease. The court found that the ordinance did not effectively deny adult theater owners a reasonable opportunity to open an adult theater and that adult theater owners must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. The court noted that the First Amendment does not require a municipality to ensure that adult uses will be able to obtain sites at bargain prices, but it does require that a municipality refrain from effectively denying adult uses from locating in the community.

Justice Rehnquist, writing for the majority, concluded:

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.

Here in Massachusetts, communities have been prevented from enforcing their zoning regulations to prohibit an adult use from opening where they have: (1) severely limited the ability for an adult use to locate in the community; (2) failed to identify the secondary effects of adult uses and the substantial governmental interest; or, (3) failed to establish a public record explaining the intent and purpose of the adult regulations.

In T & D Video, Inc. v. Revere 423 Mass. 577 (1996), the Massachusetts Supreme Court upheld a Superior Court preliminary injunction prohibiting the city from enforcing its adult entertainment ordinance. The city was trying to prevent an adult video store from opening. The judge in Superior Court found that Revere made no attempt to justify its adult entertainment ordinance. There was no reference to the secondary effects of sexually oriented businesses while the ordinance was under consideration by the city council. The ordinance did not contain a preamble explaining the intent or purpose of the regulations. The legislative record was barren. Revere's only effort at defining the purpose and intent of the ordinance came during the litigation which was well after the enactment of the regulations.

The Superior Court judge was not satisfied that the ordinance met the requirement that alternative avenues of communication not be unreasonably limited by the city. She noted that the ordinance restricted adult uses to a small area within an industrial district which all but foreclosed the possibility of opening and operating any regulated adult use in the city of Revere. The Supreme Court upheld the judge's conclusion that the Revere zoning regulations denied T & D Video reasonable alternative avenues of communication.

Recently, in A.F.M., Limited v. City of Medford, 428 Mass. 1020 (1999), the Massachusetts Supreme Court upheld a Superior Court preliminary injunction prohibiting the city of Medford from enforcing its adult regulations to prevent an adult book and video store from operating in the city. Assuming that the adult regulations adopted by the city were constitutionally proper, the court held that the preliminary injunction was properly entered because the city failed to show that A.F.M. (Airborne for Men) had been left with reasonable alternative means of communication.

Airborne for Men applied for a special permit to operate an adult book and video store. The proposed business would have been located within 750 feet of a residential district which was prohibited by the zoning ordinance. The special permit was denied by the city council. The city's zoning scheme confined adult businesses to 0.11 percent of the city's total developable land. This area consisted of one small city block which was completely occupied by a bank, an outdoor storage area and a car wash. The city did not present any information explaining why it was reasonable to restrict adult businesses to such a small area. As in the T.D. Video case, the court found that the zoning regulations denied Airborne reasonable alternative avenues of communication.

Public Hearing Notices

MGL, Chapter 40A, Section 5 requires that the Department of Housing and Community Development be notified of any public hearing scheduled by a planning board or city council concerning any proposed amendment to a local zoning bylaw or ordinance. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the scheduled hearing.

To be assured that our records will reflect proper notice, please mail all public hearing notices to the following address:

Donald J. Schmidt
Department of Housing & Community Development
One Congress Street - 10th floor
Boston, Massachusetts 02114

The Zoning Act also authorizes the Department to grant waivers of notice when a planning board or city council fails to give proper notice to the Department. Pursuant to the statute, a waiver of notice can only be granted prior to the town meeting or city council action on the proposed zoning change. We are frequently asked to grant a waiver of notice after the zoning proposal has been enacted by the community. In such situations, we will review the zoning proposal and will respond to the community in writing if we have no objections to the zoning amendment adopted by the community.

Citizen Planner Training

Two training programs for local land use officials will be conducted in April at four locations across the state by the Citizen Planner Training Collaborative. The two training programs being offered are "The Comprehensive Master Plan" and "Non-Conforming Structures and Uses. The Programs will be held at the following locations:

The Comprehensive Master Plan

Danvers: North Shore Community College - April 8, 1999
South Deerfield: Frontier Regional School - April 14, 1999

Non-Conforming Structures and Uses

South Yarmouth: Senior Center - April 12, 1999
Gardner: Mt. Wachusett Community College - April 22, 1999

The training sessions will be held at 7:30 p.m. and the cost for each workshop is \$20. For more information and to register, contact the Massachusetts Federation of Planning & Appeals Boards at (781) 246-4681.

Subdivision Plans and Zoning

A planning board may adopt a regulation requiring subdivision plans to be in compliance with local zoning requirements. Even in the absence of any express provision in the planning board's regulations requiring compliance with local zoning, the court, in Beale v. Planning Board of Rockland, 423 Mass. 690 (1996), held that a planning board can disapprove a subdivision plan which does not conform to the provisions of the zoning bylaw.

Beale owned a 56 acre parcel of land. Most of the parcel was located in the Town of Hingham. Beale proposed to construct a 457,000 square foot retail shopping center in Hingham and use a 400-foot strip of land in Rockland for an access road to the shopping center. The Rockland strip was located in an industrial zone which did not allow retail sales. The planning board gave five reasons for denying the plan. One reason was that the proposed use of the private way to provide access to the retail shopping center in the town of Hingham violated the provisions of the Rockland zoning bylaw because retail uses are prohibited in the industrial zoning district.

It is well established that the use of land in one zoning district for an access road is prohibited where the road would provide access to uses that would themselves be barred if

they were to be located in the same district as the access roadway. Where a parcel of land lies in two communities, each community may apply its zoning law to the portion that lies within its boundaries. The court held that the planning board had the authority to disapprove the plan on the basis of the zoning violation, even though the planning board's rules and regulations did not contain a specific provision requiring compliance with the zoning bylaw.

Beale challenged this conclusion arguing that Section 81U of the Subdivision Control Law allows a planning board to disapprove a plan only when the plan fails to comply with the board's own rules and regulations or with the recommendations of the board of health. However, the SJC noted that Section 81U must be read in conjunction with other provisions of the Subdivision Control Law, most notably Section 81M which specifies the purposes of the law. Section 81M provides in part that "the powers of a planning board ... shall be exercised with due regard for ... insuring compliance with the applicable zoning ordinances or by-laws." The court found that this statement of purpose provides a basis for disapproval of a subdivision plan separate from any noncompliance with the planning board's subdivision rules and regulations or board of health recommendations.

Delaying ANR Endorsement

Section 81P of the Subdivision Control Law specifies that if a planning board determines that a plan does not require approval under the Subdivision Control Law, "it shall forthwith, without a public hearing endorse ... [the plan] 'approval under the subdivision control law not required' or words of similar import Such endorsement shall not be withheld unless such plan shows a subdivision."

In Bisson v. Planning Board of Dover, 43 Mass. App. Ct. 504 (1997), a landowner submitted a plan to the planning board which did not show a subdivision. The planning board deferred endorsing the plan until town meeting amended the zoning bylaw increasing the minimum lot frontage requirement. After town meeting vote, the planning board denied ANR endorsement because the lots shown on the plan did not meet the new frontage requirement. The court held that the term "forthwith" in Section 81P compels immediate action after a planning board determines that a plan does not show a subdivision. The planning board did not have the authority to delay its determination when the plan clearly did not show a subdivision.

Also, once a planning board has endorsed an ANR plan, it cannot at a later date change its mind and rescind ANR endorsement. In Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973), the court held that the authority of a planning board to modify, amend or rescind plans under Section 81W of the Subdivision Control Law does not apply to ANR plans.

Looking at the Land Court

New Agricultural Structure & New Child Care Facility Subject to Special Permit

In Prime v. Zoning Board of Appeals of Norwell, 42 Mass. App. Ct. 796 (1997), the Massachusetts Appeals Court decided that the Zoning Act prohibits a community from requiring a special permit for the expansion or reconstruction of existing agricultural structures but allows a community to require that new agricultural structures obtain a special permit. The first paragraph of Chapter 40A, Section 3 provides that:

no ... zoning ordinance or by-law shall ... prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agricultural ... nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion or reconstruction of *existing structures* thereon for the primary purpose of agriculture

The court cautioned communities that special permit requirements may not be imposed unreasonably and in a manner designed to prohibit the operation of the agricultural use.

In Campbell v. Town of Weymouth, Misc. Case No. 237269 (1998); 6 LCR 276 (1998), Judge Green of the Land Court concluded that the construction of a new structure for a child care facility can also be subject to special permit review. The third paragraph of Chapter 40A, Section 3 provides that:

No zoning ordinance or bylaw ... shall prohibit, or require a special permit for, the use of land or structures, or the expansion of *existing structures*, for the primary, accessory or incidental purpose of operating a child care facility

Judge Green observed that the protections afforded child care facilities are similar to the protections afforded agricultural uses and concluded that a zoning bylaw may require a special permit for the construction of a new structure to be used as a child care facility. However, as was noted in the Prime decision, the special permit process may not be imposed unreasonably or in a manner designed to prohibit the operation of a child care facility.

The child care facility was proposed to be located in a floodplain. The board of appeals denied the special permit because the "area was subject to flooding and a day care center for fifty-three children in the floodplain is hazardous to the well being of those children and not an appropriate location." Judge Green annulled the board's decision. He found that the board had denied the special permit because it would have preferred a different use of the locus than the proposed child care facility. Rather than imposing reasonable conditions on the proposed facility, the board's denial of the special permit operated to nullify the protections afforded child care facilities under the Zoning Act. Judge Green remanded the matter to the board of appeals for further proceedings consistent with his decision.