COMMONWEALTH OF MASSACHUSETTS

Argeo Paul Cellucci, Governor
Jane Wallis Gumble, Director

SUBDIVISION CONTROL

AN OVERVIEW OF THE SUBDIVISION CONTROL LAW

Department of Housing & Community Development

October, 1996
Revised August, 1998

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

Argeo Paul Cellucci, Governor
Jane Wallis Gumble, Director

Dear Local Official:

The Department of Housing and Community Development provides a wide range of technical assistance, information services, and grant programs to municipal governments throughout the Commonwealth to assist communities in solving local programs. We are pleased to offer planning boards, other municipal officials, and interested persons this edition of An Overview of the Subdivision Control Law.

Our Department has received numerous questions over the years concerning the operation of the Subdivision Control Law. This publication highlights many of the substantive and procedural requirements that apply to subdivision and non-subdivision plans which require an endorsement or an approval by a planning board. We have also noted interesting court cases that have looked at a variety of issues dealing with subdivision control. This publication should be used as a resource and should not be used as a substitute for your reading of either the statute or the court cases that have interpreted the law. Whenever a question of legal interpretation arises, local officials should always seek the advice of their municipal counsel.

We trust that this publication and the services that the Department of Housing and Community Development provides will be helpful to you in carrying out your responsibilities. Questions concerning this publication should be directed to Donald J. Schmidt at 617/727-7001 x482 or call our toll free line at 1-800-392-6445.

Sincerely,

Jane Wallis Gumble
Director

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COMMONWEALTH OF MASSACHUSETTS
ARGEO PAUL CELLUCCI, GOVERNOR

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
JANE WALLIS GUMBLE, DIRECTOR

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AN OVERVIEW OF THE SUBDIVISION CONTROL LAW
MGL, CHAPTER 41, SECTIONS 81K-81GG

October, 1996
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Prepared by

Department of Housing and Community Development

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INTRODUCTION

Subdivision control laws in Massachusetts originated in a concern over the effect of the subdivision of land and sale of private land on planning and the 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. In 1936 the subdivision control powers were expanded and conferred on planning boards. The Legislature made a comprehensive revision to the statute in 1953 which marked the beginning of a separate Subdivision Control Law, MGL, Chapter 41, Sections 81K through 81GG. Although this statute has been amended since 1953, most of the provisions are essentially in the form as we know now it.

The 1953 amendments to the subdivision control legislation were adopted largely upon the basis of the recommendations of a Special Commission on Planning and Zoning. The Commission was created by the Legislature in 1951 to study the zoning and planning laws of the Commonwealth. In reviewing the Subdivision Control Law, the Commission found there was a need to revise the law because it had become difficult even for skilled and experienced conveyancers examining titles to lots in a subdivision to ascertain whether the Subdivision Control Law was applicable. Also, the Commission found that it was extremely difficult for the Registers of Deeds to decide whether to accept a plan for recording.

Among other things, the Commission found that the then existing subdivision control statute was not sufficiently clear that the primary purpose of the law was regulating the design and construction of ways in subdivisions. The Commission further noted that some well-intentioned but overzealous planning boards attempted to use their powers of approving or disapproving plans of proposed subdivisions to enforce conditions intended for the good of the public, but not relating to the design and construction of ways within subdivisions. The Commission's report recommended inserting a purpose section into the subdivision control law to clarify the language of the statute, "especially in some particulars where overzealous city planners have attempted to extend their authority to an extent greater than was intended by the framers of the law." As a consequence of the Commission's report a new purpose section (81M) was added to the Subdivision Control Law.

PURPOSE OF THE SUBDIVISION CONTROL LAW

The Subdivision Control Law is a comprehensive statutory scheme designed for the safety, convenience, and welfare of the inhabitants of the cities and towns. It accomplishes this purpose by, among other things, regulating the laying out and construction of ways in subdivisions.

MGL, Chapter 41, Section 81M states in part that the:

> … subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns … by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas. The powers of a planning board … under the subdivision control law 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; 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; 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 a subdivision with each other and with public ways in the city or town in which it is located and with the ways in neighboring subdivisions.

In a leading case interpreting the purpose of the Subdivision Control Law the court relied heavily on the legislative history of the Subdivision Control Law. The court, in Daley Construction Company, Inc. v. Planning Board of Randolph, 340 Mass. 149 (1959), held that the Planning Board lacked authority to disapprove a plan because the proposed subdivision would seriously deplete existing water sources. In reaching this conclusion, the court emphasized that Section 81M:

> shows legislative concern primarily with (a) adequate ways to provide access furnished with appropriate facilities and (b) sanitary conditions of lots … Read in context, the words, 'securing adequate provision for water' seems to us to mean installation of an adequate system of water pipes rather than an adequate supply of water, which, if not supplied from wells or other privately owned sources, is usually a matter of municipal water supply or water company action.

ACCEPTANCE OF THE SUBDIVISION CONTROL LAW

The Subdivision Control Law is in effect in any municipality, except Boston, which has accepted the statute. The question of whether the Subdivision Control Law shall take effect in a particular community is decided by the local legislative body. An interesting peculiarity of the current law in this regard is that the question of whether or not the Subdivision Control Law becomes effective is posed in a negative form. Section 81N provides that in any community which has a Planning Board, as defined in Section 81L, the Subdivision Control Law is in effect unless the local legislative body votes not to accept the provisions of the law. For more detailed information regarding the acceptance of the Subdivision Control Law please refer to Sections 81N and 81EE.

Subdivision Control as of January 1, 1954

The Subdivision Control Law is not in effect in a municipality unless the board having the power of subdivision control on January 1, 1954 transmitted a statement to the Register of Deeds and the Recorder of the Land Court within sixty days after January 1, 1954. Unless such statement was transmitted within sixty days, or the municipal clerk had prior to January 1, 1954 notified the Register and Recorder of the establishment of a Planning Board under the earlier provisions of law, the operation of the Subdivision Control Law was suspended until the municipal clerk notified the Register and Recorder that the Subdivision Control Law was in effect.

The statement to the Register and Recorder should have included an opinion of the board having subdivision control powers that the Subdivision Control Law is in effect in the community. The statement should have also included a copy, certified by the municipal clerk, of the vote and date of the City Council or Town Meeting action under which the Subdivision Control Law took effect. If there was no vote, then the board having subdivision control powers should have referenced any special statute under which the Subdivision Control Law was established in the municipality.

Any Planning Board having subdivision control powers on January 1, 1954, should have also transmitted a copy of their subdivision rules and regulations, certified by the municipal clerk, to the Register of Deeds and Recorder of the Land Court within sixty days after January 1, 1954. If the copies of the subdivision rules and regulations were never transmitted to the Register or Recorder, the operation of the Subdivision Control Law would have been suspended in your community until such copies were so transmitted.

Subdivision Control after January 1, 1954

If the Subdivision Control Law was established in a municipality after January 1, 1954, it did not take effect until the Planning Board notified the Register of Deeds and the Recorder of the Land Court that the municipality accepted the provisions of the Subdivision Control Law. The notice should have included a copy of the City Council or Town Meeting vote, certified by the municipal clerk, under which the provisions of the Subdivision Control Law were accepted.

The Planning Board was also required to notify the Register of Deeds and the Recorder of the Land Court that the Board had adopted its rules and regulations and to send a copy of their rules and regulations, certified by the municipal clerk, to both the Register and Recorder.

PLANNING BOARD RULES AND REGULATIONS

Once the Subdivision Control Law is operable in a community, Section 81Q requires a Planning Board to adopt reasonable rules and regulations relative to subdivision control which are not inconsistent with the Subdivision Control Law. The rules and regulations must specify the requirements of the Board relative to the location, construction, width, and grades of proposed ways and the installation of municipal services. The reason Section 81Q mandates that the Planning Board adopt reasonable rules and regulations is so that a prospective subdivider will know in advance what will be required of him in the way of street construction and public utilities. For more detailed information regarding the adoption and content of Planning Board regulations, please refer to Section 81Q.

Approval of Plan Which Complies With Regulations

A Planning Board must approve a definitive subdivision plan which complies with the Board's rules and regulations and the recommendations of the Board of Health.

As the court noted in Pieper v. Planning Board of Southborough, 340 Mass. 157 (1959), the legislative history of the Subdivision Control Law "gives no indication that planning boards were to have the freedom to disapprove plans which comply with applicable standards merely because the board feels general public considerations make such action desirable." In Pieper, the Planning Board had disapproved a definitive plan solely on the ground that the Board felt it essential to have an engineering survey of the town before approving any further subdivision of property. The intent of the Subdivision Control Law, as noted in Section 81M, is that a subdivision plan shall be approved by the Planning Board if the plan conforms to the recommendation of the Board of Health and the rules and regulations of the Planning Board.

Conditional Approval

A Planning Board may not attach conditions to its approval of a definitive subdivision plan unless its regulations clearly authorize the Board to impose such conditions.

In Castle Estates, Inc. v. Park and Planning Board of Medfield, 344 Mass. 329 (1962), the court found that the Planning Board had imposed improper conditions when approving a subdivision plan. The Board had approved a subdivision plan on the conditions that a water distribution system be connected with the public water system and that a drainage easement be obtained from another property owner. In reviewing the Board's regulations the court found no explicit regulation which would permit the Board to impose such conditions. The court stated that:

> The planning board … cannot impose conditions of this type upon its approval of subdivisions, where it has not included (or incorporated by reference to other regulatory provisions) in its regulations provisions defining (a) what ways and utilities may be required in connection with subdivision plans; (b) what standards are to be applied by the board in exercising any powers given to it by the regulations to withhold the approval and to impose conditions; and (c) what those powers are. The subdivision control law attaches such importance to planning board regulations as to indicate to us that they should be comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them. Without such regulations, the purposes of the law may easily be frustrated.

Clarity of Regulations

Planning Board regulations must be sufficiently clear so that landowners will know in advance what is or may be required.

In Mac-Rich Realty Construction v. Planning Board of Southborough, 4 Mass. App. Ct. 79 (1976), the Planning Board disapproved a definitive plan because a street had an inadequate width of pavement and right of way. The Board determined that a forty-four foot right of way and twenty-eight feet of pavement would be necessary to ensure safe vehicular traffic. The Board's regulations required all roadways to have a paved width of twenty-four feet and a minimum right-of-way width of forty (40) feet. The regulations further stated that a greater width may be required by the Board when deemed necessary for present and future vehicular traffic. The court found that the regulations gave adequate notice that the Board may, in its discretion, require a greater width.

The developer also argued that the Board's attempt to require bituminous concrete berms was also invalid since the Board's regulations did not specifically require concrete berms. The regulations made reference to berms but did not specify the material to be used in their construction. The court noted that it appeared that the intent of the regulation was to consider the construction of berms on a case by case basis so that the Planning Board could determine what might be appropriate for a particular development. The Planning Board's action was valid since the regulation sufficiently informed the developer that a berm of some type would be required. Also, in Canter v. Planning Board of Westborough, 7 Mass. App. Ct. 805 (1979), a regulation which required that a subdivision plan provide for pedestrian ways "normally" called for in the Board's regulations was sufficiently clear and it allowed the Board to make a case by case determination as to what might be appropriate for a particular subdivision.

However, regulations which required subdividers to give "due consideration … to the attractiveness of the street layout in order to obtain the maximum livability and amenity of the subdivision" and to show "due regard … for all natural features such as large trees, water courses, scenic points, historic spots, and similar community assets, which, if preserved, will add attractiveness and value to the subdivision" were held invalid. In Chira v. Planning Board of Tisbury, 3 Mass. App. Ct. 433 (1975), the court found that such regulations failed to set forth clear and objective standards.

> We need not decide whether regulations dealing with aesthetic considerations and environmental protection are permissible under the Subdivision Control Law, as we are of the opinion that the provisions … are not drafted in a way as to be enforceable. Whether a proposed subdivision meets such standards as "attractiveness of the street layout" and "maximum livability and amenity" and whether the preservation of a particular natural feature "will add attractiveness and value to the subdivision," and what constitutes "due consideration" and "due regard," are essentially matters of opinion - presumably the collective opinion of the members of the planning board at the time a particular plan is being evaluated. … The regulations fail to fulfill the requirement of apprising owners "in advance what is or may be required of them and what standards and procedures will apply to them."

Regulations Relating to Lots and Zoning Compliance

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 concluded, in Beale v. Planning Board of Rockland, 423 Mass. 690 (1996), that a Planning Board can disapprove a subdivision plan which does not conform to the zoning bylaw.

However, except for requiring compliance with zoning, Section 81Q specifically prohibits a Planning Board from adopting regulations relating "to the size, shape, width, frontage or use of lots within a subdivision, or to the buildings which may be constructed thereon …"

The purpose of this provision is to confine the scope of a Planning Board's discretion to prevent the Board from intruding into the sphere of zoning. However, as the court noted in SMI Investors (Deleware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), Section 81Q does not preclude a Planning Board from taking cognizance of a lot layout which directly impinges on matters laying within the proper sphere of Planning Board regulations such as means of access for vehicles and utilities.

This provision does not prevent a Planning Board from seeking information or requiring the submission of an environmental impact statement. In Loring Hills Developers Trust v. Planning Board of Salem, 374 Mass. 343 (1978), the Planning Board disapproved a subdivision plan because the developer had failed to submit information requested by the Planning Board. The Planning Board had adopted regulations which required the subdivider to submit information relating to dwelling size, type, location and population for purposes of analysis of sanitary and storm sewer systems and the water system. The Board's regulations also asked for a topographic map showing proposed grades at two-foot contours and an impact statement showing the effect of the proposed development on schools, police and fire protection, traffic patterns and other municipal services. The developer argued that the regulations requiring the requested information were not authorized under the above noted provision in Section 81Q. Although Section 81Q prohibits the Planning Board from regulating the subjects mentioned it does not forbid the Board from seeking information about those matters. The court stated that:

> The regulations may require the developer to supply information reasonably necessary to enable the boards to perform their duties. For example, Section 81Q provides that, in establishing requirements regarding ways, 'due regard shall be paid to the prospective character of different subdivisions, whether open residence, dense residence, business or industrial, and the prospective amount of travel upon various ways therein, and to adjustment of the requirements accordingly.' In applying such requirements, we think the developer may be required to furnish information about the 'prospective character' of the subdivision, even though the information in a sense 'relates' to the 'use of lots' within subdivisions.

Regulations Relating to Adequacy of Public Way

A Planning Board can consider the adequacy of a public way providing access to a proposed subdivision.

The issue of whether a Planning Board has the authority to disapprove a subdivision plan due to traffic problems and access problems caused not by any inadequacy of a way within a subdivision but rather by the inadequacy of a public way adjacent to or providing access to the proposed development was considered in North Landers Corp. v. Planning Board of Falmouth, 382 Mass. 432 (1981). The Planning Board had adopted the following regulations concerning the adequacy of ways outside the subdivision.

> Adequate Access From Public Way. A. Where the street system within a subdivision does not connect with or have, in the opinion of the Board, adequate access from a …. public way, the Board may require, as a condition of approval … that such adequate access be provided by the subdivider, and/or that the subdivider make physical improvements to and within such a way … in accordance with the provisions of … these regulations from the boundary of the subdivision to a [public] way. B. Where the physical condition or width of a public way from which a subdivision has its access is considered by the Board to be inadequate to carry the traffic expected to be generated by such subdivision, the Board may require the subdivider to dedicate a strip of land for the purpose of widening the abutting public way to a width at least commensurate with that required within the subdivision, and to make physical improvements to and within such public way to the same standards required within the subdivision. Any such …. work performed within such public way shall be made only with permission of the governmental agency having jurisdiction over such way, and all costs of any such widening or construction shall be borne by the subdivider.

The Planning Board disapproved a subdivision plan citing as one of its reasons the inadequacy of a public way which would carry the traffic generated by the subdivision. North Landers appealed the Planning Board's decision and argued that the Subdivision Control Law does not permit evaluation of ways outside the subdivision. The court determined that the Subdivision Control Law does not place such a limitation on the Planning Board and the condition of adjacent public ways outside the subdivision may be considered during the approval process. The court also noted that the Planning Board's regulation requiring "adequate access" was not so vague that it failed to sufficiently inform the subdivider of what might be required in order to obtain ultimate approval of his plan.

However, a Planning Board has no authority to require improvements to a way where the subdivider does not have the ability to make the improvements. In Sullivan v. Planning Board of Acton, 38 Mass. App. Ct. 918 (1995), the Planning Board approved a subdivision plan on the conditions that the subdivider construct an additional travel lane on Route 2A with no curb cuts. The Planning Board also required the reservation of an easement along a town road for the construction of an additional lane of traffic from Route 2A to the proposed subdivision road.

The improvements to Route 2A imposed by the Planning Board required the approval of the State Department of Public Works. It was decided that those conditions were invalid because the work to be performed required State approval which was beyond the control of the subdivider. The court found nothing in the Subdivision Control Law which would authorize a Planning Board to require improvements to a State highway. However, the court did find that requiring the easement for construction of an additional lane of traffic was a proper condition as the additional lane would serve the traffic entering and leaving the subdivision by providing a turning lane into the subdivision.

Public Hearing Requirement

The Planning Board must hold a public hearing before adopting or amending subdivision control rules and regulations. Notice of the public hearing must include the date, time, place and subject matter of the public hearing. Notice of the public hearing must also be published in a newspaper once in each of two successive weeks with the first publication being not less that 14 days before the day of the hearing.

Filing Requirement

A copy of the Planning Board's regulations and any amendments adopted after January 1, 1954, must be certified by the municipal clerk and transmitted by the Planning Board to the Register of Deeds and Recorder of the Land Court. Any Planning Board having subdivision control powers on January 1, 1954, should have transmitted a copy of its rules and regulations, certified by the municipal clerk, to the Register of Deeds and Recorder of the Land Court.

A true copy of the Board's regulations must be kept on file in the office of the Planning Board and the municipal clerk.

DEFINITION OF SUBDIVISION

As previously mentioned, the Legislature made a comprehensive revision to the Subdivision Control Law in 1953. This legislation made two significant changes to the statute. It clarified the definition of a subdivision and provided for the recording of approval not required (ANR) plans. The procedures for the submission and endorsement of an ANR plan are found in Section 81P.

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 seems 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."

Section 81P requires that an approval not required 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 defined in Section 81L.

Simply put, a subdivision is the division of a tract of land into two or more lots. However, a division of a tract of land into two or more lots will not constitute a subdivision if, at the time it is made, every lot has the necessary frontage on a certain type of way.

MGL, Chapter 41, Section 81L defines a subdivision as follows:

> "Subdivision" shall mean the division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; 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 or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades, and

adequate construction to provide for the needs of vehicular traffic in relation to the proposed use 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. 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, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth, or 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.

APPROVAL NOT REQUIRED PLANS

Any person wishing to record a plan which he believes is not a subdivision plan may submit an ANR plan to the Planning Board. The review of an ANR plan by the Planning Board does not require a public hearing. If the Board finds that the plan does not show a subdivision, as defined in Section 81L, it must immediately endorse the plan "approval not required under the Subdivision Control Law" or words of similar import.

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." The Planning Board must determine whether: (1) all lots abut a qualified way; (2) all lots have adequate frontage; and, (3) vital access exists to each lot.

Qualified Ways

Lots shown on an ANR plan must front on 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.

As was discussed in Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979), a way becomes public in one of three ways: (1) a laying out by a public authority pursuant to MGL, Chapter 82, Sections 1-32; (2) by prescription; and, (3) prior to 1846, by dedication by the owner to public use, permanent and unequivocal, coupled with an express or implied acceptance by the public. Because the 1846 statute put an end to the creation of public ways by dedication, it has only been possible since that time to create a public way either by a layout in the statutory manner or by prescription.

2. A way shown on a plan which has been previously approved in accordance with the Subdivision Control Law.

3. A way in existence when the Subdivision Control Law took effect in the municipality having, in the opinion of the Planning Board, sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the lots.

Adequate Frontage

The lots shown on an ANR plan must meet the minimum frontage requirements as specified in the local zoning bylaw. If the local zoning ordinance or bylaw does not specify any minimum frontage requirement, then the proposed lots must have a minimum 20 feet of frontage in order to be entitled to ANR endorsement.

A plan showing a lot having less than the required frontage is not entitled to ANR endorsement even if the Zoning Board of Appeals has granted a frontage variance for the lot.

Absent a zoning provision authorizing a reduction in lot frontage by special permit, an owner of land wishing to create two building lots where one lot 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.

The need to obtain approval from both the Planning Board and Zoning Board of Appeals was noted in Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981), where landowners 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. They petitioned the Zoning Board of Appeals for a variance and presented the Board with a plan showing two lots, one with 200 feet of frontage, and the other with 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 submitted a subdivision plan to the Planning Board showing the two lot subdivision.

After a public hearing, the Planning Board waived the 200 foot frontage requirement for the substandard lot and approved the two lot subdivision. MGL, Chapter 41, Section 81R, authorizes a Planning Board to waive the minimum frontage requirement of the Subdivision Control Law. The court found that the Planning Board had to grant the frontage waiver before the plan could be approved by the Board.

Later, in Seguin v. Planning Board of Upton, 33 Mass. App. Ct. 374 (1992), the court defined the process that must be followed when a landowner seeks a frontage waiver from the Planning Board. 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. They applied for and were granted a variance from the 100 foot frontage requirement of the Upton Zoning Bylaw. Upon obtaining the variance, the Sequins 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, the Seguins appealed the Planning Board's denial of the ANR endorsement. The court held that the Seguin's plan showed a subdivision and had to be submitted and approved as a subdivision plan.

Vital Access

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 access exists to the lots 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 dealt with whether proposed building lots have actual access and have focused on the adequacy of the way on which the proposed lot fronts and the adequacy of the access from the way to the buildable portion of the lot.

Adequacy of a Public Way

In Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), the court looked at the adequacy of access of an existing public way. Perry submitted a two lot ANR plan to the Planning Board. Both lots had the required 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. Because no way existed on the ground to serve the proposed lots, the court found that the Planning Board was right in denying ANR endorsement. The court noted that a board can properly deny an ANR endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in Section 81M.

Relying on the Perry decision, among others, the Hingham Planning Board denied endorsement of a plan where all the proposed lots abutted a public way. In Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), the court found that the 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 five lots. Lazell Street was a public way which was used and maintained by the Town of Hingham. It was a paved way and, except for a portion which was one-way, was 20 to 22 feet wide which was about the same width as other streets in the area. Each lot met the frontage requirement of the Hingham zoning bylaw.

The Planning Board denied ANR endorsement because they determined that 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. The court did not agree with the Planning Board. The court found that Lazell Street provided adequate access that a public way normally provides in that it was of sufficient width and suitable to provide access for fire-fighting equipment and other emergency vehicles.

Since 1987, the Perry and Hutchinson decisions represented the parameters for determining the adequacy of a public way for the purposes of an ANR endorsement. If proposed lots abutted an unconstructed public way (paper street), the plan was not entitled to an ANR endorsement. However, if the proposed lot abutted an existing public way which was (1) paved, (2) comparable to other ways in the area, and (3) provided adequate access, the plan was entitled to ANR 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 were 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 which was either unpaved or not properly maintained until Sturdy v. Planning Board of Hingham, 32 Mass. App. Ct. 72 (1992).

In Sturdy, 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 ANR endorsement. The Planning Board denied the endorsement and Sturdy appealed. The proposed lots shown on the plan abutted Side Hill Road which was a public way. 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 one car and it would be very difficult for large emergency vehicles to turn onto Side Hill Road at either end.

The court determined that the Sturdy plan was entitled to ANR endorsement. The court found that deficiencies in a public way are insufficient grounds for denying an ANR endorsement. The rationale behind the Sturdy decision is since municipal authorities have the obligation to maintain public ways there is already public control as to how perceived deficiencies, if any, in such public ways are to be corrected.

A public way which is passable but temporarily unusable at certain times of the year may also pass the vital access test. In Sturdy, the court noted that the way was close to impassable during very wet portions of the year. We assume from the Sturdy decision, that although more difficult, the public 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 a public way providing principal access to a lot can be

temporarily unavailable provided that adequate access for emergency vehicles exists on another way.

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 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. The court did not agree and found that adequate access was available by ways in a neighboring town during the time when a portion of Champeaux road was closed due to flooding and the distance for emergency vehicles was no greater than the distance they must travel to reach numerous other points within Sturbridge.

The Long Pond decision adds a variation to the vital access standard in that the principal access to a lot can be temporarily unavailable from a public way provided that adequate access for emergency vehicles exists on another way. To be eligible for this variation, the landowner must show that the public way usually offers actual access and that there is a second means of adequate access when the public way is unavailable.

If a public way exists in some form and is passable, according to Sturdy, a plan showing lots abutting such a public 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. the way is not passable even when using a tank), a plan showing lots abutting such a public way would not be entitled to ANR endorsement.

Adequacy of a Private Way

The Subdivision Control Law specifically gives the Planning Board more discretion in determining the adequacy of a private way. As was noted in the Hutchinson decision, a Planning Board has broader powers in determining the adequacy of a way which is not a public way but was a way in existence when the Subdivision Control Law took effect in the community. A Planning Board has the authority to deny an ANR endorsement if the private way, in the opinion of the Planning Board does not have a sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land.

Adequacy of a Previously Approved Subdivision Way

A Planning Board can deny 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 plan. The Selectmen did not specify any construction standards for the proposed way, 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. 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.

Adequacy of the Access

Not only must a Planning Board consider the adequacy of the existing way, the vital access standard also requires a determination as to the adequacy of the access from the way to the buildable portion of the lot.

In 1978 the court had its first 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. 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. For example, one lot had a neck which was 1,185 feet long having seven changes in direction before it reached Madaket Road which was a paved road in good condition. The neck narrowed at one stage to seven feet.

The Planning Board endorsed the plan ANR and 15 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 Judicial Court, on its own initiative, ordered direct appellate review.

In deciding the case, the Massachusetts Supreme Judicial Court looked at the purposes of the Subdivision Control Law as stated in Section 81M and noted that "a principal objective 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 to provide practical vehicular access to the main or buildable portions 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 and therefore were not entitled to an ANR endorsement.

Gifford v. Planning Board of Nantucket

The Gifford decision was a bellwether case as it established the requirement that a proposed building lot have accessibility from the way to the buildable portion of the 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 this requirement. Hrenchuck submitted a plan to the Planning Board requesting an ANR endorsement. All the lots shown on the plan had frontage on 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 was not a qualified way for the purposes of the Subdivision Control Law. The court determined that Hrenchuck was not entitled to an ANR endorsement because there was no actual access to Route 95, the public way on which Hrenchuk claimed his lots had frontage.

One of the more interesting cases which dealt with the question of whether proposed building lots actually had access to a way 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 each had at least 100 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 previously adopted a regulation which imposed a requirement 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 because the vehicular access would not be 1000 feet apart, and McCarthy appealed.

McCarthy claimed that the plan did not show a subdivision because every lot had 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 for the purposes of the Subdivision Control Law. Citing the Gifford and Hrenchuck decisions, the court agreed with the Planning Board.

Shortly after the McCarthy decision, the Appeals Court had an opportunity to further define the accessibility issue 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 particular district where the lots were located, the zoning ordinance did not specify any frontage requirement. In such a case where a zoning ordinance or bylaw does not specify any frontage requirement, Section 81L requires that proposed lots, to be entitled to an ANR endorsement, must have a minimum of 20 feet of frontage. 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. The access to the buildable portion of one lot was 20 feet wide 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 decision.

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 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. Although sympathetic with the Board's position, the court decided against the Planning

Board and stated a general rule to guide Planning Boards in determining whether access exists to the buildable portion of a lot.

> 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.

Gallitano v. Board of Survey & Planning of Waltham

Illusory Access

None of the previous cases dealt with a situation where the question of access centered on a topographical situation which might prevent access from the building site to the way. To what extent a Planning Board can consider topographical issues when reviewing an ANR plan was first considered 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 Wetland Protection Act, when reviewing an ANR plan. The Massachusetts Supreme Court granted further appellate review and in Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989), reversed the decision of the Appeals Court.

Corcoran submitted a six lot ANR plan to the Planning Board. Each lot had the required frontage on a public way. However, the plan showed wetland areas between the buildable portions of some of the lots and the public way. The Planning Board claimed that Corcoran was not entitled to an endorsement because the presence of wetlands on the lots prevented access to buildable sites in the rear of several of the lots.

The Planning Board believed that not all of the lots could accommodate both a house and its accompanying septic system on dry areas between the road and the wetlands. The Planning Board maintained that this case was governed by Gifford and other cases which 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 in Gifford and subsequent cases was applicable to Corcoran's plan.

The court decided that a Planning Board cannot deny an ANR endorsement simply because other permitting approvals are necessary before practical access exits from the way to the building site. In the court's view, the existence of wetlands that do not render access illusory is a different situation from where there exists a distinct physical impediment or unusual lot configuration which would bar practical access.

After Corcoran, it was unclear 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 then have practical access onto a way? The court, in Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), shed some light on this question.

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 an ANR endorsement from the Planning Board. The plan showed 12 lots, each lot having the minimum 50 feet of frontage on a public way as required by the Braintree zoning bylaw. However, there was a guardrail along the street extending 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 ANR endorsement because the lots had no practical access to the street, 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 no longer exists. 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 concluded that neither the slope nor the guardrail constituted an insurmountable impediment and found 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 the need for the guardrail. The Planning Board appealed and the Massachusetts Appeals Court reversed the decision of the Land Court judge. The Massachusetts Supreme Judicial Court allowed further appellate review and agreed with the Appeals Court.

The court found that Planning Boards may properly withhold ANR endorsement where the "access implied by the frontage is … illusory in fact." It was not enough that Poulos proposed to regrade his land in a manner satisfactory to the State DPW and that the State DPW would then respond by removing the guardrail. In citing the Perry case, the court noted that there should be no endorsement of the plan in the absence of existing adequate access to the public way.

In order for a plan to be entitled to an ANR endorsement, each lot shown on the plan must have practical access to the public way. The Planning Board should consider the conditions which exist at the time a plan is presented, not the conditions which might exist in the future. The Poulos decision indicates that severe topographical conditions which would prevent practical access from the lots to the way is sufficient basis to deny ANR endorsement.

81L Exemption

As previously mentioned, whether a plan is entitled to an ANR endorsement is determined by the definition of "subdivision" in Section 81L. Included in this definition 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 of such buildings remains standing, shall not constitute a subdivision.

The 1953 comprehensive revision to the Subdivision Control Law inserted this exemption into the statute. The purpose of this exemption is not clear but the 1953 Report of the Special Commission on Planning and Zoning shows that the drafters were aware of what they were doing, although it does not explain their reasons.

The central issue dealing with the 81L exemption has been the interpretation of the term "buildings." The legislation does not define what type of structure 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 exemption until Citgo Petroleum Corporation v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987).

Citgo owned a parcel of some 68 acres of land which contained a number of buildings. Clean Harbors leased eleven acres of the parcel for a hazardous waste terminal and reached an agreement with Citgo to buy the eleven acres. Citgo prepared a plan dividing the parcel into two lots each containing several buildings. 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 81L exemption. The Planning Board denied ANR endorsement because the lot to be conveyed to Clean

Harbors lacked the necessary frontage. The Board took the position that a literal reading of the term "building" would undercut the purposes the Subdivision Control Law by allowing a landowner to use any detached garage, shed or other outbuilding as a basis for unrestricted backland development.

The court disagreed with the Planning Board and found that a main office building, underwriter's pump house/machine shop, wax plant building, earth burner building, and a yard office were "substantial" and qualified as buildings under the statute. The court did state, however, that a claim that a detached garage, chicken house or woodshed qualifies for the 81L exemption might present a different case. The court also noted that just because a lot can be divided under this exception does not mean the resulting lots will be buildable under the zoning ordinance.

The most significant aspect of the Citgo case is the notation by the court that the 81L exemption does not relieve a property owner from complying with local zoning requirements. Because the 81L exemption only relieves a landowner from complying with the frontage requirement of the Subdivision Control Law, a variance or variances from the Zoning Board of Appeals may be necessary.

Since the Citgo decision, there has been one Land Court case involving what constitutes a building within the meaning of the statute. In Taylor v. Pembroke Planning Board, (Plymouth) Misc. Case No. 126703, 1990 (Fenton J.), the court determined that in order to qualify for the 81L exemption, the use of the building is no way controlling on the issue. A 88.6 foot by 30.8 foot cement block building with its own cesspool and electricity which had been used to store automobiles and as a turkey farm was found to be a substantial building.

Perimeter Plans

A perimeter plan is a plan of land showing existing property lines, with no new lines drawn. Such plans are usually filed so that property owners can obtain a three year ANR zoning protection for the land shown on the plan.

Section 81L defines "subdivision" in terms of "the division of a tract of land into two or more lots." Thus, where a plan shows no division of land, an argument can be made that the plan needs no Planning Board action and can be recorded pursuant to Section 81X. The fourth paragraph of Section 81X states in part that:

> ... 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 ownership, and the lines of streets and ways shown are those of public and private streets or ways

already established, and that no new lines for division of existing ownerships or for new ways are shown.

In Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan, J.), the Planning Board had endorsed a perimeter plan showing a 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 that as a matter of law the Planning Board should not have endorsed the perimeter plan. 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.

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 that the plan showed no division of land and therefore no need for the verification process of Section 81P. The court further stated that a perimeter plan is properly filed under Section 81X and not under the ANR process found in Section 81P.

However, in Costello v. Planning Board of Westport, (Bristol) Misc. Case No. 152765, 1991 (Sullivan, J.), a Land Court judge concluded that perimeter plans are entitled to an ANR endorsement. In her decision the judge summarized that nothing in the statute requires the conclusion that only divisions of land which do not constitute a subdivision are entitled to ANR endorsement and that perimeter plans are entitled to an ANR endorsement.

It should be noted that the Costello, Twomey and Horne cases were not appealed and hence the views of the Appeals Court and the Supreme Judicial Court are not known. The perimeter plan issue remains unsolved. A Planning Board should adopt a consistent approach to the review of perimeter plans.

One Lot Plans

In Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963), the court reached the conclusion that a plan showing the division of a tract of land into two parcels where one parcel was clearly not available for building was not a division of land into two lots which would require Planning Board approval under the Subdivision Control Law.

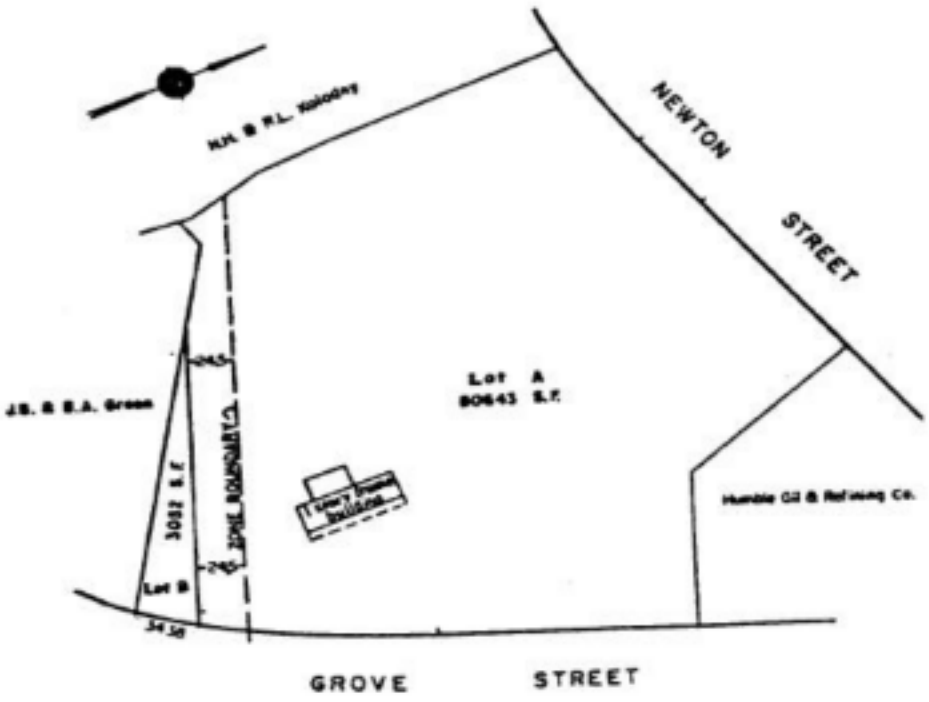
In Bloom, owners of a parcel of land were refused a variance to allow them to build an apartment complex. Their parcel extended more that 25 feet into a single-family zoning district. The zoning bylaw of the town of Brookline contained the following requirement:

> When a boundary line between districts divides a lot in single ownership, the regulations controlling the less restricted portion of such lot shall be applicable to the entire lot, provided such lot does not extend more that 25 feet within the more restricted district.

A plan was submitted to the Planning Board showing two lots. Lot A was a large parcel which only extended 24 feet into the single-family zone. The second lot, which was entirely in the single-family zone did not meet the frontage requirements of the zoning bylaw. A statement was placed on lot B that it did not conform to the Zoning Bylaw. The reason the plan was submitted to the Planning Board was to create a lot which would not be subject to the above noted zoning requirement making the lot available for apartment construction.

Section 81P provides that an ANR endorsement "shall not be withheld unless such plan shows a subdivision." For purposes of the Subdivision Control Law, a "subdivision" is a "division of a tract of land into two or more lots." A "lot" is defined in Section 81L as "an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings." The court determined that the plan was entitled to ANR endorsement since a statement had been placed on the plan making it clear that lot B was not available for the site of building.

Bloom v. Planning Board of Brookline



Section 81P states that the "endorsement under this section may include a statement of the reason approval is not required." Court cases have supported the concept that, where a Planning Board knows its endorsement may tend to mislead buyers of lots shown on a plan, the Planning Board may exercise its powers in a way that protects persons who will rely on the ANR endorsement. For example, in Bloom, the court noted that the Planning Board could have placed thereon or have caused the applicant to place thereon a statement that the lot was not a lot which could be used for a building. Since the Planning Board has no jurisdiction to pass on zoning matters, we would suggest that Planning Boards consider the following type of statement for one lot plans where one or more of the parcels shown on the plan do not meet the frontage requirement of the Subdivision Control Law.

> For the purposes of the Subdivision Control Law, parcel ___ cannot be used as the site for a building.

If a landowner wishes to divide his land in order to convey a portion of his property to another landowner, the following statement might be used.

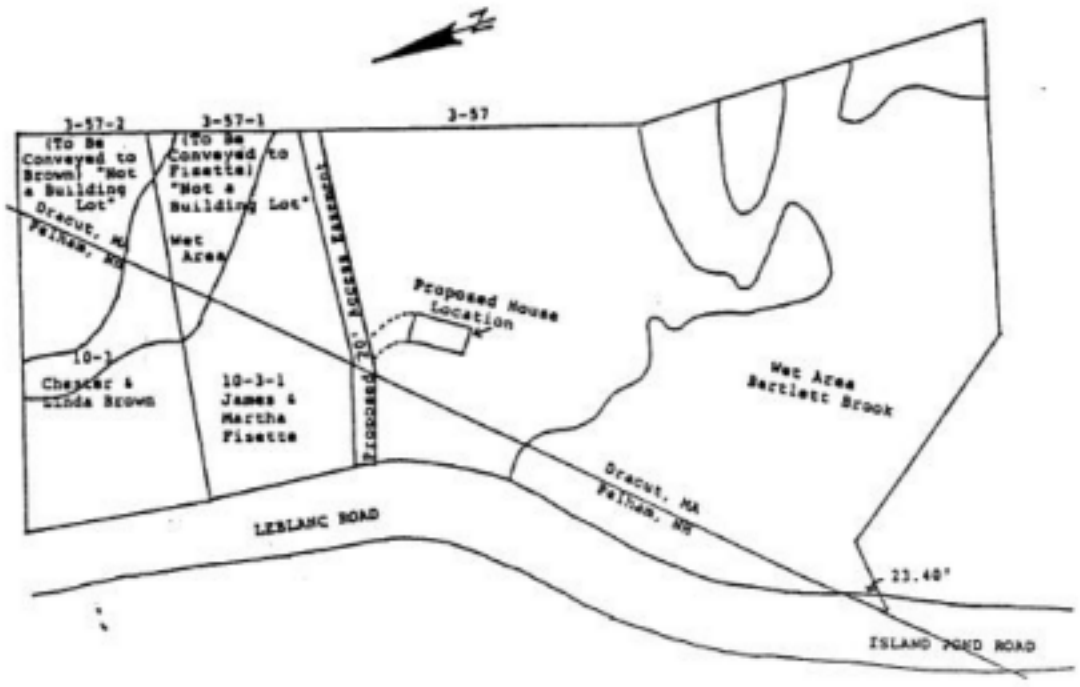
> Parcel ___ to be conveyed to abutting property owner and is not available as a site for a building.

In Cricones v. Planning Board of Dracut, 39 Mass. App. Ct. 264 (1995), a land owner submitted a plan showing a division of land into three parcels. Two parcels shown on the plan contained a statement that the parcel was not a building lot. The third parcel contained no such statement and also did not meet the frontage requirement as specified in the zoning bylaw. The court found that, in effect, the landowner submitted a single lot plan which did not constitute a subdivision under the Subdivision Control Law and concluded that the plan was entitled to an ANR endorsement because it did not show a division of land into two or more lots. In reaching this conclusion, the court made the following observations:

> 1. In determining whether to endorse a plan "approval not required," a Planning Board's judgment is confined to determining whether a plan shows a subdivision.
>
> 2. If a plan does not show a subdivision, a Planning Board must endorse the plan as not requiring subdivision approval.
>
> 3. If the Planning Board is presented with a plan showing a division of land into two or more "lots," each of which has sufficient frontage on a way, the Planning Board can properly concern itself with whether the frontage depicted is actual or illusory.

4. If a plan shows a subdivision rather than a single lot under the Subdivision Control Law, the Planning Board can consider the adequacy of the frontage of any lot shown on the plan independent of any variance which may have been granted by the Zoning Board of Appeals.

Cricones v. Planning Board of Dracut



Plans Showing Zoning Violations

Frequently, Planning Boards are presented with a plan for ANR endorsement where the plan shows a division of land into proposed lots which:

a. all the proposed lots have the required frontage on a qualified way, but

b. one or more of the proposed lots lack the required minimum lot area or the plan indicates some other zoning deficiency.

Since the plan shows a zoning violation, can the Planning Board refuse to endorse the Plan?

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 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 because the plan indicated violations to the minimum lot area and sideline requirements of the zoning bylaw. However, the Court decided that a plan showing proposed lots with sufficient frontage and access, but indicating some other zoning violation is entitled to ANR endorsement.

If the necessary variances have not been granted by the Board of Appeals, what can a Planning Board do to make it clear that a proposed lot may not be a building lot? A prospective purchaser of a lot may assume that the Planning Board's endorsement is an approval of zoning matters even though such endorsement gives the lots shown on the plan no standing under the applicable zoning bylaw. If an applicant is unwilling to note on the plan those lots which are in noncompliance with the zoning bylaw, we would suggest that the Planning Board place the following type of statement on the plan:

1. The above endorsement is not a determination of conformance with zoning regulations.

2 No determination of compliance with zoning requirements has been made or intended by this endorsement.

3. Planning Board endorsement under the Subdivision Control Law should not be construed as either an endorsement or approval of zoning lot area requirements.

Hopefully, one of the above statements would have the affect of leading a prospective purchaser to seek further advice.

SUBDIVISION ADMINISTRATION

The Subdivision Control Law sets out a detailed procedure for the review, approval or disapproval of plans by a Planning Board. The following discussion attempts to highlight some of the key procedural requirements that Planning Boards should be aware of when reviewing plans under the Subdivision Control Law. However, it should not be used as a substitute for your reading of the Law.

Once the Subdivision Control Law is in effect, all subdivisions of land must be approved by the Planning Board. Section 81O provides in part that:

> No person shall make a division of any land in any city or town in which the subdivision control law is in effect unless he has first submitted to the planning board of such city or town for its approval … a plan … and the planning board has approved such plan in the manner hereinafter provided.

The Subdivision Control Law also contains a variety of measures for the enforcement of the requirements of the Act. For example, Section 81X provides in part that:

> No register of deeds shall record any plan showing a division of a tract of land into two or more lots, … in a city or town in which the subdivision control law is in force unless (1) such plan bears an endorsement of the planning board … that such plan has been approved …, or (2) such plan bears an endorsement … that approval of such plan is not required … , or (3) the plan is accompanied by a certificate of the clerk of such city or town that it is a plan which has been approved by reason of the failure of the planning board to act thereon within the time prescribed … .

The local building official plays an important role in the enforcement of the Subdivision Control Law. Specifically, Section 81Y provides in part that the building official:

> shall not issue any permit for the erection of a building until first 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 under section 81X, 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 … .

In Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993), the Planning Board approved a five lot definitive plan on the condition that the "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 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 frontage requirements of the Beverly zoning ordinance. The Planning Board endorsed the plan. Hamilton applied for a building permit to erect a single-family structure on one of the newly created lots. The Building Inspector was made aware of the condition noted on the previously approved definitive plan that had limited that subdivision to five lots. On the strength of that limitation, the Building Inspector declined to issue the permit. On appeal, Hamilton argued that the ANR endorsement superseded the limiting condition imposed on the definitive plan. The court did not agree with Hamilton and found that the restrictions in an approved subdivision plan are binding on a building inspector and that the Planning Board would have to hold a public hearing and modify its previous approval of the definitive plan pursuant to Section 81W before a building permit could be issued.

Voting Requirements

Section 81L contains a requirement that "a majority of the members" of a Planning Board must provide signatures in order for there to be a proper certification or endorsement of a plan. Section 81L defines "Certified" as follows:

> "Certified by (or endorsed by) a planning board", as applied to a plan or other instrument required or authorized by the subdivision control law to be recorded, shall mean bearing a certification or endorsement signed by a majority of the members of a planning board, or by its chairman or clerk or any other person authorized by it to certify or endorse its approval or other action and named in a written statement to the register of deeds and recorder of the land court, signed by a majority of the board.

The general rule as to 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. However, where a statute requires a majority of the board to perform a certain function then the quorum requirement is a majority of the members of the entire board and not a majority of those present and voting on the particular matter.

In Queen v. Brock, Barnstable Superior Court No. 93-999 (August 16, 1994), a Superior Court judge reviewed the above definition of "Certified by (or endorsed by) a planning board" and concluded that in order for a plan to be approved, a majority of

an entire seven member Planning Board, or four members, must vote in favor of a proposed subdivision plan.
Although the statute authorizes the Planning Board to designate an individual to certify and endorse on behalf of the Board, this provision does not eliminate the need of a Planning Board to meet and vote on an ANR plan. In Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963), the chairman of the Planning Board endorsed an ANR plan without submitting it to entire Board. The court noted that the chairman should have submitted the plan to the Planning Board.

Approval Not Required Plans

If you have a question concerning the process for reviewing ANR plans, your answer will most likely be found in either Sections 81L, 81P, 81T or 81BB.

Section 81T provides that every person submitting an ANR plan to the Planning Board must give written notice to the municipal clerk by delivery or by registered mail that he has submitted the plan. This is an important requirement if the Planning Board fails to act in timely manner. In Korkuch v. Planning Board of Eastham, 26 Mass. App. Ct. 307, (1988), the court determined that a developer who submitted an ANR plan but did not give immediate or very prompt written notice of the submission of the plan to the municipal clerk was not entitled to a certificate from the municipal clerk certifying constructive approval of the plan when the Board failed to act on the plan in a timely manner.

If the Planning Board determines that a plan does not require approval under the Subdivision Control Law, it should "forthwith," without a public hearing, endorse the plan "approval under the Subdivision Control Law not required" or words of similar import. As noted by the court in Bisson v. Planning Board of Dover, 43 Mass. App. Ct. 504 (1997), the term "forthwith" compels immediate action by a Planning Board after the Board determines that the plan does not show a subdivision. Once the Planning Board has endorsed a plan, it cannot change its mind and rescind the ANR endorsement. In Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973), the court found that the authority to modify, amend or rescind plans under Section 81W is not applicable to ANR plans.

If the Planning Board determines that the plan requires approval under the Subdivision Control Law, the Board must give written notice of its determination to the municipal clerk and the person submitting the plan within 21 days after the plan has been submitted to the Board.

If the Planning Board determines that approval under the Subdivision Control Law is required, the person submitting the ANR plan may appeal the Planning Board's determination pursuant to Section 81BB. If the Planning Board endorses the plan "approval not required", judicial review of the endorsement can be claimed pursuant to

MGL, Chapter 249, Section 4 and the time period for claiming review is 60 days. See Stefanick v. Planning Board of Uxbridge, 39 Mass. App. Ct. 418 (1995).

Constructive Approval of ANR Plans

Automatic approval of a properly submitted plan will occur if the Planning Board fails to act on the plan or fails to notify the municipal clerk or the person submitting the plan of its determination within 21 days after the plan has been submitted to the Board. If the plan becomes approved for failure to take timely action, the Planning Board must immediately endorse the plan.

If the Planning Board fails to make such endorsement, the municipal clerk shall issue a certificate of approval to the person who submitted the plan. The certificate should indicate that the approval of the plan under the Subdivision Control Law is not required since no notice of action was received from the Planning Board within the required time period.

Preliminary Plans

The provisions for allowing the submission of preliminary plans first appeared in the statute in 1947. At that time, the Planning Board was allowed to give tentative approval, with or without suggested modifications. Action by the Planning Board was not binding as the preliminary plan process was merely a step toward a final decision which would later be made on a complete and detailed definitive plan. In 1958, a detailed definition of a preliminary plan was added to the statute. The statute was also amended allowing the Planning Board to disapprove a preliminary plan. The purpose of this power is not clear. As the court noted in Livolvi, Inc. v. Planning Board of Marlborough, 347 Mass. 330 (1964), it may well have been added to relieve a Planning Board from the burden of making extensive recommendations with respect to a plan which was obviously defective.

Up until 1986, the submission of a preliminary plan was voluntary and primarily designed to commence discussion between the applicant and the Planning Board over the proposed development. The statute made no distinction between residential and nonresidential plans. The 1986 amendment to the statute required the mandatory submission of preliminary plans for all nonresidential subdivisions.

Section 81L contains a detailed definition of a preliminary plan. A preliminary plan which complies substantially with the definition in Section 81L will have the benefit of the shorter definitive plan review period and any zoning protections afforded to a preliminary plan under the State Zoning Act. Livolvi, Inc. v. Planning Board of Marlborough, 347 Mass. 330 (1964).

Section 81S establishes the procedure for the submission of preliminary plans. Preliminary plans are submitted to the Planning Board and the Board of Health and

written notice that the plan has been submitted goes to the municipal clerk. Within 45 days after submission of a preliminary plan each board must notify the applicant and municipal clerk 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 to by the person submitting the plan, or that the plan has been disapproved. In the case of disapproval, the board must state in detail its reasons for disapproving the preliminary plan. There is no specific penalty provided for the Board failing to take timely action.

Generally, the provisions of the Subdivision Control Law relating to a plan are not applicable to a preliminary plan. The Register of Deeds may not record a preliminary plan. A developer has no right to appeal the action taken by the Planning Board on a preliminary plan, Mac-Rich Realty Construction, Inc. v. Planning Board of Southborough, 4 Mass. App. Ct. 79 (1976). The Planning Board has no right to refuse to receive a definitive plan merely because the Board has disapproved a preliminary plan, Livolvi v. Planning Board of Marlborough, 347 Mass. 330 (1964).

Definitive Plans

The Subdivision Control Law explicitly defines the manner in which a Planning Board must treat an application to subdivide a parcel of land and the procedure that must be adhered to by the developer. Sections 81O, 81T and 81U establish the procedures for filing, notice, public hearing and Planning Board action on definitive plans.

The initial step requires an applicant to submit a plan showing the lots into which such land is to be divided. Section 81O provides that a definitive plan is submitted when "delivered at a meeting of the board or when sent by registered mail to the planning board." If the plan is mailed to the Planning Board then the date of receipt by the Planning Board is considered the date of submission of the plan. Section 81U requires that the applicant also file a copy of the definitive plan with the Board of Health. The applicant must also give written notice to the municipal clerk by delivery or registered mail that he has submitted the plan.

Upon receipt of the plan, the Planning Board is required to hold a public hearing. Notice of the public hearing must be given by the Planning Board at the expense of the applicant. Section 81T prescribes the requirements for a properly advertised public hearing.

Board of Health Action

The first three paragraphs of Section 81U deal with the administrative procedures relative to the approval or disapproval of a definitive plan. The Board of Health has 45 days after the definitive plan is filed to report in writing to the Planning Board either its approval or disapproval of the plan. In the event of disapproval, the Board of Health

is required to include in its report specific findings as to what areas, if any, shown on the plan cannot be used for building sites without injury to the public health. The report should also include the reasons for the Board's decision and, where possible, recommendations for adjustments. A copy of the Board's report must be sent by the Board to the applicant. Failure of the Board of Health to report is considered an approval of the Plan by the Board of Health. Where a definitive plan shows that no public or community sewer is to be installed, approval of the plan by the Board of Health does not mean that the Board has approved a permit for the construction and use of any individual sewage system nor is such approval treated as an application for a permit to construct or use an individual sewage system.

A Planning Board cannot approve a plan which does not conform with the recommendations of the Board of Health. If the plan does not conform with the recommendations of the Board of Health, the Planning Board must modify and approve or disapprove the plan. Loring Hills Developers Trust v. Planning Board of Salem, 374 Mass. 343 (1978).

A Board of Health is required to afford a developer a measure of procedural due process prior to formulating an adverse recommendation to the Planning Board. A developer who files a request with the Board of Health at the time of filing is entitled to a hearing before the Board of Health. Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171 (1977).

Planning Board Waiver

Section 81R authorizes a Planning Board to waive any of their rules and regulations adopted pursuant to the Subdivision Control Law. Before waiving any of their rules and regulations, the Planning Board must find that granting the waiver is in the public interest and not inconsistent with the purpose of the Subdivision Control Law. In granting a waiver, the Board is not required to make written findings to support their grant of the waiver. Windsor v. Planning Board of Wayland, 26 Mass. App. Ct. 650 (1988).

In Meyer v. Planning Board of Westport, 29 Mass. App. Ct. 167 (1990), the court noted that a Planning Board is not required to specify and list in writing those rules and regulations that the Board waived so long as the public record discloses evidence of a conscious waiver. However, it is strongly recommended that any waiver granted by the Board either be specified in the Board's decision or noted on the definitive plan.

Section 81L defines an "applicant" as the owner of the land, his agent or representative, or his assigns. In Batchelder v. Planning Board of Yarmouth, 31 Mass. App. Ct. 104 (1991), the Planning Board waived this requirement that the applicant be the owner of record. The court held that the Planning Board lacked the authority to grant such a waiver of a statutory requirement. The court based its reasoning on the

fact that one of the objectives of the Subdivision Control Law is to ensure the provision of adequate drainage, sewerage, and water facilities. One of the ways this objective is achieved is to secure a covenant from the owner of record. If the owner of record is not party to the proceedings there is no guarantee that the Planning Board would receive a properly executed covenant.

The Planning Board may also waive the frontage requirement of the Subdivision Control Law. The frontage requirement of the Subdivision Control Law is found in Section 81L within the definition of "subdivision" and is the same frontage requirement which is specified in the local zoning ordinance or bylaw.

The waiver of frontage requirements has been previously discussed in the Approval Not Required Plans section of this publication. However, two issues concerning this process is worth repeating:

> 1. A waiver of the frontage requirements of the Subdivision Control Law by the Planning Board is not a variance. A landowner still needs to obtain a zoning variance from the Board of Appeals and both processes are independent of each other. Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981).
>
> 2. In order to obtain a frontage waiver from the Planning Board, an applicant must submit a subdivision plan and request the waiver. Seguin v. Planning Board of Upton, 33 Mass. App. Ct. 374 (1992).

Planning Board Action

After the public hearing, the Planning Board must either approve the plan, modify and approve the plan or disapprove the plan.

The Planning Board must approve the plan if it complies with the Board's rules and regulations and the recommendations of the Board of Health. The Board of Health's report may require that the approval of the plan by the Planning Board be on the condition that no building or structure can be built or placed upon any designated area shown on the plan without the consent of the Board of Health. If the Board of Health fails to make a report, the Planning Board must note on the plan that the Board of Health approval is by failure of the Board to make a report.

If the Planning Board disapproves the plan, the Board must state in detail where the plan does not comply with the rules and regulations of the Board or the recommendations of the Board of Health. Disapproval of the plan is a final action from which the developer has a right of appeal. However, any resubmission of a plan to revoke a previous disapproval requires a new public hearing. Patelle v. Planning Board of Woburn, 6 Mass. App. Ct. 951 (1978).

The Planning Board must revoke its disapproval and approve a definitive plan if the plan, as amended, conforms with the Planning Board's rules and regulations and the recommendations of the Board of Health. Any such revised plan must be filed with the Board of Health for review even though the Board of Health approved the original plan. Doeblin v. Tinkham, 7 Mass. App. Ct. 720 (1979).

The Planning Board must file a certificate of its action with the municipal clerk and send a notice of such action by registered mail to the applicant.

Constructive Approval of Definitive Plans

Automatic approval of a definitive plan will occur if the Planning Board fails to take final action or file a certificate of final action with the municipal clerk.

In the case of a nonresidential subdivision plan, final action and filing of the certificate must occur within 90 days after the submission of the plan.

In the case of a residential subdivision plan, where a preliminary plan was acted upon or where 45 days have elapsed since the submission of the preliminary plan, final action on the definitive plan and filing of the certificate with the municipal clerk must occur within 90 days after the submission of the definitive plan.

In the case of a residential plan where no preliminary plan was either filed or acted upon and 45 days had not elapsed since the filing of a preliminary plan and a definitive plan was filed, final action and filing of the certificate with the municipal clerk must occur within 135 days after the submission of the definitive plan.

At the written request of the applicant, the time period to take final action or file with the municipal clerk a certificate of action may be extended. A notice of any agreed upon extension must be filed with the municipal clerk.

If a definitive plan is constructively approved the municipal clerk must, after the expiration of the 20 day appeal period without notice of an appeal or if an appeal was taken after final court action leaving the approval intact, issue a certificate of approval to the person submitting the plan. The certificate should state the date the plan was submitted, the fact that the Planning Board failed to take final action and that the approval of the definitive plan has become final for failure of the Planning Board to take final action.

Performance Guarantee and Endorsement

An appeal of the Planning Board's decision or inaction on a definitive plan may be taken pursuant to Section 81BB of the Subdivision Control Law. Section 81X requires that after the 20 day appeal period, the municipal clerk must certify that no notice of appeal was received within the 20 day period. The clerk's certification may be endorsed on the plan or stated on a separate document which must be recorded and referred to on the plan. If an appeal was taken and plan approval is upheld by the court, the municipal clerk must certify that a final decree by the court has sustained the approval of the plan. Again, the certification by the clerk may either be endorsed on the plan or stated on a separate document which must be recorded and referred to on the plan.

After the expiration of the 20 day appeal period and before endorsing its approval on the definitive plan, the Planning Board must obtain a performance guarantee to ensure the construction of ways and the installation of municipal services. The purpose of a performance guarantee is to protect the public interest. See Marlborough Savings Bank v. City of Marlborough, 45 Mass. App. Ct. 250 (1998). Section 81U provides that the method for securing performance may be one of the following:

1. a proper bond,

2. a deposit of money or negotiable securities,

3. a covenant,

4. a lenders agreement, or

5. a combination of the above.

The applicant selects the method for securing performance and may vary the method from time to time. The Planning Board determines whether the performance guarantee is sufficient to secure performance. In determining the monetary amount, the Planning Board should include a sufficient sum to cover inflationary costs.

In all cases, the Planning Board should specify or require the applicant to specify the time period within which the construction of the ways and the installation of municipal services will be completed.

A Planning Board, when approving a subdivision plan, has the authority to impose reasonable conditions. The court has held that a Planning Board may impose a condition, when a subdivision plan is secured by a covenant, which will result in the automatic rescission of the plan. The issue of 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 Costanza, the Planning Board had approved a subdivision plan on the condition that the developer complete all roads and municipal services within a two year period 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 MGL 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 period the roads and services were not complete, but the landowner submitted a plan to the Planning Board requesting an ANR endorsement. The plan showed lots with frontage on a way shown on the earlier subdivision plan. The landowner's position was that he was entitled to an ANR endorsement since the lots shown on his 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 Subdivision Control Law and that the Planning Board could consider that condition when determining 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 road did not qualify as a way previously approved under the Subdivision Control Law and therefore the plan before the Board was a "subdivision" and not entitled to an ANR endorsement. A similar result was also reached in Campanelli, inc. v. Planning Board of Ipswich, 358 Mass. 798 (1970).

Under the Costanza decision, an approval of a subdivision plan automatically ceases to exist if the work is not completed within the specified time period set out in the conditional approval. Since a Planning Board approval is conditional, the automatic rescission is not subject to the procedural requirement of Section 81W. Therefore, the consent of the mortgagee is not required. See Bigham v. Planning Board of North Reading, 363 Mass. 860 (1972).

Recording Definitive Plan

Section 81X requires that a definitive plan must be recorded within six months after the date of the Planning Board endorsement. If the plan has not been recorded within six months, the applicant must either apply to the Planning Board or municipal clerk for a

certificate. The certificate must be issued by either the Planning Board or the municipal clerk if the records of the Board or the municipal clerk show that there has not been any modification, change, amendment or rescission to the approval of the plan. The

certificate will allow the applicant to record the approved subdivision plan within 30 days after the date of certification. The certificate must be dated and either endorsed on the plan or stated on a separate document which must be recorded and referred to on the plan.

The six month time period to record a subdivision plan does not apply to a constructively approved plan. Stoner v. Planning Board of Agawam, 358 Mass. 709 (1971). The Subdivision Control Law also contains no provision which limits the time period for the recording of an ANR plan.

Completion of Work

Upon the completion of the ways and the installation of municipal services, the applicant should notify the municipal clerk and the Planning Board, by registered mail, that the work has been completed. If the Planning Board determines that the construction or installation has not been completed, the Board must notify the applicant and municipal clerk, by registered mail, as to how the construction or installation fails to comply with their rules and regulations.

If the Planning Board fails to give such notification within 45 days after the municipal clerk received the applicant's notice, all obligations under a bond will terminate, any deposit shall be returned and any covenant will become void. If the 45 day period has expired without such a notification or the release of the performance guarantee by the Planning Board, the municipal clerk must issue a certificate indicating that the performance guarantee secured by the Planning Board has terminated.

Modifications, Amendments or Rescissions

Section 81W gives the Planning Board the power on its own motion or on the petition of any interested person to modify, amend or rescind its approval of a subdivision plan. The court, in Windsor v. Planning Board of Wayland, 26 Mass. App. Ct. 650 (1988), concluded that a Planning Board may also modify, amend or rescind a constructively approved plan. All of the provisions of the Subdivision Control Law relating to the submission of a definitive plan, so far as apt, are applicable to a modification, amendment or rescission. The Planning Board should proceed according to the procedures the Board followed when originally approving the definitive plan. The one significant qualification on the power of a Planning Board to change the status of an approved plan is that no modification, amendment or rescission can affect any lot in a subdivision which has been sold or mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan without the consent of the owner of the lot and of the holder of any mortgage on the lot. However, the sale of the entire parcel of land or of all the lots not previously released by the Planning Board to a single grantee will not prohibit any modification, amendment or rescission.

A Planning Board has the authority to make changes to an approved definitive plan without the consent of the owners of lots in a subdivision where the changes do not have a direct and tangible impact on the property rights of the lot owners. The Planning Board's authority to modify a definitive plan without the consent of the property owners was a major issue in Patelle v. Planning Board of Woburn, 20 Mass. App. Ct. 279 (1985). In Patelle, the court found that amendments to a definitive plan affecting location of trees, width of streets, planting between curbs and lot lines, traffic signals, overhead or underground utilities, street lighting, transformation of a cul-de-sac to a through street, relocation of open space area, and the creation of house lots out of a portion of land previously designated as open space did not need the consent of lot owners in a subdivision.

Section 81DD provides that damages sustained by "any person injured in his property by reason of any modification, amendment or rescission of the approval of a plan under Section 81W without his consent" are recoverable under MGL, Chapter 79. A modification, amendment or rescission of approval could result in damages to a property owner and the Board's power should be exercised with great care and the advice of legal counsel.

So far as unregistered land is concerned, no modification, amendment or rescission takes effect until:

1. the plan as originally approved, or a copy, and a certified vote of the Planning Board and any additional plan referred to in the vote has been recorded;

2. an endorsement has been made on the original plan referring to such vote and where it is recorded; and

3. the vote of the Board is indexed in the grantor index under the names of the owners of record of the land affected.

So far as registered land is concerned, no modification, amendment or rescission takes effect until:

1. verified by the Land Court pursuant to MGL, Chapter 185 or,

2. the Land Court does not make such verification until ordered by the court pursuant to MGL, Chapter 185, Section 114.

GRANDFATHERING

The Subdivision Control Law provides a protection to certain lots from complying with the subdivision regulations adopted by the Planning Board. Section 81FF deals with the applicability of the Subdivision Control Law to previously recorded plans and provides relief to good faith purchasers of individual building lots.

Unregistered Land

With respect to unregistered land, the first paragraph of Section 81FF provides in part that:

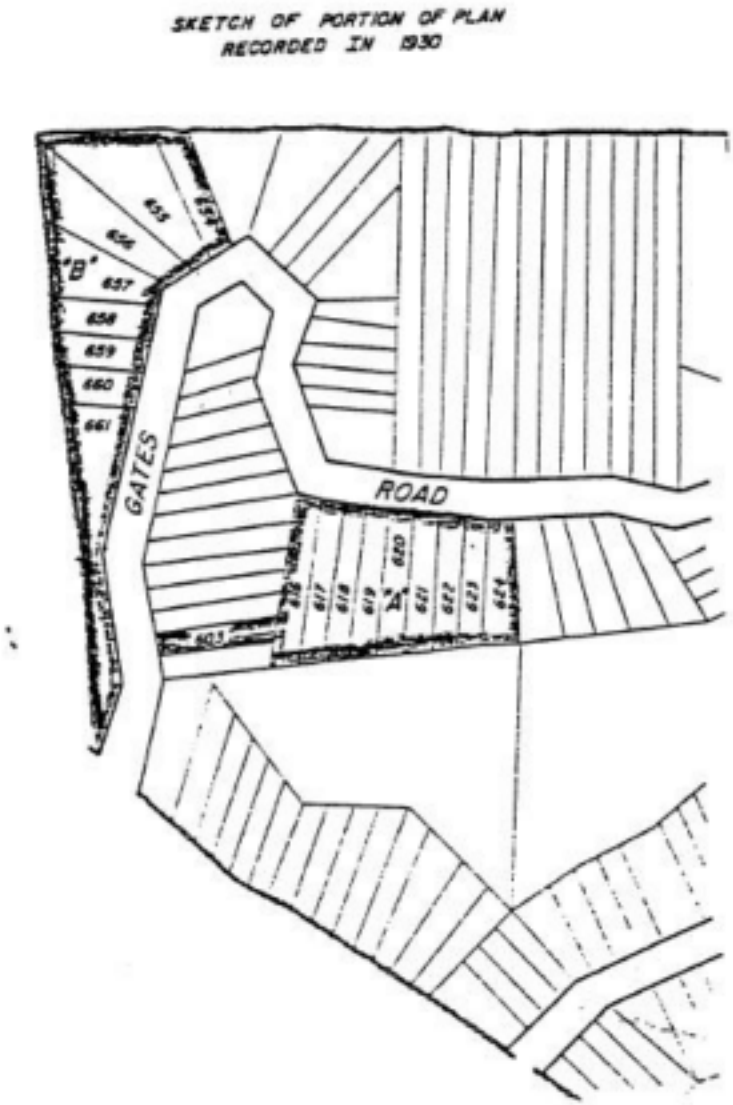
> … recording of the plan of a subdivision in the registry of deeds before the subdivision control law was in effect in the city or town in which the subdivision was located shall not exempt the land within such subdivision from the operation of said law except with respect to lots which had been sold 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 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.

Under the provisions of the first paragraph of Section 81FF, the recording of a plan does not exempt unregistered lots in 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 from the remainder of the subdivision" 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 endorsement from the Planning Board. One ANR plan consisted of 10 lots containing an area of 42,340 square feet and the other plan consisted of 8 lots containing an area of 48,000 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 whether the parcels in

question were held in isolation from the original subdivision on the date Middleton adopted subdivision control. However, the court noted that if the 81FF protection was applicable, each parcel would be treated as one protected lot.

Clows v. Planning Board of Middleton



At issue in Toothaker v. Planning Board of Billerica, 346 Mass. 436 (1963), was the meaning in Section 81FF of appurtenant rights of way. The plaintiffs owned approximately 1200 lots shown on a subdivision plan of over 1800 lots. The subdivision plan was recorded in 1914 and the Subdivision Control Law took effect in Billerica March 3, 1951. Of the lots shown on the 1914 plan, 649 were protected by Section 81FF. The plaintiff 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. The court ruled that the plan was subject to the Subdivision Control Law but that the rights of way of the 649 exempted lots could not be destroyed.

Registered Land

As to the protection afforded registered land, the second paragraph of Section 81FF provides in part that:

> 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.

The second paragraph of Section 81FF 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 cannot register or confirm a plan of land in a subdivision in a community where the Subdivision Control Law is in effect unless the plan has 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 also 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]."

ZONING FREEZES

Zoning protections for lots or the use of land shown on previously approved plans is one of the more interesting areas of land use regulation in Massachusetts. A zoning freeze allows either a use or the construction of a structure which when completed will not conform to the existing zoning regulations in the community. The zoning protection provisions for a lot or the use of land shown on a plan are found in MGL, Chapter 40A, Section 6. For the sake of simplicity, zoning freezes fall into one of the following two categories:

1. Lot Protection

2. Plan Protection

Separate Lot Protection

For many years, zoning legislation in Massachusetts has provided a zoning protection for separately held substandard building lots. The separate lot protection was inserted into the Zoning Enabling Act in 1958. As was noted in Planning Board of Norwell v. Serena, 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. 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.

The language of the separate lot protection 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."

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 provided that the lot

1. conformed to existing zoning when legally created, if any;

2. has at least 5,000 square feet of area and fifty feet of frontage; and,

3. is in an area zoned 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 protection 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.

Common Lot Protection

The second sentence of the fourth paragraph of MGL, Chapter 40A, Section 6 provides protection for common ownership lots. This protection was inserted into the Zoning Act in 1979. The zoning freeze for common ownership provides that:

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 such adjoining lots held in common ownership.

In Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829 (1985), the court found that the zoning freeze 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.

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 freezes for subdivision and non-subdivision plans have 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 of the Planning Board's endorsement.

The interpretation of the common ownership zoning freeze by the court opened doors which in the past had not been 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 freeze from increased dimensional requirements for single or two-family use. The common ownership protection also provides an opportunity to checkerboard lots shown on a definitive plan in clusters of three to obtain the five year protection. This technique could extend the zoning life of lots shown on a definitive plan beyond the eight year exemption period.

The common ownership freeze increases the protection afforded ANR 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 the lots 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 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 requirement;

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; and,

4. the lot must have been held in common ownership with any adjoining land at the time of the effective date of the increased zoning requirement.

Preliminary Plan Protection

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 MGL, Chapter 40A, Section 6 protects land shown on a preliminary plan from all zoning changes for a period of eight years. Land shown on a preliminary plan will be governed by the zoning regulations in effect at the time of submission of the plan. If a preliminary plan is submitted, a definitive plan must be submitted within seven months. The eight year zoning freeze runs from the date the Planning Board endorses its approval of the definitive plan. Section 6 provides in part as follows:

> If 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 will be governed by … the zoning ordinance or by-law, if any, in effect at the time of the … submission … [of] such plan … and, if such definitive plan … is finally approved, for eight years from the date of the endorsement of such approval … .

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 on a proposed zoning change does not prevent a landowner from filing a subdivision plan to protect his land from future zoning changes. MGL, Chapter 40A, Section 5, 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.

There have been many court decisions dealing with the relationship between the operation of the Subdivision Control Law and the zoning protection provisions of the Zoning Act. In Arenstam v. Planning Board of Tyngsborough, 29 Mass. App. Ct. 314

(1990), the court interpreted the extent of the seven month protection for land shown on a preliminary plan.

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 the definitive plan 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 definitive 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 still entitled to the zoning freeze. In support of his argument, he directed the court to Section 81U of the Subdivision Control Law which places no time limit on submitting an amended plan when the original plan has been disapproved by the Planning Board. The second paragraph of Section 81U provides in part:

> 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 … and shall revoke its disapproval and approve such plan which, as amended conforms to such rules and regulations and recommendations.

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. The seven month zoning freeze 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.

Definitive Plan Protection

As previously mentioned, 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 definitive plan is subsequently endorsed by the Planning Board. 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. Moreover, the definitive plan zoning freeze is extended by a period equal to the time a moratorium on construction, the issuance of permits or utility connections is imposed by a governmental entity.

A successful appeal under Section 81BB of the denial of the definitive plan will preserve the definitive plan zoning freeze. Any appeal or litigation regarding any lot shown on an approved definitive plan will also extend the zoning freeze provided final adjudication is in favor of the lot owner.

Presently, MGL, Chapter 40A, Section 6 affords the following eight year zoning freeze to land shown on a definitive plan:

> 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 … .

What happens if within the eight year period a community increases its minimum lot area, lot frontage or yard requirements? Can unbuilt lots 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, a lot qualified 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. In order for a lot to be conveyed into separate ownership within the definitive plan freeze period and be eligible for separate lot protection, the statute required that the definitive plan must have been endorsed by the Planning Board 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 reviewed the old separate lot protection provisions and its application to lots shown on a previously approved definitive plan. A preliminary plan had been submitted to the Planning Board prior to the town's increasing the minimum lot area requirement. After the effective date of the increased lot area requirement the Planning Board approved and endorsed a definitive plan. Prior to the expiration of the definitive plan zoning freeze, which at that time was seven years, all 76 lots shown on the definitive plan were conveyed into separate ownership. At a later date, one of the lot owners applied

for a building permit to construct a single-family home. The building permit application was denied.

The court found that the lot was not entitled to the old separate lot protection because the definitive plan was endorsed by the Planning Board after the effective date of the increased zoning requirement. If the definitive plan had been endorsed prior to the effective date of the increased zoning requirement, the lots conveyed into separate ownership within the seven year period would have had the benefit of the separate lot protection. A similar result was also reached in Tsagronis v. Board of Appeals of Wareham, 33 Mass. App. Ct. 55 (1992), where a definitive plan had been approved after the town had increased its zoning requirements.

In Wright, 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 eight year 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, must be issued prior to the expiration of the eight year 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 stop the running of the zoning freeze period. However, in Green v. Board of Appeals of Norwood, 2 Mass. App. Ct. (1974), the court found that if a building permit application is filed in a timely manner, the zoning protection will not be lost due to a local official's inaction.

ANR Plan Protection

MGL, Chapter 40A, Section 6 states in part that:

> … the use of land shown on [an 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 … .

What the Legislature meant by the phrase "the use of the land shown on such plan shall be governed …" has been subject to a number of court cases. Did the Legislature intend that the use of the land would be governed by all applicable provisions of the zoning bylaw in effect when the plan was submitted to the Planning Board? Or did the Legislature mean, as to use, that the land shown on the plan would only be protected from any bylaw amendment which would prohibit the use?

In Bellows Farms v. Building Inspector of Acton, 364 Mass. 253 (1973), the court found that the zoning statute merely protected the land shown on an ANR plan 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 an ANR

plan would not be immune to changes in the zoning bylaw which did not practically prohibit the protected use.

At the time Bellows Farms submitted an ANR plan to the Planning Board, apartments were permitted as a matter of right. Based on the "Intensity Regulation Schedule" in effect at that time of submission, a maximum of 435 apartment units could have been constructed on the land shown on the plan. After the submission of the plan, the town amended the "Intensity Regulation Schedule" and off-street parking and loading requirements. The town also adopted another zoning amendment which required site plan approval by the Board of Selectmen. If the amendments applied to the land shown on the plan, Bellows Farms would only be able to construct a maximum of 203 apartment units.

The town argued that the protection afforded by the 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 Farms could still use its land for apartments. The court agreed with the town. However, the court did note that the use protection could extend to certain changes not directly relating to use, if the impact of such changes, as a practical matter, nullified the use protection afforded to land shown on an ANR plan.

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 ANR plan, a shopping center was permitted as of right. The issue was whether Cape Ann was required to obtain a special permit and if so whether the City Council had the discretionary authority to deny the special permit. The court held that Cape Ann was required to obtain a special permit and the City Council could deny the special permit if Cape Ann failed to comply with the zoning ordinance except for those provisions that practically prohibited the shopping center use. The court warned the City Council that they could not deny the special permit on the basis that the land would 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. Later, in Marashlian v. Zoning Board of Appeals of Newburyport, 421 Mass. 719 (1996), a different result was reached when the Massachusetts Supreme Judicial Court did not disturb a Superior Court judge's finding that a landowner was not required to obtain a special permit. In Marashlian, the use of the locus for a hotel was permitted as a matter of right at the time of the ANR endorsement. At a later date, the zoning was changed to require a special permit for hotel use. The Superior Court judge found that the use of the locus for a hotel was protected as of right and no special permit was required to allow the construction of a hotel.

In Perry v. Building Inspector of Nantucket, 4 Mass. App. Ct. 467 (1976), the court found that a proposed single-family condominium development was not entitled to a three year protection from increased dimensional requirements. The town had amended their zoning bylaw which prohibited Perry's proposed use in the zoning district where his land was located. At the same time, the town increased the intensity regulations in another zoning district where Perry's proposed use was a permitted use. In applying the principle of the Bellows Farms case where the use is no longer authorized in the zoning district, the court found that a reasonable accommodation must be made by either applying the intensity regulations 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.

The three year use protection is not confined to those uses which were permitted as a matter of right at the time of the submission of the ANR plan. In Miller v. Board of Appeals of Canton, 8 Mass. App. Ct. 923 (1979), the court held that uses authorized by special permit are also entitled to the zoning freeze.

An ANR plan does not have to be recorded in order for the land shown on the plan to be entitled to the zoning freeze. In Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232 (1992), the court held that nothing in the Zoning Act requires recording of an ANR plan as a prerequisite for a zoning freeze.

In Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976), the court found no basis in the Zoning Act which would permit the freeze provisions to be combined in a "piggy-back" fashion. Wolk had an ANR plan endorsed by the Planning Board. He unsuccessfully argued that the three year use protection allowed him to submit a preliminary or definitive subdivision plan within that time period and the plans would be governed by the provisions of the zoning bylaw in effect at the time he submitted his ANR plan.