

MASSACHUSETTS PLANNING



American Planning Association
Massachusetts Chapter
Making Great Communities Happen

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Winter 2019

Annual Planning Awards

page 3



Plus: *Under The Gavel11 • PDO Corner16 • Planner Spotlight17*



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On the cover: Hancock Adams Common, Quincy.



From the President

Happy New Year Planners!

I hope you had a wonderful holiday season. APA-MA wrapped up last year with a sold out Annual Awards Ceremony at Tufts University. Many thanks to Tufts for hosting us and to the Awards Committee for all the great work you did. This issue is dedicated to the 2018 awardees – enjoy!

The APA-MA Chapter has some exciting plans in store for 2019:

- **New APA-MA website** – We have been working with the Social Law Library on a new website. Stay tuned for an early Spring launch!
- **More Planner Spotlights** – In 2018 we launched a series that highlights planners from around the state. If you know someone we should spotlight please email us at communications@apa-ma.org. Check out the current spotlights! www.apa-ma.org/news/apa-ma-spotlight-series
- **Social events** – you told us you wanted more social opportunities, so we appointed a Social Events Coordinator to organize them! Elizabeth Wood, Planning Director in Leominster, had joined the Board and has some great ideas for social events this year.
- **Half-day conferences/special topic workshops** – these will be short opportunities to get CM credit, focusing on professional development, housing, Opportunity Zones, and more!
- **Gearing up for the 2019 SNEAPA Conference in Springfield.** Our Conference Co-Chairs, Alison LeFlore and Scott Turner, are recruiting volunteers now. Email Alison at alison.leflore@gmail.com if you are interested.

This is also an election year for APA-MA. All positions will be up for election this year. More information will be coming out in February.

I hope you are staying warm and hope to see you soon!

All the best,

Angela Cleveland, AICP
Aclevelandaicp@gmail.com

APA-MA/MAPD Annual Planning Awards



On December 14th, APA-MA and the Massachusetts Association of Planning Directors (MAPD) celebrated the holiday season and honored state-of-the-art planning projects and professionals at a luncheon ceremony at Tufts University in Medford. The APA-MA awards program, co-sponsored by MAPD, recognizes outstanding planning projects, individuals, and organizations across Massachusetts for significant contributions to the field of planning. This year, new categories were added to recognize projects that addressed important planning issues like sustainability and transportation. Congratulations to the 18 award winners this year — we applaud you for your contribution to making great communities happen for all!

PLANNING PROJECT AWARD

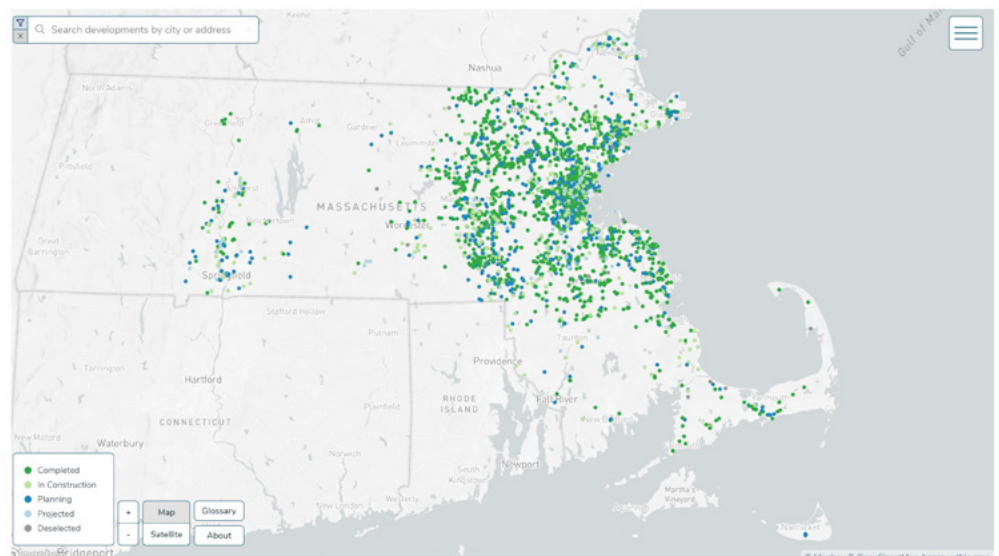
MassBuilds

It's a challenge to look at development from both a regional perspective and a local perspective. While local officials may have a sense of development proposals planned for their municipality, they may not be aware of proposed developments beyond of the borders that may offer benefit or pose challenges for their community.

That's where MassBuilds comes in. It's a tool for creating a collaborative data inventory of planned real estate developments across Massachusetts. It's a web-based resource to understand past developments and to see future trends of planned developments and their implications for cities and towns.

The data provides specific details about each development, including information such number of housing units and proximity to

public transit, and is used to create improved forecast of population and employment changes. The result is a living library powered by, and available to, a community of data stewards, public officials, municipal staff, and residents.



SOCIAL ADVOCACY AWARD

Metro Mayors Coalition Regional Housing Task Force

The housing crisis felt in one city or town is frequently the same crisis felt by their neighbors, and decisions made in one municipality can affect nearby municipalities. This understanding led the Metro Mayors Coalition to create a Regional Housing Task Force. Comprised of officials and planning staff, the task force worked collaboratively to understand the regional causes of the housing crisis, establish a regional housing target, and define the parameters of new housing in the MMC area.

This unique initiative tackled both the technical planning side and political aspects of housing production.

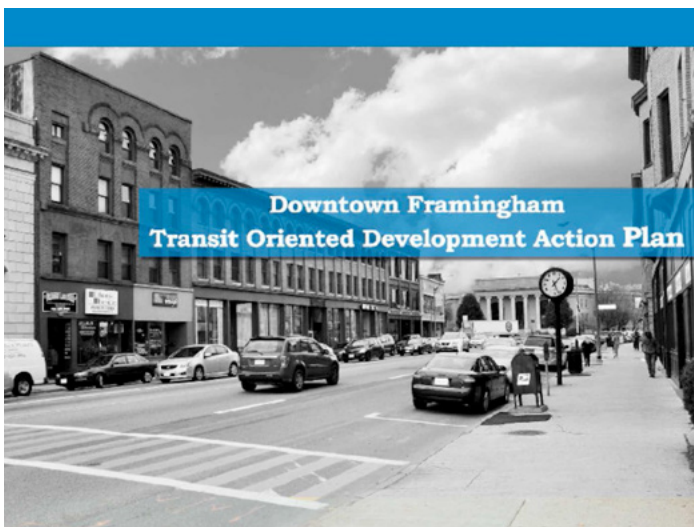


The result is a set of guiding principles and accompanying strategies for housing development that pertain to engagement, production and preservation, affordability and stability, fair housing, and location and complete neighborhoods.

PLANNING PROJECT AWARD

Framingham Transit-Oriented Development Strategy

Downtown Framingham has experienced a resurgence through a series of new public investments, private developments, and contributions by residents and community organizations. Among these many factors, a key one is the Framingham Transit-Oriented Development Strategy. The process and action plan that are part of the strategy provided a roadmap to achieve the vision of enhancing Downtown Framingham and making it a more vibrant, walkable, transit oriented, and economic hub. Subsequently, public and private stakeholders have followed up through the commitment of time, effort, and resources needed to make the vision a reality. The project has become a model for TOD in the state and offers an example of deliberative and inclusive actions to enhance downtowns across the Commonwealth.



DISTINGUISHED SERVICE AWARD

Jack Wiggin, FAICP

We were thrilled to receive the nomination of Mr. Jack Wiggin, FAICP for the Distinguished Service Award. This nomination was based upon Jack's 40 years of inspired work during which time he:

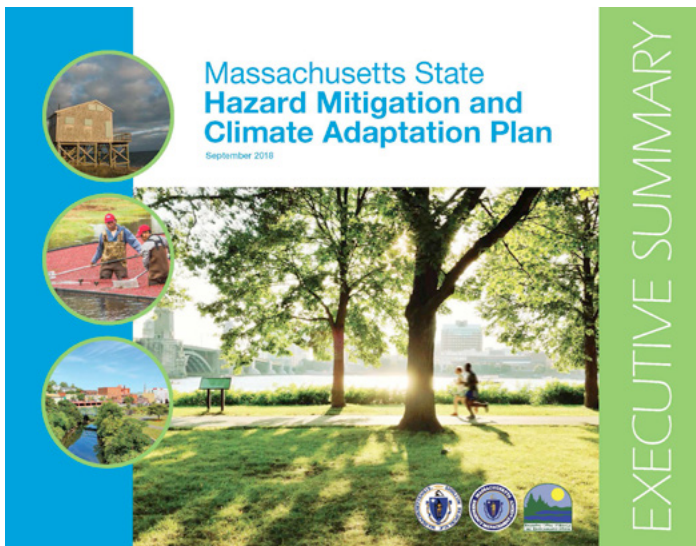


- made significant contributions to the development of best practices in coastal area management practice,
- worked with dozens of maritime communities to creatively use their natural assets, harbor and transportation infrastructure, and human resources to expand business opportunities;
- helped establish and grow the University of Massachusetts Boston's Urban Harbors Institute;
- established the MS in Urban Planning and Community Development Program at the University of Massachusetts Boston;
- contributed to the development of the APA Massachusetts Chapter by being an active member who attended and contributed to Chapter meetings, serving on numerous Chapter committees,

Based upon these many contributions to our profession and chapter, we are delighted to present to Jack the Chapter's 2018 Distinguished Service Award.

Statewide Planning: Massachusetts State Hazard Mitigation and Climate Adaptation Plan

Expanding on the State's 2013 Hazard Mitigation Plan and 2011 Climate Change Adaptation Report, the Massachusetts State Hazard Mitigation and Climate Adaptation Plan is a first-of-its-kind statewide plan integrating a traditional hazard mitigation plan with a climate change adaptation plan. The Plan expands upon previous State planning efforts, integrating planning elements for 14 natural hazards related to the following climate changes: precipitation, sea level rise, rising temperatures, and extreme weather. It is hoped that the Plan's integration of climate change impacts and adaptation strategies with hazard mitigation planning serves as a model for other states. Development of the Plan was managed by the Executive Office of Energy and Environmental Affairs, the Executive Office of Public Safety and Security, and the Massachusetts Emergency Management Agency, and involved a Project Management Team composed of technical specialists from several key state agencies. The consulting team supporting development of the Plan was led by AECOM.



Judi Barrett
Principal

BARRETT
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judi@barrettplanningllc.com | www.barrettplanningllc.com

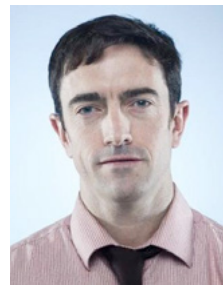
Erin Wortman

With an almost 12-year career, Erin Wortman became the Director of Planning & Community Development for the Town of Stoneham four years ago; for 13 years prior, the Town had no Planning Department or professional planning staff. Since then, Erin has been a champion for planning and the engagement of underrepresented groups. Just a few of the successes in her time with Stoneham include the establishment and implementation of a Complete Streets Policy and Plan leading to Erin's recognition as a Complete Street Champion by Smart Growth America, the creation of the Town's first Housing Production Plan, and the establishment of Tax Increment Financing for downtown businesses. Additionally, for the last several years, Erin has served as a mentor and coordinated internships for a student pursuing their Masters in Urban Planning. As a planner, Erin has and continues to provide a significant and valued contribution to her community, recognizing and balancing the needs of various stakeholders.



JOURNALISM & COMMUNICATIONS AWARD

Tim Logan, *The Boston Globe*



Since 2015, Tim Logan has been a real estate and development reporter for *The Boston Globe*, and before then, a reporter for the *Los Angeles Times* and *St. Louis Post Dispatch*. With a perspective influenced by a Masters in Urban Affairs from Saint Louis University, Tim prolifically covers all things development for the *Globe*. Consistent with the broadly relevant nature of the planning profession, in the last month of 2018 alone Tim wrote articles related to the planned redevelopment of Suffolk Downs and Somerville's Union Square, the rise of automated stacked parking, the status of the Governor's Housing Choice legislation, real estate acquisitions and corporate expansion plans, Airbnb and short-term rental regulations, and the importance of good lighting in workspaces. We appreciate and commend Tim for his coverage and look forward to his continued reporting on all things relevant to our profession and our communities.

Envision Concord — Bridge to 2030

Over the course of 18-months and hundreds of hours of stakeholder outreach, the Envision Concord Comprehensive Plan lays out a clear path to achieve the Town's ambitious goals. The Plan was crafted to ensure that implementation was not an after-thought chart of "to do" items but rather a carefully crafted strategy with full buy-in from department heads who will be responsible for moving recommendations forward. The embrace of this "systems approach" was embodied in the Plan by the inclusion of a systems diagram that illustrates how the pieces work together and by the addition of three sections, called "Big Ideas." The Plan also adapted the APA's sustainability principles to fit Town goals and values, including the elevation of sustainability to not simply a planning element but to a plan principle and "filter" for all decision-making in the town to achieve Concord's sustainability goals.



PLANNING PROJECT AWARD — SMALL COMMUNITY

Medfield State Hospital Reuse Master Plan

The Medfield State Hospital Reuse Master Plan is a community driven plan to guide the reuse and rehabilitation of 39 historic buildings plus selected new construction

on a 128-acre campus overlooking the Charles River. The state hospital campus was shuttered by the Commonwealth in 2003, and was acquired by the Town of Medfield in 2014. The Plan clearly demonstrates the desire to create a new neighborhood through historic rehabilitation and preservation of access by the public to site amenities. The Plan balances the priorities and desires of Medfield with the economic and financial objectives of minimal impacts on school and Town services, minimal effects on property tax rates, and the potential for profitable development from the investor's perspective. Preparation and presentation of the Plan is intended to be equally useful for a resident or potential developer, yet the financial model departs from the traditional development model in that the resulting density is based on balancing needs and community desires, not highest and best use.



South Water Street Reconstruction — Town of Plymouth

The South Water Street Corridor improvements were implemented in 2017 as a result of the 2006 *Public Space Action Plan* which provided the framework to improve the public realm in Plymouth's Downtown and Harbor District. South Water Street is a major public space running directly in front of Plymouth Rock and the Commonwealth's Department of Conservation and Recreation (DCR) Pilgrim Memorial Park. The South Water Street Project is an example of how to strike a balance between many different modes and needs within a busy public way. It is a "complete street," showcasing how good urban design of a streetscape can reinvent a corridor. The public infrastructure was completely rebuilt, along with the utilities, to improve the visitor's experience and increase resiliency to coastal storms along the Harbor. Pedestrians are given priority over vehicular traffic by providing wide comfortable sidewalks, interesting design details, high-quality materials, intimate seating areas, shorter crossing distances, and safer crosswalks, all within a park-like setting with sensitive stormwater management and landscaping.



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KLA didn't just check the boxes. They helped us make the most of the MVP program by including equitable community engagement and a series of compelling educational videos - which were a big hit in town! The MVP program has built a solid foundation for resilience in Concord thanks to KLA.

KATE HANLEY
SUSTAINABILITY DIRECTOR, CONCORD

Coastal Resilience Solutions for East Boston & Charlestown

The Climate Resilience Solutions project is the first neighborhood-specific application of the Climate Ready Boston framework, the City's ongoing climate change initiative. It is a direct response to the 2016 Climate Ready Boston report that the City "prioritize and study the feasibility of district-scale flood protection" and "develop local climate resilience plans in vulnerable areas to support district-scale climate adaptation." The design team, in coordination with all levels of government, community members and the private sector, developed a strategy for East Boston and Charlestown that included evaluation criteria, recommendations for near-term and long-term actions, order-of-magnitude costs and an implementation roadmap to guide the City as it begins to move from planning to physical actions to protect the community. The implementation plan outlines actions that will provide flood protection, waterfront access, recreation, mobility and protect over 11,000 residents and at least 300 businesses as well as critical highway and transit infrastructure, healthcare facilities and other important services. Coastal Resilience Solutions For East Boston and Charlestown is an important first step in this planning, setting the stage and developing a vision for additional future efforts to be undertaken by the City.



STUDENT PROJECT AWARD

Clean Green Driving Machines: Reducing Municipal Fuel Consumption, Tufts University, Department of Urban and Environmental Planning

In the spring of 2018, the Massachusetts Department of Energy Resources (DOER) enlisted a student team from Tufts University's Department of Urban and Environmental Policy and Planning to help Massachusetts Green Communities reduce their vehicle fuel consumption, energy costs, and greenhouse gas emissions. Through research of fuel reduction practices in US cities and towns, phone interviews and surveys with Green Communities, and an analysis of fuel economy trends of vehicles on the market, the team expanded the methods and knowledge available to municipalities to reduce their vehicle fuel consumption and updated the fuel economy requirements in the Green Communities Division's (GCD) Fuel Efficient Vehicle (FEV) Policy. The policy encourages municipalities to purchase the most fuel efficient vehicles and technologies feasible.



Clean Green Driving Machines

Reducing Municipal Vehicle Fuel Consumption

Green Communities Division, Mass Department of Energy Resources

Albert Good // Emily Klotz // Lily Ko

May 2018

CITIZEN PLANNER AWARD

Stephen M. Nolan – Town of Medfield

The award for Citizen Planner went to Stephen Nolan of Medfield for his distinguished contribution to planning. Mr. Nolan is a partner at Nolan Sheehan Patten, LLP where he focuses on affordable housing and community development. He serves on the Boards of the Lawyers Clearinghouse for Affordable Housing and Homelessness; and the National Housing and Rehabilitation Association; and acts as Pro Bono Counsel for Greater Boston Habitat for Humanity and Museum of African American History. Mr. Nolan has been a committed volunteer for the Town of Medfield over the past 30 years, serving on the Planning Board and Zoning Board of Appeals. He has addressed critical planning issues including increasing the supply of affordable housing; structural town government issues; and economic development matters, including the re-use of the former Medfield State Hospital property and successful downtown redevelopment program.



Quincy's Hancock Adams Common

The new Hancock Adams Common opened September 2018 with great fanfare and a celebration that drew more than 2,000 attendees. It stands as a bold and creative example of the successful reimagining and enhancement of an historic New England city's downtown core. Years of planning by the Quincy Planning Department, the Mayor's Office, and the associated project design teams resulted in the rerouting of traffic around the downtown center by decommissioning a four-lane vehicular thoroughfare and replacing it with a new city common. Serving as the new "front yard" for downtown Quincy, Hancock Adams Common creates a seamless pedestrian experience, directly connecting the Quincy Center MBTA station with historic landmarks, public facilities, local businesses, and multifamily residential developments.



The three-acre Common features engaging display fountains, interpretive design elements and sculptures, ornamental plantings, large lawn areas and hardscape plaza spaces suitable for hosting public events, and offers flexibility for future programming opportunities.

FAYE SIEGFRIEDT AWARD

Rachel Meredith Warren – Town of Stoneham

Rachel Meredith Warren from the Town of Stoneham was awarded the Faye Siegfriedt Award for her unwavering dedication to community planning. Ms. Warren is a civic-minded leader who uses her time to build consensus, facilitate community conversations, and advocate for progress.



At a time when there was no planning department, Rachel stepped up to guide Stoneham's first planning process in years, create good policy models, and develop a system for citizens to understand and get involved in their community. Ms. Warren chairs the Stoneham Transportation Advisory Committee, School Committee and is President of the Stoneham Community Development Corporation, an organization which she helped shape and strengthen. Ms. Warren's voice has empowered others to speak up, advocate for change, and make informed decisions that have made Stoneham a better place.

ELECTED OFFICIAL OF THE YEAR

Senator William Brownsberger

Will Brownsberger is the State Senator for the District representing Belmont, Watertown and parts of Boston, serving since 2011. He also served in the State House of Representatives, and is a Belmont Selectmen, which partially explains his strong affinity for local Planning issues such as Transportation, Zoning Reform and Sustainability. He's a strong advocate for transit, biking, walking and overall transportation safety, keeping many important projects in his district on track. He is also very responsive to his constituency, answering his own emails and phone calls! Thank you for all you do as an elected official, Senator Brownsberger!



City of Lowell

Lowell is really making waves and getting noticed! From the most recent designation of the Canalway Cultural District as a Great Place in America to the celebration of the 40th anniversary of the Lowell National Historic Park, the City continues to celebrate and respect its evolution from the nation's largest industrial center to one of the most exciting cultural centers in Massachusetts. The City has a thriving arts community, daily cultural activities, converted mill housing (including affordable units), and an array of dining and shopping destinations. The newest development project is the Hamilton Canal District, a 15-acre area which will be renovated to create over 700 new units of housing, up to 55,000 square feet of retail, and up to 450,000 square feet of commercial or office space. And the City has great Planners to thank for leading this work. The Planning, Community Development, and Economic Development teams are top notch and committed to working collaboratively with residents, developers, business owners, the institutions, and other



stakeholders, to find the right solution. This very well deserved, and timely, award for Community of the Year, goes to the City of Lowell!



EMERGING/RISING PLANNER AWARD

Brian Creamer – Nitsch Engineering

The Emerging/Rising Planner Award is proudly awarded to Brian Creamer for his professional and community leadership and positive impact on the planning profession. Mr. Creamer works for Nitsch Engineering building better communities through resilient design and public engagement. Mr. Creamer graduated from Boston University with a Master's Degree in City Planning and from Pennsylvania State University with a Bachelors Degree in Landscape Architecture. He is an Adjunct Faculty member in the Boston University City Planning and Urban Affairs program and a guest lecturer at Babson College and Boston Architectural College. Within his community, he advocates for a stronger, sustainable, safer, and more walkable Malden through his work as the Chair of the City of Malden's Mayor's Advisory Committee on Walkability, a Conservation Commissioner and on the Friends of the Malden River Core Committee and Mystic River Watershed Association.



"Merger," She Wrote!

by Bob Ritchie, Esq.

In this article we dive into a weedy but shallow swamp of facts presented in the 2018 Appeals Court decision, *Kneer v. ZBA of Norfolk*, 93 Mass. App. Ct. 548 (2018). We will do this through the eyes of Appeals Court Justice Jim Milkey who wrote the Court's decision.

Justice Milkey analyzes the binary interrelationship between grandfathering and merger, with focused attention to the all-important fact-intensive inquiry into the nature and scope of "control" in determining whether a landowner could lawfully have taken effective action to minimize or eliminate nonconformities resulting from zoning changes.

The facts presented in this decision break down along the two distinct bases upon which town zoning officials first concluded that a merger had occurred: (1) merger in the first degree when the Town first adopted zoning in 1953; and (2) merger in the second degree when in 2012 a person who is both the record owner of land adjacent to the Locus and also a trustee of a trust in which she has broad powers but no beneficial interest participates in the acquisition of the Locus as a trust asset.

Deirdre Mead is a good daughter. She actively sought to help her mother, Mildred Kneer, by fulfilling the duties of a good daughter as well as by acting under her authority as a trustee of her mother's revocable Trust to secure for the Trust—owner of record of property located at 9 Hunter Avenue (the "Locus") in Norfolk—the necessary permits and approvals needed to construct a residential dwelling thereon. The Trust was established in 2001 by Kneer and her husband (now deceased) as part of their estate planning. In 2010, following the death of Mr. Kneer, the Trust was amended to add Mead as a co-trustee along with Kneer, who remained the Trust's sole beneficiary. Trust provisions established broad powers and extensive management control over the Trust assets and equipped either trustee (Kneer or Mead), acting alone, to exercise any of those powers consistent with the fiduciary obligations binding upon trustees generally.

This last point becomes relevant and important when we address the second charge—Merger in the Second Degree—below. But first let's see how it came about that the Trust was first charged with, but later acquitted, of first-degree merger.

Charge 1: Merger in the First Degree

The still undeveloped Locus has, from 1945 to date, consisted of slightly less than 0.18 acre in area. When zoning was first adopted by the Town in 1953, the minimum lot size had been slightly over 0.34 acre; but in 2013—when the Trust sought a septic system permit from the

Board of Health and a building permit from the Building Inspector (the "BI")—the minimum lot area had increased to roughly one acre.

The health agent granted the Trust approval for the septic system. But the BI, relying on an opinion of the Town Attorney, denied the building permit for two distinct reasons, the first reason being that the Locus had long ago merged with adjacent land, was itself short of current zoning minimums, and did not enjoy the benefit of having been "grandfathered" upon past successive zoning bylaw changes, starting with initial adoption of zoning in 1953. The second reason cited for denial will be discussed below in connection with Charge 2.

In 1953, the Locus had been a constituent part of a much larger tract of land in common ownership that in 1945 had been depicted on a Land Court plan of lots. The Locus at that time was made up of two of those lots, identified as Lots 46 and 47 on the plan. Development patterns along Hunter Avenue typically combined two of the recorded lots for combined residential use. The adjacent land into which the BI believed the Locus had merged included Lots 6, 12, and 13 to the west, and Lots 44 and 45 to the east. His belief was presumably grounded on the assumption that the then common owner of all seven of these lots could have configured what evolved into the Locus so as to satisfy the 1953 minimum lot area of 0.34 acre. The Locus, however, made its appearance in title history eventually becoming the property of the Trust by deed in 2012.

You might be thinking that G.L. c. 40A, § 6, supports the BI's view; and if so, you would be right. Right because when in 1953 zoning established the 0.34 acre minimum, the 0.18-acre Locus could not (conformably with § 6) have been sold off as a separate building lot, since



Justice Milkey sagely notes in his opinion in this case, "merger has its roots in the common law" we inherited from England centuries ago.

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it was then part of a larger tract of land—including the other 5 lots on the Land Court plan—all held in common ownership. As you know, G.L. c. 40A, § 6, provides that “[a]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities.” See *Preston v. Planning Board of Hull*, 51 Mass. App. Ct. 236-238 (2001), and *Seltzer v. ZBA of Orleans*, 24 Mass. App. Ct. 521,522 (1987). Justice Milkey sagely notes in his opinion in this case, “merger has its roots in the common law” we inherited from England centuries ago.

To digress on merger’s common law ancestry, consider the root meaning of the two related land use concepts of “grandfathering” and “merger.” Webster’s New Universal Unabridged Dictionary defines the verb “merge” to mean “to become combined, united, swallowed up, or absorbed” or “to lose identity by uniting or blending into” something else; and walking this explanation back, we find that the word evolved from the Latin verb “*mergere*,” which has been defined as meaning “to plunge or sink” or “to be swallowed up by immersion” (or to “dive” or “plunge”). For the Latins, a diver was said to be a “*mergus*” (which by extension became the Roman’s term for “seagull”). So, our courts’ cases prompt us to remember that our land use concepts

of merger and its linguistic ancestor share a considerable amount of DNA.

Our statute then tracks common law but with the salutary provision that insulates noncompliant lots from increases in lot area and frontage requirements if not held in common ownership with adjacent land. See *Cara-betta v. ZBA of Truro*, 73 Mass. App. Ct. 266, 269 (2008).

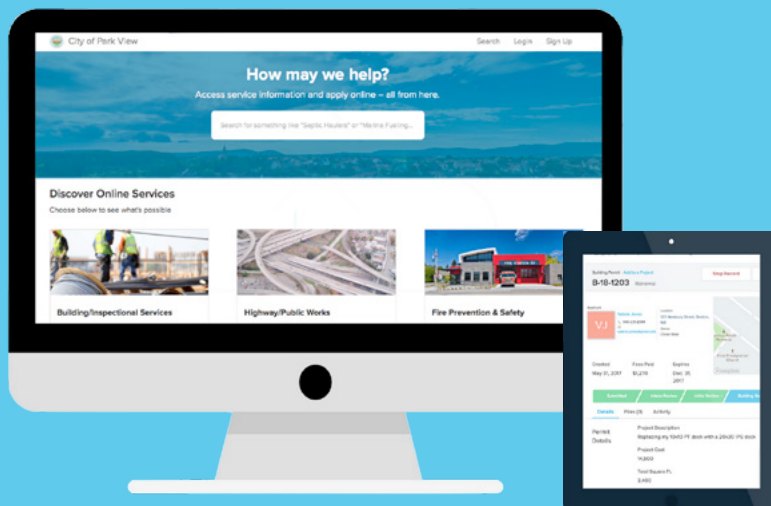
BI and the Town attorney perhaps should have considered that: (1) municipalities are free to expressly adopt more generous grandfather provisions than the statute (See *Marinelli v. ZBA of Stoughton*, 65 Mass. App. Ct. 902, 903 (2005); and (2) the Norfolk zoning bylaw in 1953 expressly provided that “[l]ots shown on any plan recorded by deed or plan at the time this [by-law] is adopted may be used.” (This language does not appear in the Town’s current zoning bylaw).

Although the ZBA upheld the BI, the trial court on appeal reversed the decision of the ZBA. Judge Milkey concurred with the trial court judge that the more generous express language of the bylaw “plainly intended to offer grandfathering protection to the then-existing lots so long as at that time the lots were shown on a plan that had been recorded.” See *Wayside Ltd. Partnership v. ZBA of Shirley*, 461 Mass. 469, 474-475 (2012). Judge Milkey notes that while deference is due to reasonable interpretations of the bylaw by local officials, the “meaning” of

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the bylaw is ultimately a question of law for the courts, and thus for the courts to decide.

Result: BI and ZBA were wrong to conclude that there was merger on this basis.

Appeals Court Verdict: Not Guilty of Merger in the First Degree

Charge 2: Merger in the Second Degree


Having been acquitted under Charge 1, the Trust needed next to convince the Appeals Court that the BI, ZBA, and trial court judge were all wrong in finding that the Locus merged with Mead's property at 11 Hunter Avenue when, in 2012, the Trust acquired title to the unimproved Locus. The trial judge upheld the denial of the building permit having concluded that a merger with the Mead property had occurred. The trial court judge relied on *Planning Board of Norwell v. Serena*, 27 Mass. App. Ct. 689, 690 (1989), in finding compelling similarities between Mead's powers as a trustee of the Trust and the trust powers of Mr. and Mrs. Serena over land owned by a trust which they themselves set up and in which they were sole trustees and sole beneficiaries. No fiduciary duty was owed to anyone else. There was control. There was a merger.

The trial judge's contentment was to be dashed by Justice Milkey's determination that inadequate attention had been given to Mead's fiduciary duties as a trustee.

In *DiStefano v. Stoughton*, 36 Mass. App. Ct. 642 (1994), the Appeals Court used the same reasoning by "piercing the corporate veil," concluding that the sole officer and sole director of a close corporation would not be insulated from merger when his corporation placed title to assorted lots of a 40-acre tract in a checkerboarded distribution among four separate owners: the corporation, himself personally, his spouse, and to himself as a trustee of a realty trust. Land Court had no trouble finding the requisite full control of the lots notwithstanding nominally different owners of record. There was power to control contiguous lots and use them without any restraint arising from a legal duty to anyone else. There was control. There was merger.

The trial judge in this case was content that Mead's broad trust powers provided sufficient control over the

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Locus to find that a merger had indeed occurred with Mead's own property at 11 Hunter Avenue lying adjacent to and easterly of the Locus. The trial judge's contentment was to be dashed by Justice Milkey's determination that inadequate attention had been given to Mead's fiduciary duties as a trustee. Justice Milkey noted that "[a]s a trustee, Mead's 'first duty' [was] the protection of the trust estate," and derivatively to secure all trust benefits to Kneer as sole beneficiary. Acting in ways primarily beneficial to herself rather than the Trust would be a violation of her fiduciary duties as trustee. How then would it be *lawfully* possible for Mead to lessen the nonconformity of her own property upon the Trust's acquisition of title to the Locus in 2013?

Citing *Serena*, the Appeals Court ruled that Mead's status as co-trustee of the Trust that owned the Locus "did not, *by itself*" render the two properties as being held in common ownership." (emphasis added)

But wait! What about veil piercing? Justice Milkey addresses this by saying that the trial judge was incorrect in concluding that control—and thus merger—had occurred based solely on separate ownership and broad trustee powers. "None of this is to say that...Mead—or the trust—is insulated from a claim of veil piercing." It could still be possible, Milkey points out, that the Trust could have been used "as a means of masking an arrangement in which, in reality, it was Mead, not Kneer, who held "the master hand."

The Appeals Court was in no position itself to explore this line of inquiry, it being essentially a factual inquiry and requiring further evidence. Justice Milkey goes so far as to say that "[t]here are some established facts that cut in favor of veil piercing and merger."

Appeals Court Verdict: Not Guilty of Merger in the Second Degree...but...

Conclusion — Remand and a Second Bite of the Apple

Charge 1—The Locus was not unbuildable by merger as the result of the adoption of zoning in 1953.



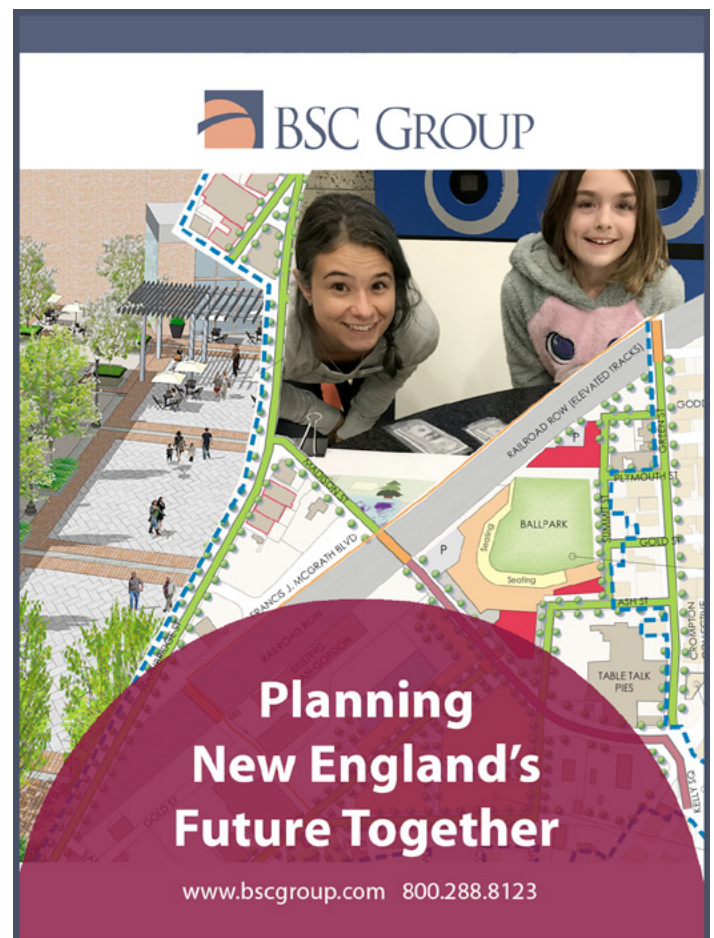
Charge 2—The Locus was not unbuildable upon the Trust's acquisition of title in 2012. The trial judge erred, on the legal grounds he cited, in ruling that merger occurred in 2012 when the Trust acquired title to the Locus, notwithstanding broad trustee powers.

Case Remanded—"It is possible on this record that facts could be found that would support merger on other grounds. Accordingly, we vacate the judgment and remand the case for further proceedings consistent with this opinion."

Postscript

In footnote 13, Justice Milkey stated that nothing in his opinion should be read as expressing a view on how the issue of "other grounds" should be resolved. The Court's opinion does, however, make mention of a number of possible lines of inquiry the lower court and Jessica Fletcher might now pursue.

— Formerly Town Counsel for Amherst, Assistant Attorney General and Director of the AG's Municipal Law Unit, and General Counsel to the Massachusetts Department of Agriculture, Bob Ritchie is currently a consultant to Massachusetts cities and towns.



Commentary on “Merger,” She Wrote

by Bob Mitchell, FAICP

As with most decisions of the courts, there are lessons to be learned, or relearned, by local public officials, including land use boards, planners, building inspectors, and municipal attorneys. In the *Kneer* case, there are both old lessons and new lessons. Among these are the following:

1) Zoning History is Important —

According to the town attorney, building inspector, and zoning board of appeals, the lot, 7,650 square feet in size and then in existence, did not meet the minimum lot size requirement of 10,000 square feet adopted by the town of Norfolk in 1953. They also determined the lot was held in common ownership at the time of this zoning adoption. Therefore they believed it was not a legal nonconforming lot (“grandfathered”) and thus not eligible for a building permit for a new house.

While the current Norfolk zoning bylaw grandfathering protections for lots is coextensive with G.L. c. 40A, § 6, it was not always so. The 1953 zoning bylaw had explicit language that exempted existing lots duly recorded by deed or plan from the new lot size minimum. Thus, this parcel was in fact exempt from the new 10,000-square-foot requirement as both the Land Court and Appeals Court determined.

It is not enough for local officials to know what language is in the existing zoning ordinance or bylaw. It may be necessary, depending on the facts of a proposal before the city or town, to determine the language

in the zoning code from 5, 10, 25, or even 60 plus years ago. Municipalities should have a “library” of all previous zoning ordinances or bylaws to use as reference materials if a case such as the *Kneer* case arises in their communities. The private property rights of land owners may very well be dependent on past, not current, zoning code language.

2) Nonconformities and Municipal Choices — The topic of nonconformities is largely governed by G.L. c. 40A, § 6. Nonconformities may, however, only be changed, extended, or altered where and how the local zoning ordinance or bylaw so provides. There is a broad spectrum along which municipalities may decide how to treat nonconformities. The municipality could prohibit modification of nonconformities altogether, or could liberally provide for such changes, including identifying certain changes that would not require a “finding,” but rather would be subject to the review of the building inspector.

However a community treats nonconformities, it must do so with language adopted within its zoning ordinance or bylaw. As the Appeals Court in the *Kneer* case noted, a town can adopt more generous grandfathering protections, but it must do so explicitly.

Cities and towns should understand this flexibility available to them in treating nonconformities. Once a community determines how best to address this topic, it must then adopt appropriate language

within the zoning code to provide specific regulations that carry out the intent of the city or town.

3) Follow the Fiduciary Evidence —

It likely wouldn’t be the first thing that comes to mind for local officials when reviewing a question of grandfather status; but, as this case illustrates, delving into the details of a family trust document may be necessary in order to determine whether a lot is buildable or not. The Land Court determined that the facts of the trust led to a conclusion that this was a merged lot.

However, the Appeals Court did not agree. It found that while the trust documents gave Kneer’s daughter Mead, a cotrustee, broad authority over the trust property, that did not mean that Mead was free to use the property as her own. Mead could not use the parcel subject to the trust to lessen the nonconformity of her own adjacent property. Mead’s status as cotrustee of the trust that owned the parcel did not render the two properties as being held in common ownership.

4) Stay Tuned for Highlights of the Next Episode —

Finally, the Appeals Court determined that even though this was not a merged lot either under the 1953 rezoning, or the fact that Kneer’s daughter was a co-trustee, there might be other facts that would support a determination that this is a merged lot. Thus, the case was remanded for further proceedings.

“Municipalities should have a ‘library’ of all previous zoning ordinances or bylaws to use as reference materials if a case such as the *Kneer* case arises in their communities. The private property rights of land owners may very well be dependent on past, not current, zoning code language.”



The PDO Corner

by Darlene Wynne, AICP, APA-MA Professional Development Officer

Welcome to the "PDO Corner" where I share information related to earning your AICP, meeting your Certification Maintenance requirements, and other professional development items.

Announcing the 2019 AICP Exam Prep Course!

We are proud to again offer the APA-MA AICP Exam preparation course for planning professionals and AICP Candidates who wish to take the exam in either May or November 2019. This intensive multi-day training is offered only in the spring and has proven to be a valuable resource for AICP Exam test takers in the past. We have assembled an esteemed array of lecturers to help guide you in studying for the exam. The cost of the course is \$100 payable on the first day of class (cash or check only).

The course runs from 6:00-9:00 p.m. on the following dates: March 4, March 11 or 18, March 25, and April 1. It will be held at the offices of Robinson & Cole LLP, One Boston Place, 25th floor, Boston, MA 02108. Register here: <https://goo.gl/forms/fwUwAsREvqayXctt1>.

Topics covered will include: Exam Review, Planning Law, Ethics, Fundamental Planning Knowledge and Administration, Current Planning, Core Planning Values, Project Management, Plan Making, Transportation, Public Participation, Advocacy Planning, and Economic Development. We also hope to have some recent exam takers in to talk about their experiences and study habits.

Thank you to our confirmed lecturers:

Neil Angus, AICP CEP, LEED AP BD&C, ND
Christi Apicella, AICP
Judi Barrett
Brian Currie, AICP
Michael Giaimo, Esq.
Peter Lowitt, FAICP
Ralph Willmer, FAICP

2019 Planning Webcast Series Seeks Presentations

APA-MA Chapter is an enthusiastic participant in the Planning Webcast Series. Each year we are expected to contribute at least one professional education session to the series. Anyone interested in sharing their planning-related topic to a national audience from the comfort of your desk is able to give a presentation. The webcasts take place on Fridays at 1:00 p.m. and are typically 90 minutes long. Please contact me if interested.

APA Learn!

APA recently released a new online education platform, APA Learn! APA Learn is a catalog of over 375 courses with topics ranging from Affordable housing to Zoning. APA Learn has a seamless CM logging feature. APA members receive special pricing. [Learn more.](#)

— Darlene Wynne, AICP is Assistant Planning Director for the City of Beverly. Reach her at dwynne@beverlyma.gov.

Congratulations to everyone who passed the AICP exam in 2018!

New AICP members:

Erica Blonde
Matthew Ciborowski
Kenneth Comia
Brian Creamer
Ashley Eaton
Irene Figueroa Ortiz
Spencer Gober
Lydia Hausle
Jonathon Idman
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Chloe Schaefer
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Alexander Train
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Derek Valentine

New AICP Candidates:

Cory Berg
Travis Crayton
Taylor Dennerlein
Lauren Drago
Francis Goyes Flor
Kenneth Kirkland
Jeremy Price
Johanna Stacy
Patrick Welch



Great crew of Planners at the 2019 Massachusetts Municipal Association Conference! From left to right: Brian Currie, Judi Barrett, Angela Cleveland, Bob Mitchell, Ralph Willmer. Front: Kristina Johnson.

Planner Spotlight: David Gamble

Position: Principal, Gamble Associates

Location: Cambridge, MA

Where did you grow up?

Northeast Ohio — Conneaut, or as my mom liked to refer to it, “Ohio’s sharpest corner!” She ran the Chamber of Commerce. It was a point of pride.

Where do you live?

Watertown.

You have a degree in urban design — how did you come to teach urban planning?

I’m trained as an architect, studied urban design, and now find myself working mostly with landscape architects. At first, I was working in cities and neighborhoods doing things that I didn’t know constituted urban planning — in some ways, it all seemed like an extension of design. I dove into the urban planning pedagogy when preparing for the AICP exam. As a Lecturer and Design Critic at the Harvard Graduate School of Design, I teach students who don’t have a design background how to think and draw spatially.

Why did you choose to work in Massachusetts?

My wife and I love Boston. The city is the right scale, it has a decent public transportation system, and most importantly, citizens are invested in their communities. The development pressures are pronounced. The region’s historic character and

municipal boundaries create unique challenges, and result in communities where people understand and feel that there is a lot at stake, and are thus engaged in the planning process.

What’s one project you’re really excited about?

We worked on the design guidelines for historic mill district in downtown Andover. The City is relocating their municipal Town Yard to the periphery of town, opening up more than four acres of new development adjacent to their commuter rail station. We worked with the town to develop design guidelines for 100 acres in downtown. This is a historically industrial area with a pretty strong market and community; however, the downtown area was filled with parking lots and older, underutilized industrial uses. We were able to help link up existing community assets to create a master vision linking downtown to the river. We very much enjoy getting to know the community and work with them to implement different phases of the project over time.

What are some of the greatest challenges and opportunities of having your own firm?

The majority of our work is municipal — and we really like our clients, who are working in the best interest of their communities. The areas we like to work in are often experiencing renewal and community pressures. In these communities, we can help visualize and articulate ways in which planning can be beneficial and not detrimental. A key is finding a niche that allows you to be effective for your clients and knowing how to work with them to get things done.

We are a small practice, and we don’t take on many new clients



at once. It’s difficult to have the restraint to not chase every project, but we’ve tried to stay focused on strengthening relationships with existing communities and clients, and devoting ourselves to the work we know best.

Can you talk a bit about the intersection of urban design and urban planning?

We see urban design and urban planning along a spectrum. Most people characterize them as one or the other. We use our skill sets as a creative act. One definition of an architect is someone who organizes a process, and that’s the way I like to think of it. I try not to too narrowly define disciplines.

Are there any planning myths you wish you could dispel?

We believe in effective community engagement but in many communities, there is an over-democratization of process which stymies progress and no one is willing to make a decision. A more accelerated public engagement process can be seemingly detrimental, but it is actually beneficial because people have clear expectations and it builds momentum. If you have frequent conversations, set milestones and meet people where they are, you can be successful.

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Planner Spotlight *cont'd*

It's also not uncommon for a community to ask "What can outsiders tell them about their own neighborhood?" To that I would say that there are many advantages to bringing an outside perspective. One of the advantages of being a consultant is that we are not too closely aligned with preexisting concentrations of authority, and can take a fresh approach to the process.

Do you have any advice for young planners?

It's such an obvious statement, but get involved and form partnerships. Leadership is important, but partnerships are even more so. Good ideas can come from anywhere, and we strive to create flattened hierarchies and environments where people can contribute their ideas and be heard.

Do you have any favorite websites or tools related to planning and design that you'd like to share?

I actually like *Planning Magazine*. Also: Planetizen, Next City.

What are a few of your favorite places?

I've been traveling around the U.S. a lot, looking at towns and cities implementing urban design scale projects and overcoming barriers to redevelopment — shameless plug: look at "Rebuilding the American City." There are so many great places. I have a soft spot for post-industrial cities still trying to find their way. But naturally Portland, San Francisco, Chattanooga are remarkable. But also Louisville, Buffalo, St. Louis. Abroad: Hong Kong, Prague, Berlin, and Amsterdam.

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