THE ANR HANDBOOK

Approval Not Required Plans

COMMONWEALTH OF MASSACHUSETTS
Argeo Paul Cellucci, Governor
Jane Swift, Lieutenant Governor

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
Jane Wallis Gumble, Director

January, 1997
revised May, 2000

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

Argeo Paul Cellucci, Governor
Jane Swift, Lieutenant Governor
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Dear Local Official:

Due to the numerous questions that have arisen over the years concerning the "Approval Not Required" (ANR) process of the Subdivision Control Law, we felt it would be beneficial to produce and distribute a publication concerning this issue.

This copy of The ANR Handbook is published by our Division of Municipal Development, which provides a wide range of technical assistance, information services, and grants to municipal governments to assist communities in solving local problems.

We are pleased to offer for the use of planning boards, other municipal officials, and interested persons this edition of The ANR Handbook. Questions regarding 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.

We trust that this booklet and the services we provide will be helpful to you in carrying out your responsibilities.

Sincerely,

Jane Wallis Gumble
Director

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One Congress Street
Boston, Massachusetts 02114

THE ANR HANDBOOK

PLANS NOT REQUIRING APPROVAL UNDER THE SUBDIVISION CONTROL LAW

January, 1997
Revised May, 2000

Prepared by

Department of Housing & Community Development
Division of Municipal Development

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INTRODUCTION

Perhaps no other aspect of the Subdivision Control Law has caused more controversy and headaches at the local government level than the concept of Approval Not Required (ANR) Plans. Over the years, the Department of Housing and Community Development has received numerous inquiries relative to the approval not required process. The most common question asked by local officials is under what circumstances are plans entitled to an endorsement from the Planning Board that "approval under the Subdivision Control Law is not required."

In response to such requests, several issues of the Land Use Manager reviewed the legislative history and relevant case law dealing with Approval Not Required Plans. Due to the response to the Land Use Manager series, it was decided that a publication focusing on this issue would be beneficial to municipal officials, landowners and other interested parties who deal at the local level with the ANR process. In 1990, the (Executive Office of Communities and Development), now the Department of Housing and Community Development prepared and distributed a publication entitled ANR Plans Not Requiring Approval Under the Subdivision Control Law. This publication is the revised edition of that document.

It must be recognized that this publication cannot cover all possible situations. Whenever a question of legal interpretation arises, we would suggest that local officials seek the advice of their municipal counsel.

HISTORY

In most states, subdivision control laws were enacted to address two problems. Early subdivision control statutes were primarily concerned with ensuring that plots of subdivisions be technically accurate and in good form for recording and tax assessment purposes. Later, a concern for the impact of subdivisions on street development within communities emerged; and many statutes were accordingly amended to provide for the regulation of the layout of ways when a subdivision of land occurred.

In Massachusetts, the first comprehensive subdivision control statute was enacted exclusively for the city of Boston in 1891. It provided that no person open a public way until the layout and specifications were approved by the street commissioners. By 1916, similar powers were conferred on Boards of Survey in many cities and towns throughout the Commonwealth. With the revision of the state statute in 1936 (see St. 1936 c. 211), the subdivision control powers were expanded and conferred on Planning Boards.

The Subdivision Control Law, Chapter 41, Sections 81K through 81GG, MGL, essentially in the form we now know it, was enacted in 1953 (see St. 1953 c. 674). This legislation made two significant changes to subdivision control. It stated for the first time the purposes of subdivision control, which are found in Section 81M; and provided for the recording of approval not required plans. The provisions for an endorsement that approval is not required are found in Section 81P.

Under prior Subdivision Control Law legislation, a plan showing lots and ways could be recorded without the approval of the Planning Board if such ways were existing ways and not proposed ways. The purpose of providing for an approval not required process was to alleviate the difficulty encountered by Registers of Deeds in deciding whether a plan showing ways and lots could lawfully be recorded. As explained by Mr. Philip Nichols on behalf of the sponsors of the 1953 legislation, ". . . it seemed best to require the person . . . who contends that (his plan) is not a subdivision within the meaning of the law, because all of the ways shown on the plan are already existing ways, to submit it to the planning board, and if the board agrees with his contention, it can endorse on the plan a statement that approval is not required, and the plan can be recorded without more ado." (see 1953 House Doc. No. 2249, at 55.)

As the Court summarized in Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the enactment of the approval not required process by the Legislature was not intended to enlarge the substantive powers of a Planning Board, but rather to provide a simple method to inform the Register of Deeds that the Planning Board was not concerned with a plan **"because the vital access is reasonably guaranteed."**

We are frequently asked for advice as to whether a Planning Board should endorse a plan "approval under the Subdivision Control Law is not required." Chapter 41, Section 81P, MGL,

requires that such an endorsement cannot be withheld unless a plan shows a subdivision. Therefore, whether a plan requires approval or not rests with the definition of "subdivision" as found in Chapter 41, Section 81L, MGL. A "subdivision" is defined in Section 81L as "the division of a tract of land into two or more lots" but there is an exception to this definition. A division of land will not constitute a "subdivision" if, at the time it is made, every lot within the tract so divided has frontage on a certain type of way. Section 81L also requires that the frontage be at least the designated distance as required by the zoning bylaw, and if no distance is required, the frontage must be at least 20 feet.

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

1. The lots shown on such plan must front on one of the three types of ways specified in Chapter 41, Section 81L, MGL;

2. The lots shown on such plan must meet the minimum frontage requirements as specified in Chapter 41, Section 81L, MGL; and,

3. A Planning Board's determination that the vital access to such lots as contemplated by Chapter 41, Section 81M, MGL, otherwise exists.

One of the more interesting aspects of the ANR process, if not the Subdivision Control Law, is the vital access standard. The necessity that the Planning Board determine that vital access exists to the lots shown on a plan before endorsing an ANR plan is not expressly stated in the Subdivision Control Law. The vital access standard has evolved from court decisions. The decisions have been concerned as to whether proposed building lots have practical access and have focused on the following two issues:

1. Adequacy of the way on which the proposed lots front; and

2. Adequacy of the access from the way to the buildable portion of the lot.

ADEQUACY OF A WAY

The first case dealing with the question of the adequacy of a way was Rettig v. Planning Board of Rowley, 322 Mass. 476 (1955). A plan was presented to the Planning Board showing 15 lots abutting three ways that were created long before the Subdivision Control Law became effective in the Town of Rowley. Two of the roadways shown on the plan were between ten and fourteen feet wide, contained severe ruts and were impassable at times due to heavy rains. The Planning Board determined that the plan constituted a subdivision, which required their approval.

The Subdivision Control Law in effect at that time defined "subdivision" as the "division of a tract of land into two or more lots in such manner as to require provision for one or more new ways, not in existence when the Subdivision Control Law became effective in the . . . town . . . to furnish access for vehicular traffic to one or more of such lots . . . ."

The court found that the ways shown on the plan did not provide adequate access for vehicular traffic. Because of the inadequacy of the ways serving the proposed lots, the court found that the Planning Board did not exceed its authority when they denied to endorse the plan.

RETTIG V. PLANNING BOARD OF ROWLEY

332 Mass. 476 (1955)

Excerpts

Wilkins, J. . . .

> The plan must be judged as a whole. Irrespective of the meaning of "way" in Section 81L, and for present purposes taking "way" in the sense of a physical way on the ground, as ruled by the judge, it is plain that Orchard Drive on the ground is not a way "adequate for access for vehicular traffic" to ten of the lots shown on the plan. As recently as 1951, when the subdivision control law became effective in Rowley, it could not in any practical sense have been in existence as a way. All that appeared at the view were outlines of a ten foot roadway, once used by a vehicle or vehicles of unknown character, and ruts and a condition of impassability due to rain. Orchard Drive clearly does not rise even to the dignity of a rough country road, broken and sunken in spots, as is Bowlery Drive off which it leads. Obviously, the plaintiffs propose to make "division of a tract of land into two or more lots in such manner as to require provision for one or more new ways . . . to furnish access for vehicular traffic to one or more of such lots." The decree is reversed and a decree is to be entered stating that the planning board of Rowley did not exceed its authority, and that no modification of its decision is required.

The authority of a Planning Board to make a determination as to the adequacy of a way before endorsing a plan "approval not required" was again noted in Malaguti v. Planning Board of Wellesley, 3 Mass. App. Ct. 797 (1975). The Planning Board had denied endorsement because the proposed building lots did not have frontage on an "adequate way." The trial judge found that not every lot had frontage on a public way and that the way in question was inadequate for vehicular traffic. The court agreed and in citing Rettig found that the Planning Board did not exceed its authority in refusing to endorse the plan because the plan showed a subdivision.

The vital access standard which requires that ways must be safe and convenient for travel was again considered in Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980). In this case, the court looked at ways that had been previously approved in accordance with the Subdivision Control Law. In 1960, the Board of Selectmen, acting as an interim Planning Board, approved a 26 lot subdivision. The Selectmen did not specify any construction standards for the proposed ways, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee as required in Chapter 41, Section 81U, MGL.

Eighteen years after the approval of the subdivision plan by the Board of Selectmen, Richard submitted an ANR plan to the Planning Board. During the 18 year period, the locus shown on the ANR plan had been the site of gravel excavation so that it was now located 25 feet below the grade of surrounding land. The Planning Board refused to endorse the plan. The central issue before the court was whether the lots shown on the ANR plan had sufficient frontage on ways that had been previously approved in accordance with the Subdivision Control Law. The court found that to be entitled to the ANR endorsement, when a plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards.

RICHARD V. PLANNING BOARD OF ACUSHNET

10 Mass. App. Ct. 216 (1980)

Excerpts:

Kass, J. . . .

> As stated by the parties, the fundamental question is whether a plan showing lots of sufficient frontage and area to comply with then applicable zoning requirements, fronting on ways shown on a plan previously approved and endorsed in accordance with the Subdivision Control Law, is exempt from further subdivision control . . ., even though those ways have never been built and exist on paper only. Put in that fashion, the question is not susceptible to an

answer of uniform application because it fails to take into account significant factual variables.

For example, if the new plan showed lots of lawful dimensions abutting ways on an earlier approved plan, but the earlier approved plan contained conditions which had not been met, then the new plan would not be exempt from subdivision control and would not be entitled to an "approval not required" endorsement under Section 81P. Costanza & Bertolino, Inc. v. Planning Bd. of North Reading, 360 Mass. 677, 678-681 (1971). In that case, a covenant entered into by the developer pursuant to G.L. c. 41, Section 81U, required him to complete the construction of ways and installation of the municipal services within two years from the date of the execution of the covenant. The developer had not done so, and the court held that the planning board had properly declined to make a Section 81P endorsement.

It follows that in a case where the landowner has filed a bond, or deposited money or negotiable securities, or entered into a covenant to secure the construction of ways and installation of municipal services, and a new plan is presented which merely alters the number, shape and size of the lots, such a plan is entitled to endorsement under Section 81P, "provided every lot so changed still has frontage on a public way . . . of at least such distance, if any, as is then required by . . . by-law . . ." G.L. c. 41, Section 81O; and provided, of course, that conditions for execution of the plan have not already been violated, as was the case in Costanza & Bertolino.

Indeed, the provisions of the fifth paragraph of Section 81U concerning securing of completion of the ways and municipal services of a subdivision plan are mandatory. For all that appears, the Acushnet selectmen, acting as the interim planning board, did not articulate the manner in which the ways were to be constructed, what municipal services were to be furnished or the standards to which that work was to be done. . . . We are of the opinion that exception (b) of the definition of "Subdivision" in Section 81L requires either that the approve ways have been built, or that there exists the assurance required by Section 81U that they will be built. Otherwise, the essential design of the Subdivision Control Law - that ways and municipal services shall be installed in accordance with specific municipal standards - may be circumvented. . . . In the instant case, where the locus is twenty-five feet below the surrounding land, the municipal concern about the safety of the grades of the roads giving access to the lots and about adequate drainage facilities is particularly compelling.

The Subdivision Control Law gives the Planning Board some discretion in determining the adequacy of a private way. As was noted in the Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), 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 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.

In determining the adequacy of such a way, a Planning Board must consider the present condition of the way in relationship to its rules and regulations. In Barton Properties, Inc. v. Hetherington, 4 LCR 293 (1996) (Misc. Case No. 223621), Judge Scheier of the Land Court noted that the way's historic inadequacy is not material if the access is adequate at the time the ANR plan is submitted to the Planning Board.

However, in order to qualify as a way in existence, the Land Court has concluded that the way must have physically existed on the ground and provided meaningful access prior to the Subdivision Control Law taking effect in the community.

In Coolidge Construction Co., Inc. v. Planning Board of Andover, 7 LCR 75 (1999) (Misc. Case No. 238169); and Gould v. Planning Board of Pembroke, 7 LCR 78 (1999) (Misc. Case No. 237217), the Land Court ruled that a way does not qualify as a "way in existence" if it did not exist on the ground at the time the Subdivision Control Law took effect in the community. As explained in Gould:

> " A fair reading of … the subdivision control law … suggests that the legislature intended merely to recognize ways already in use at the time the subdivision control law became effective, provided such ways offer adequate access, and not to create a mechanism to circumvent the subdivision review process for ways newly constructed within the layout of previously delineated 'paper streets.'"

Unlike the ways in Coolidge Construction and Gould, in Musto v. Medfield Planning Board, 7 LCR 281 (1999) (Misc. Case No. 229690), the way in question existed on the ground in some form prior to the Subdivision Control Law taking effect in the community. However, since the landowner could not show that at that time it was used in any meaningful way as a means of vehicular access, it could not be considered a way in existence prior to Subdivision Control. The landowner further argued that they could improve the way to a level adequate to warrant endorsement of their ANR plan. Relying on Rettig, Judge Green disagreed and concluded that such improvements would constitute a new way that would require approval under the Subdivision Control Law.

ADEQUACY OF A PUBLIC WAY

A statutory private way is a way laid out and accepted by a town, for the use of one or more inhabitants, pursuant to MGL, Chapter 82. In Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), it was argued that a statutory private way was a public way for the purposes of determining whether a plan was entitled to be endorsed "approval not required." The court found that such a way was not as a matter of law a public way for the purposes of subdivision control and that development on a statutory private way would require Planning Board approval unless it could be proven that such a way was both maintained and used as a public way. In Spalke v. Board of Appeals of Plymouth, 7 Mass App. Ct. 683 (1979), the court rejected the argument that the Atlantic Ocean was a public way for access purposes. The close reading by the court as to a qualified public way for the purposes of access is important. However, even if a proposed division of land abuts a public way, the Planning Board must consider the adequacy of the 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 bts had the required zoning frontage on Oakland Street, which was a way that had appeared on town plans since 1927. The County Commissioners of Nantucket, by an order of taking registered with the Land Court in 1962, took an easement for the purposes of a public highway. Oakland Street, a public way, had never been constructed. The Planning Board decided that the plan constituted a subdivision because the lots did not front on a public way as defined in the Subdivision Control Law. The court agreed.

PERRY V. PLANNING BOARD OF NANTUCKET

15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

> A "subdivision" for purposes of the Subdivision Control Law, is defined as "the division of a tract of land into two or more lots . . ." A division is excluded from the definition of a subdivision . . . if "at the time when [the division] is made, every lot within the tract so divided has frontage on . . . a public way . . . ." The question for decision is what is intended by the term "public way" in this exclusion.
>
> The Legislature provided, in G.L. c. 82 Sections 1-16, for the layout and establishment of highways within municipalities by county commissioners . . . .

When the way is completed, the municipality is required, among other things, to repair and maintain it, and the municipality becomes liable for damages caused by defects. See G.L. c. 84, Sections 1, 15 and 22. . . . .

The Legislature presumably knew of the existing body of statutory law pertaining to public ways when it enacted the exemption from subdivision control . . . The exemptions from subdivision control . . . are important components of the Subdivision Control Law which itself creates a "comprehensive statutory scheme," . . . and which includes among its express purposes the protection of the "safety, convenience and welfare of the inhabitants of the cities and towns" by means of regulation of "the laying out and construction of ways in subdivisions providing access to the several lots therein . . ." We note that the Legislature has provided, consistent with these goals, that planning boards are to administer the law "with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; . . . [and] for securing adequate provision for . . . fire, police, and other similar municipal equipment . . . ."

We note further that the exclusions set out in Section 81L, . . . which excuse a plan from subdivision approval, thereby providing a basis for an 81P endorsement, do so with reference to specific objective criteria apparently chosen by the Legislature for the quality of access they normally provide. . . . We conclude that whatever status might be acquired by ways as "public ways" for purposes of other statutes by virtue of their having been "laid out," . . . such ways will not satisfy the requirements of the "public way" exemption in Section 81L, . . . of the Subdivision Control Law, unless they in fact exist on the ground in a form which satisfies the previously quoted goals of Section 81M.

. . . In our view, . . . a board can properly deny an 81P endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in Section 81M. . . . We also recognize that Section 81M, insofar as it treats the sufficiency of access, is couched primarily in terms of the adequacy of subdivision ways rather than the adequacy of the public ways relied upon by an owner seeking exemption from subdivision control. We do not view these considerations as affecting the soundness of our reasoning. The board's power in these circumstances arises out of the provisions of the subdivision control law itself, read in light of the statutes pertaining to public ways and relevant decisions. The statutory and decisional framework provides for orderly land development through the assurance that proper access to all lots within a subdivision will be reasonably guaranteed. Because no way exists on the ground to serve [the] lots. . . . the

board was right to require the plan's antecedent approval under the Subdivision Control Law, and its action should not have been annulled.

Relying on the Perry decision, among others, the Hingham Planning Board denied endorsement of a plan where all the proposed lots abutted an existing public way. In Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), the court found that the existing public way provided adequate access and that the Planning Board had exceeded its authority in refusing to endorse the plan.

Hutchinson proposed to divide a 17.74 acre parcel on Lazell Street in Hingham into five lots. Lazell Street was a public way that was used by the public and maintained by the Town of Hingham. Each lot met the Hingham zoning bylaw requirements. The Planning Board contended that the plan was not entitled to an endorsement for the following reasons:

1. Lazell Street did not have sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land.

2. The frontage did not provide safe and adequate access to a public way.

HUTCHINSON V. PLANNING BOARD OF HINGHAM

23 Mass. App. Ct. 416 (1987)

Excerpts

Dreben, J. . . .

> Citing Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144 (1983), and Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979), the board argues that, even if a way falls within the definition of Section 81L, that is not enough. "[I]t is also necessary that a planning board determine that the way in question . . . satisf[ies] the requirements of G.L. c. 41, Section 81M, which ... include the requirement that the way be safe for motor vehicle travel."
>
> The board misapprehends the Perry and Hrenchuk decisions. Those cases rest on the reasoning of Gifford v. Planning Bd. of Nantucket, 376 Mass. 801 (1978), which held that as an aid in interpreting the exclusions of Sections 81L and 81P the court may look to Section 81M as elucidating the purposes of those exclusions. . . . Thus, even though a statutory exemption (e.g., frontage on a public way) of Section 81L is technically or formally satisfied, if, in fact, there is no practical access to the lots, Section 81L will not apply. . . . .

> In sum, where there is the access that a public way normally provides, that is, where the "street [is] of sufficient width and suitable to accommodate motor vehicle traffic and to provide access for fire-fighting equipment and other emergency vehicles," . . . the goal of access under 81M is satisfied, and an 81P endorsement is required.
>
> We turn now to the findings of the judge. He found that Lazell Street is a paved public way, that, except for a portion which is one-way, it is twenty to twenty-one feet wide, about the same width as the other streets in the area, and that it can "provide adequate access to all the proposed lots for the owners, their guests, police, fire, and other emergency vehicles." The judge also found that the road "is as safe to travel upon as any of the hundreds of comparable rural roads that criss-cross the entire Commonwealth."
>
> We do not reach the board's arguments on traffic safety as we do not deem them relevant. We note that even if those arguments were to be considered, the judge's findings on traffic safety are not clearly erroneous and are dispositive. The board's contentions to the contrary are without merit. These findings bring Lazell Street within the "specific objective criteria . . . chosen by the Legislature for the quality of access," . . . which entitle a landowner to an 81P endorsement.

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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 lots abutted an existing public way that 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 that abutted an existing substandard or unpaved public way was entitled to an ANR endorsement. In previous decisions, the court had stated that Planning Boards are authorized to withhold ANR endorsement in those unusual situations where the "access implied by the frontage is illusory." The court, however, had not had the opportunity to consider the "illusory" standard in relation to a public way existing on the ground which was either unpaved or not properly maintained 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 approval not required endorsement. The Planning Board denied endorsement and Sturdy appealed. The proposed lots shown on the plan abutted Side Hill Road, which was a public way. A Superior Court judge found that Side Hill Road was a passable woods road of a dirt substance with some packed gravel. It was approximately eleven

to twelve feet wide, muddy in spots and close to impassable during very wet portions of the year. The road was wide enough for only one car and it would be very difficult for large emergency vehicles to turn onto Side Hill Road at either end.

Whether Sturdy's plan was entitled to an ANR endorsement depended on whether the access that Side Hill Road afforded was, in fact, illusory. The Superior Court judge determined that the plan was entitled to the ANR endorsement notwithstanding any deficiencies in the way. The Massachusetts Appeals Court agreed.

STURDY V. PLANNING BOARD OF HINGHAM
32 Mass. App. Ct. 72 (1992)

Excerpts:

Dreben J. ...

> ... a planning board may withhold the ANR endorsement (where the tract has the required frontage on a public way) only where the access is "illusory in fact." ... Deficiencies in a public way are insufficient ground for denying the endorsement. The ANR endorsement for lots fronting on a public way, provided for in G.L. c.41, § 81L, is a legislative recognition that ordinarily "lots having such a frontage are fully accessible, and as the developer does not contemplate the construction of additional access routes, there is no need for supervision by the planning board on that score." ... Moreover, since municipal authorities have the obligation to maintain such ways, there is already public control as to how perceived deficiencies, if any, in such public ways are to be corrected. ... .

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., way is not passable), a plan showing lots abutting such a public way would not be entitled to ANR endorsement.

A public way that 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 public way was close to impassable during very wet portions of the year. We assume from the Sturdy decision that, although more difficult, the way was still passable during the wet season. However, in Long Pond Estates Ltd. v. Planning Board of Sturbridge, 406 Mass. 253 (1989), the court decided that 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 Army Corps of Engineers, and was periodically closed due to flooding. Between 1980 and 1988, the Corps of Engineers closed the affected portion of the public way on an average of 33 1/2 days a year.

In refusing to endorse the plan, the Planning Board stated that (1) the existence of the flood easement meant that the public way did not provide adequate access for emergency vehicles to the proposed lots and (2) alternative access to the proposed lots through an abutting town would involve excessive response time. A Superior Court judge decided that the plaintiff was entitled to an ANR endorsement. The Planning Board appealed and on its own motion, the SJC transferred the appeal to the High Court from the Appeals Court.

LONG POND ESTATES LTD V. PLANNING BOARD OF STURBRIDGE

406 Mass. 253 (1989)

Excerpts:

Lynch, J. . . .

> . . . As authority for its inquiry into the adequacy of Champeaux Road as a public way, the planning board cites cases upholding denials of ANR endorsements based on restrictions on access to the public roads leading to the proposed developments. See McCarthy v. Planning Bd. of Edgartown, 381 Mass. 86 (1980) (limited access highway); Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144 (1983) (planned yet unconstructed highway); Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979) (limited access highway).
>
> The periodic flooding of a portion of the public way that exists here does not bring this case within the ambient of McCarthy, Perry, or Hrenchuk. "[P]lanning boards are authorized to withhold 'ANR' endorsements in those unusual situations where the 'access implied by [the] frontage is . . . illusory in fact.' " Corcoran v. Planning Bd. of Sudbury, ante 248, 251 (1989), quoting Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). Here, adequate access to the proposed lots is available via ways in a neighboring town during the time when a portion of Champeaux Road is closed due to flooding. Moreover, the distance that Sturbridge emergency vehicles must travel to reach the proposed lots using the alternative route is no greater than the distance they must travel to reach numerous other points within Sturbridge. Thus the undisputed facts disclose that the lots meet the literal requirements for an ANR endorsement and that access is available at all times, albeit occasionally on ways of a neighboring town. For these reasons, we find that the planning board exceeded its authority . . . in refusing to endorse the plaintiff's plan "approval under the subdivision control law not required."

The Long Pond decision adds a variation to the practical access theory in that the public way access to a lot can be temporarily unavailable provided that adequate access for emergency vehicles exists on another way.

ADEQUACY OF ACCESS

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

The court was first confronted with the issue of the adequacy of access from the way to the lot in Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973). Certain lots shown on a plan were connected to a public way by a long, narrow strip of land that flared out at the street to satisfy the frontage requirement of the zoning bylaw. The Planning Board had originally endorsed the plan as "Approval Not Required" (ANR) but at a later date rescinded their endorsement. Cassani argued that the Planning Board was required as a matter of law to endorse the plan. The Planning Board took the position that the lots were merely connected to the way but did not front on the public way to comply with the frontage requirement of the zoning bylaw. Since meaningful, adequate frontage did not exist, the Planning Board argued that the plan constituted a subdivision that required its approval under the Subdivision Control Law.

Because the court found that a Planning Board cannot rescind an ANR endorsement, it did not reach the substantive issue of whether the Planning Board acted erroneously in originally endorsing the plan. However, the court did express a certain degree of sympathy towards the Planning Board on the question of adequate access when it noted:

> We do not disagree with the contention of the planning board that it ought to have the power to rescind a determination under Section 81P that approval is not required in order better to protect the public interest in preventing subdivisions without adequate provision for access, sanitation and utilities. But if such a power is to be found, it must be found in the Subdivision Control Law, which is a "comprehensive statutory scheme" . . . and not in our personal notations of sound policy. As the statute is clear, we are not at liberty to interpose such notions, but must apply the statute as the Legislature wrote it.

It was not until 1978 that the court would again have the opportunity to consider the adequacy of access from the way 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.

One lot had a neck which was 1,185 feet long having seven changes of direction before it reached Madaket Road which was a paved road and in good condition. The neck narrowed at one stage to seven feet. Another lot had a neck which was 1,160 feet long having six changes of direction before it reached Cambridge Street at a twelve degree angle. Cambridge Street was unpaved and in relatively poor condition. Of all the lots shown on the plan, the necks ranged from forty to 1,185 feet in length. Twenty-nine necks were over 300 feet, sixteen were over 500 feet, and five were over 1,000 feet. Thirty-two necks changed direction twice or more while nine changed three times, one four times, five five times, one six times, and two seven times. Three necks narrowed to ten feet or less and six to not more than 12 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 Court, on its own initiative, ordered direct appellate review.

In deciding the case, the court looked at the purposes of the Subdivision Control Law as stated in Section 81M and noted that "a principal object of the law is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." 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 as contemplated by the Subdivision Control Law.

GIFFORD V. PLANNING BOARD OF NANTUCKET

376 Mass. 801 (1978)

Excerpts

Kaplan, J. . . .

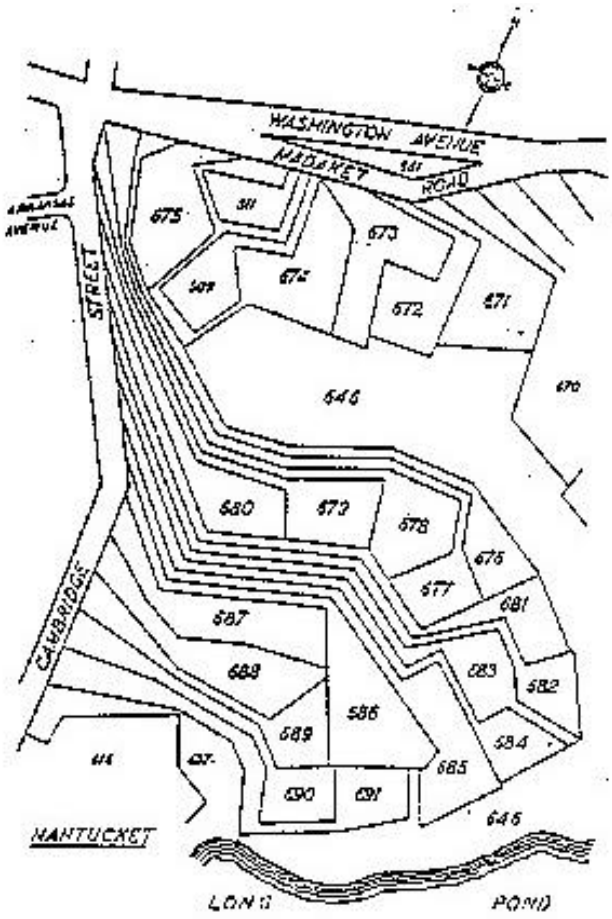
> Where our statute relieves certain divisions of land of regulation and approval by a planning board ("approval . . .not required"), it is because the vital access is reasonably guaranteed in another manner. The guaranty is expressed in Sections 81L and 81P of the statute in terms of a requirement of sufficient frontage for each lot on a public way. In the ordinary case, lots having such a frontage are fully accessible, and as the developer does not contemplate the construction of additional access routes, there is no need for supervision by the planning board on that score. Conversely, where the lots shown on a plan bordered on a road "not in any practical sense . . . in existence as a way," and thus incapable of affording suitable access to the lots, we insisted that the

relevant plan was a subdivision under the then current law. Rettig v. Planning Board of Rowley, 332 Mass. 476, 481 (1955).

If the purpose of a frontage requirement is to make certain that each lot "may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare" . . ., then in the plan at bar frontage fails conspicuously to perform its intended purpose, and the master and the judge were right to see the plan as an attempted evasion of the duty to comply with the regulations of the planning board. The measure of the case was indicated by the master (and by counsel at argument before us) in the observation that the developer would ultimately have to join some of the necks to provide ways from lots to the public way: but that is an indication that we have here a subdivision requiring antecedent approval.

We stress that we are concerned here with a quite exceptional case: a plan so delineated that within its provisions the main portions of some of the lots are practically inaccessible from their respective borders on a public way. To hold that such a plan needs approval is not to interfere with the sound application of the "approval not required" technique.

Gifford v. Planning Board of Nantucket



The Gifford decision was a 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 that dealt with this requirement. Hrenchuk 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 Hrenchuk 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. The court also noted that the following elements must be met before a plan can receive an ANR endorsement from the Planning Board.

1. The lots shown on the plan front on one of the three types of ways specified in Chapter 41, Section 81L, MGL; and,

2. The Planning Board determines that adequate access, as contemplated by Chapter 41, Section 81M, MGL, otherwise exists.

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 that 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 Hrenchuk decisions, the court agreed with the Planning Board.

> We agree. Whatever the meaning of "frontage" in a particular town by-law, we have read the definition of "subdivision" to refer to "frontage" in terms of the statutory purpose, expressed in Section 81M, to provide "adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel.

Shortly after the McCarthy decision, the Appeals Court had an opportunity to further define the 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.

GALLITANO V. BOARD OF SURVEY & PLANNING OF WALTHAM

10 Mass. App. Ct. 269 (1980)

Excerpts:

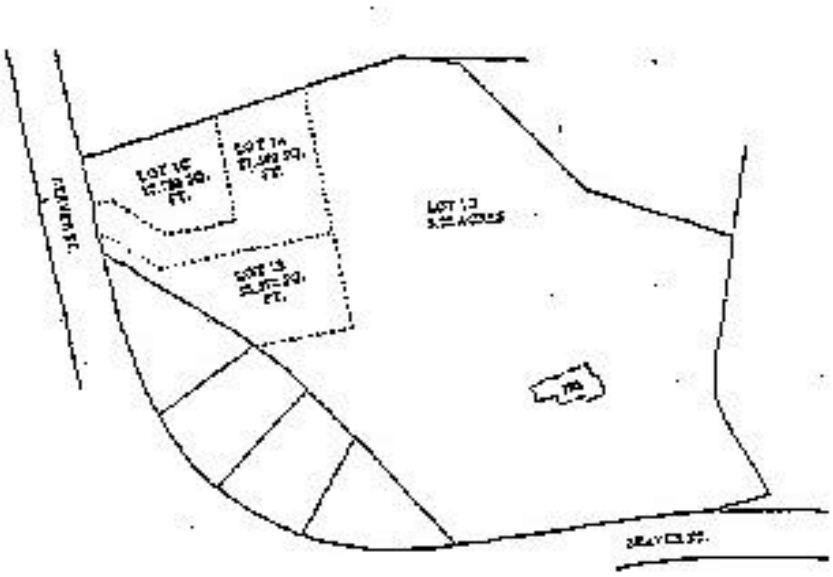
Armstrong, J. . . .

> It is obvious that all of the difficulties complained of are possible even in municipalities which require minimum frontage but which do not regulate the widths or angles of driveways and do not limit the setbacks of dwellings or require that they be visible from the street. It is equally obvious that a zoning ordinance which, like Waltham's, requires building lots to be one hundred feet wide but allows them to have as little as twenty feet of frontage contemplates that some degree of development will be permissible on back lots exempt from planning board control. Such is the choice made by a municipality which fails to expand the twenty-foot minimum frontage requirement of G. L. c. 41, Section 81L. If not a conscious choice, but merely an omission, it is probably one beyond the power of a planning board to rectify: for a planning board controls development principally through its regulations, . . . and it is powerless to pass regulations governing "the size, shape, width, [or] frontage . . . of lots." G. L. c. 41, Section 81Q, as amended through St. 1969, c. 884, Section 3.

> Gifford v. Planning Bd. of Nantucket, on which the board relies, involved a plan showing a division of a parcel into forty-six lots, each meeting the frontage and area requirements of Nantucket's zoning by-law, but only by means of long, narrow connector strips, some over a thousand feet long, some narrowing to as little as seven feet in places, some containing changes of direction at angles as sharp as twelve degrees. Holding that such a plan was "an attempted evasion"

and should be treated as one showing a subdivision, the court stated: "We stress that we are concerned here with a quite exceptional case: a plan so delineated that within its provisions the main portions of some of the lots are practically inaccessible from their respective borders on a public way." The plan before us is qualitatively different: access is not impossible or particularly difficult for ordinary vehicles, and such difficulty as there is seems implicit in a zoning scheme which allows frontage as narrow as twenty feet. To permit the board to treat such a plan as subject to their approval would be to confer on the board the power to control, without regulation, the frontage, width, and shape of lots. The Gifford case, if we read it correctly, was not intended thus to broaden the powers of planning boards. The Gifford case does preclude mere technical compliance with frontage requirements in a manner that renders impossible the vehicular access which frontage requirements are intended in part to ensure; it does not create a material issue of fact whenever municipal officials are of the opinion that vehicular access could be better provided for. As a rule of thumb, we would suggest that the Gifford case should not be read as applying to a plan, such as the one before us, in which the buildable portion of each lot is connected to the required frontage by a strip of land not narrower than the required frontage at any point, measured from that point to the nearest point of the opposite sideline.

Gallitano v. Board of Survey & Planning of Waltham



None of the previous cases dealt with a situation where the question of access centered on a topographical situation that might prevent access from the building site to the way. In DiCarlo v. Planning Board of Wayland, 10 Mass. App. Ct. 911 (1984), the court considered whether a steep slope which prevented practical access onto a public way was an appropriate matter for the Planning Board to consider.

In 1980, DiCarlo submitted a subdivision plan showing eight lots, numbered 1 through 8, which was rejected by the Planning Board. One reason given by the Planning Board for such denial was that the proposed grading plan would create a steep slope onto a public way which would prevent adequate access to two lots (lots 1 and 2) fronting on River Road, a public way. DiCarlo decided to create the same lots by filing two separate plans. The first plan, filed in 1981, showed lots 1,2,3, and 8. These lots all had the required frontage on River Road. No grading plan was required and the Planning Board endorsed the plan ANR. The second plan, filed in 1982, showed lots 4,5,6, and 7 as well as the lots that were shown on the ANR plan. It was noted on the plan, however, that the ANR lots were not part of the subdivision but were shown on the plan only for area identification purposes. This plan included a grading plan that would change the grade of lots 1 and 2 to deny those lots practical access to River Road. Unlike the original subdivision plan filed in 1980, this plan showed a 24 foot easement over lots 4 and 5 in favor of lots 1 and 2 to a proposed subdivision road.

A Superior Court judge, in examining the history of the development, considered all eight lots as one basic plan and found that the evidence presented and the 24 foot easement provided lots 1 and 2 with adequate access out of the subdivision. In deciding against DiCarlo, the Appeals Court expressed that Planning Boards must have the opportunity and are responsible for ensuring that adequate access exists to building lots.

DICARLO V. PLANNING BOARD OF WAYLAND

19 Mass. App. Ct. 911 (1984)

Excerpts:

> . . . We need not determine, however, whether the judge's finding was warranted, as we hold that in any event the question of access should, in the first instance, be determined by the board. . . . the submissions and the board's 1982 decision show that the question of access to lots 1 and 2 under the easement was never considered by the board.
>
> While the judge could easily conclude that the board looked at all eight lots in considering the proposed changes in grade, no similar inference can be drawn on the question of access. The 1980 plan did not contain the easements, and, in considering the plan . . ., there was no occasion for the board to look at access to lots 1 and 2. In light of G.L. c. 41, Section 81M, and the evidence, it is not a foregone conclusion that the board will find that the easement provides adequate access to lots 1 and 2. . . . .
>
> The plaintiff argues that a remand to the board is inappropriate as matter of law since lots 1 and 2 front on a public way. He claims that the stipulation that "the proposed grades of Lots 1 and 2 . . . would prevent practical access from Lot 1 and 2 to River Road" is irrelevant under Section 81L. Our cases, however, are to the contrary. "[A] principal object of the law [G. L. c. 41, Section 81M] is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." . . . We hold, therefore, that the plaintiff cannot rely on the River Road frontage to preclude a remand on the question of access.

Since the DiCarlo decision revolved around the submission of a subdivision plan, there was still no court case on point as to what extent a Planning Board could consider topographical issues when reviewing approval not required plans until the Massachusetts Appeals Court decided Corcoran v. Planning Board of Sudbury, 26 Mass. App. Ct. 1000 (1988). In that case, the Appeals Court ruled that a Planning Board could consider the presence of wetlands, which are subject to the Wetlands Protection Act, when reviewing an approval not required plan (See

Land Use Manager, Vol. 6, Edition No. 6, August, 1989). The Massachusetts Supreme Court granted further appellate review and reversed the decision of the Appeals Court.

Corcoran had submitted a six lot ANR plan to the Planning Board. Each lot had the required frontage on a public way. The ANR plan showed wetland areas between the buildable portions of some of the lots and the public way.

The plan also showed a 25 foot wide common driveway. Presumably, the proposed driveway would provide access to those lots which could not directly access onto the public way. The Planning Board refused to endorse the plan and Corcoran appealed.

The Planning Board argued that even though Corcoran's plan met the statutory requirements for an ANR endorsement, such technical compliance alone was not enough. The Planning Board claimed that Corcoran was not entitled to an endorsement because the presence of wetlands on the lots prevented practical access to buildable sites in the rear of several of the lots. The Planning Board also noted the judge's finding that not all of the lots could accommodate both a house and its accompanying septic system on dry areas between the road and the wetland.

The Planning Board maintained that this case was governed by Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978), and other decisions which have held that technical compliance with the frontage requirement of the Subdivision Control Law does not in itself entitle a plan to an ANR endorsement. The SJC disagreed that the rationale contained in Gifford and subsequent cases was applicable to Corcoran's plan.

CORCORAN V. PLANNING BOARD OF SUDBURY

406 Mass. 248 (1989)

Excerpts:

Lynch, J. . . .

> Here, by contrast, there is no question that the frontage provides adequate vehicular access to the lots. The presence of wetlands on the lots does not raise a question of access from the public way, but rather the extent to which interior wetlands can be used in connection with structures to be built on the lots. Wetlands use is a subject within the jurisdiction of two other public agencies, the conservation commission of Sudbury and the DEQE. The conservation commission and the DEQE are also authorized to determine the threshold question whether the wet areas are in fact wetlands subject to regulation. This determination involves questions of fact concerning the kind of vegetation in the area in question and whether the wetlands are significant.

> Gifford was not intended to broaden significantly the powers of planning boards. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269, 273 (1980). The guiding principle of Gifford and its progeny is that planning boards are authorized to withhold "ANR" endorsements in those unusual situations where the "access implied by [the] frontage is . . . illusory in fact." Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). We conclude that the existence of interior wetlands, that do not render access illusory, is unlike the presence of distinct physical impediments to threshold access or extreme lot configurations that do. That the use of the wetlands is, or must be, subject to the approval of other public agencies (G. L. c. 131, section 40) does not broaden the scope of the board's powers.
>
> The judgment of the Land Court is affirmed. The plaintiffs' plan should be endorsed "approval under the subdivision control law not required."

In Corcoran, the court decided that a Planning Board cannot deny an ANR endorsement in those instances where other permitting approvals may be necessary before practical access exists from the way to the building site. Therefore, the necessity of obtaining wetlands approval under G.L. 131, Section 40, a Title 5 permit, or insuring the availability of water pursuant to G.L. 40, Section 54 are not relevant considerations when reviewing an ANR plan. However, a Planning Board review can consider extreme topographical conditions as the Court qualified its decision when it noted that the existence of wetlands that do not render access illusory is a different situation than when there exists a distinct physical impediment or unusual lot configuration which would bar practical access.

The court again looked at the wetlands issue in Gates v. Planning Board of Dighton, 48 Mass. App. Ct. 394 (2000), and concluded that the Planning Board was correct in denying ANR endorsement because the existence of wetlands prevented practical, safe and efficient access to the buildable portions of the proposed lots. In this case, the land owner proposed to divide his parcel into twelve lots. One lot had conforming frontage on Milken Avenue, which was a public way. The remaining eleven lots had frontage on Tremont Street, which was also a public way.

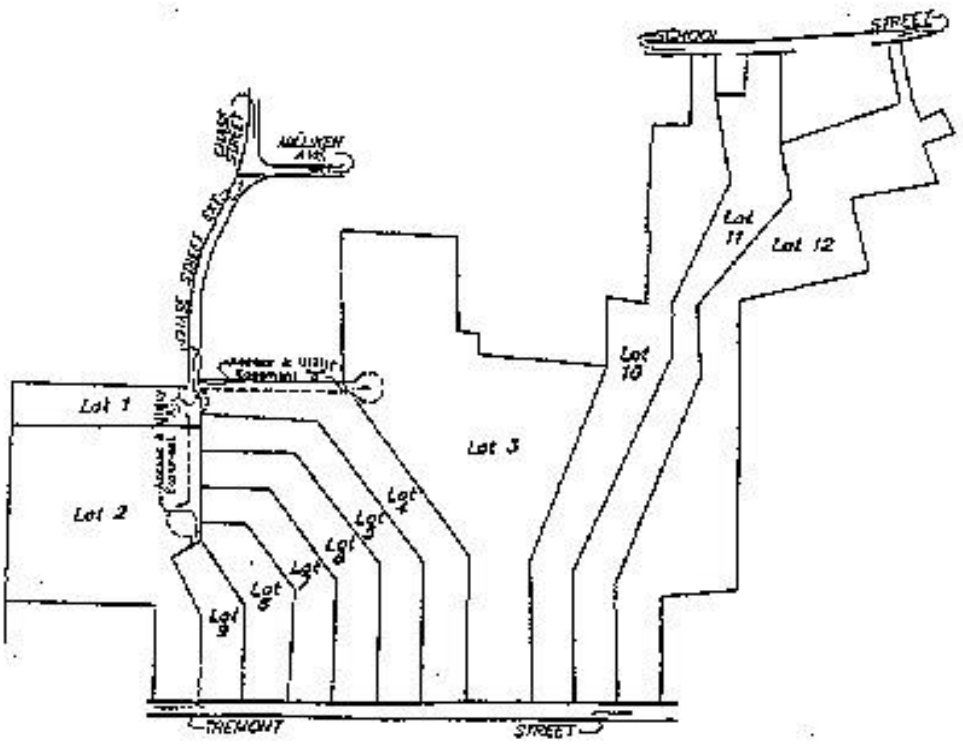
As to the eleven lots on Tremont Street, the front land was wetlands and unsuitable for residential construction. Leaving aside practicality and the necessity of other public approvals, the developer's engineer said access from Tremont Street was theoretically possible. To reach the portions of the lots from Tremont Street where a house could be built, it would be necessary to build driveways on bridges over the wetlands. In the case of six of those lots the bridges would be about 2,000 feet long.

The developer's professional engineer conceded at trial that approaching the lots from Tremont Street would be an "environmental disaster" as well as an economic calamity. His plan showed alternate access from other points and at those points the frontage was less than the 175 feet required under the Dighton zoning bylaw. Access for eight lots was to be achieved by

constructing an extension to Chase Street, which was an existing private way. A common driveway was also proposed with a cul-de-sac for a vehicular turn around.

The court gently reminded the developer that the object of the Subdivision Control Law and the task of the Planning Board is to ensure, by regulating their design and construction, safe and efficient roadways to lots that do not otherwise have safe and efficient access to an existing public roadway. In upholding the ANR denial, the court concluded that the proposed Chase Street extension and common driveways constituted a road system which required approval by the Planning Board under the Subdivision Control Law.

Gates v. Planning Board of Dighton



Is a plan be entitled to ANR endorsement if a distinct physical impediment exists that prevents practical access but can be removed at a later date so that each lot would have practical access onto a public way? The court, in Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), shed some light on this issue.

Poulos owned a parcel of land that 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.

POULOS v. PLANNING BOARD OF BRAINTREE
413 Mass. 359 (1992)

Excerpts:

O'Connor, J. ...

> Planning boards may properly withhold the type of endorsement sought here when the "access implied by the frontage is...illusory in fact." ... The plaintiff argues that the access is not illusory in this case because, as the judge determined, the plaintiff could regrade the slope, and regrading would result in the DPW's removal of the guardrail, which would no longer be needed. The plaintiff also argues that, subject to reasonable restrictions, he has a common law right of access from the public way to his abutting lots that would require the DPW to remove the guardrail if it were not to do so voluntarily. ...
>
> We conclude, as did the Appeals Court, that c. 41, §§ 81L & 81M, read together, do not permit the endorsement sought by the plaintiff in the absence of **present** adequate access from the public way to each of the plaintiff's lots. It is not enough that the plaintiff proposes to regrade the land in a manner satisfactory to the DPW and that the DPW may respond by removing the guardrail. In an analogous situation, the Appeals Court upheld the refusal of a planning board to issue an "approval not required" endorsement where the public way shown on the plan did not yet exist, even though the town had taken

the land for future construction of a public street. The Appeals Court concluded that public ways must in fact exist on the ground" to satisfy the adequate access standard of c. 41, § 81M. Perry v. Planning Bd. of Nantucket, supra at 146, 150-151. While Perry dealt with nonexistent public ways, and this case deals with nonexistent ways of access, the principle is the same. There should be no endorsement in the absence of existing ways of access.

In addition, we reject the argument, based on Anzalone v. Metropolitan Dist. Comm'n, supra, that, at least after regrading, the plaintiff would have a common law right of access that would entitle him to the requested endorsement. It is not a right of access, but rather actual access, that counts. In Fox v. Planning Bd. of Milton, supra at 572-573, the Appeals Court held that abutting lots had adequate access to a Metropolitan District Commission (MDC) parkway, not merely because the abutter possessed a common law right of access, but because, in addition, the MDC had granted the landowner a permit for a common driveway to run across an MDC green belt bordering the parkway. In the present case, the plaintiff has not received such an approval

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Relying on Poulos, the Lincoln Planning Board denied an ANR endorsement in Hobbs Brook Farm Property Company Limited Partnership v. Planning Board of Lincoln, 48 Mass. App. Ct. 403 (2000). Hobbs Brook submitted a five lot ANR plan to the Planning Board. Each lot had at least the 120-foot minimum frontage required by the Lincoln zoning bylaw although the frontage on four lots was partially obstructed by a metal guardrail or concrete Jersey barrier. However, each lot had unobstructed access ranging from twenty-two feet to eighty-seven feet. Hobbs Brook needed curb cuts from the Massachusetts Department of Highways (MDH) because all the lots abutted State Route 2. MDH had advised Hobbs Brook that it would not issue a curb cut permit until the town approved the plan.

The Planning Board denied ANR endorsement on the grounds that (1) access to Route 2 was extraordinarily unsafe and dangerous; (2) the owner had not obtained curb cut permits from the MDH; and (3) guardrails, Jersey barriers, and Cape Cod berms might impede access along the full length of the 120 feet required as frontage. The court decided that none of the reasons stated by the Planning Board justified the denial of the plan. As to the guardrails, Jersey barriers, and Cape Cod berms, those partial obstructions did not have the physical barrier effect described Poulos. As previously noted, in that case there was a guardrail along almost the entire frontage of eight of the twelve lots shown on the plan. There was also a sharp drop in the grade of land behind the guardrail. Here, by comparison, the court concluded that adequate access existed to each of the lots.

> "It is simply not correct, as the planning board argues, that the entire frontage required for a lot under Lincoln's zoning by-law must be unobstructed. The by-law makes no such statement. Moreover, the purpose of the minimum frontage requirement in zoning codes deals with the spacing of buildings and the width of

lots as well as access. For purposes of access, it is worth remembering, twenty feet is the minimum frontage required by c.41, s. 81L, although we do not intimate that the MDH or other authority having jurisdiction may not impose a higher standard."

APPROVING ANR LOTS ON SUBDIVISION WAYS

Under the Subdivision Control Law, one method for amending a previously approved subdivision plan is found in MGL, Chapter 41, § 81W, which provides in part that:

> "A planning board, on its own motion or on the petition of any person interested, shall have the power to ... amend ... its approval of a plan of a subdivision ... . All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the ... amendment ... of such approval and to a plan which has been changed under this section."

Another method for amending a previously approved subdivision plan can be found in MGL, Chapter 41, § 81O which provides in part that:

> "After the approval of a plan ... the number, shape and size of the lots shown on a plan so approved may, from time to time, be changed without action by the board, provided every lot so changed still has frontage on a public way or way shown on a plan approved in accordance with the subdivision control law for at least such distance, if any, as is then required ... and if no distance is so required, has such frontage of at least twenty feet."

The process for amending a subdivision plan pursuant to § 81W is the same process that a Planning Board must follow when approving the original subdivision plan. Rather than going through the public hearing process, Section 81O allows a developer/landowner, as a matter of right, to change the number, shape and size of lots shown on a previously approved subdivision plan. A developer/landowner may also submit an ANR plan when changing the number, shape, and size of lots shown on a previously approved subdivision plan. What must a Planning Board consider when reviewing an ANR plan where the proposed lots abut a way shown on a plan that has been previously approved and endorsed by the Planning Board pursuant to the Subdivision Control Law ?

Before endorsing an ANR plan where the lots shown on a plan abut such a way, the court has determined that a Planning Board should consider the following:

1. Are the approved ways built or is there a performance guarantee in place, as required by MGL, Chapter 41, § 81U, that they will be built?

2. Was there a condition placed on the previously approved subdivision plan which has not been met or which would prevent further subdivision of the land?

MGL, Chapter 41, § 81U provides several techniques for enforcement of the Subdivision Control Law. A Planning Board, before endorsing its approval of a subdivision plan, is required to obtain an adequate performance guarantee to insure that the construction of the ways and the installation of municipal services will be completed in accordance with the rules and regulations of the Planning Board. The court has decided that a plan is not entitled to an ANR endorsement unless the previously approved subdivision way shown on the ANR plan has been built or there is a performance guarantee assuring that the way will be built.

In Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980), the Board of Selectmen, acting as an interim Planning Board, approved a 26 lot subdivision. The Selectmen did not specify any construction standards for the proposed ways, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee. Eighteen years after the approval of the subdivision plan by the Board of Selectmen, Richard submitted an ANR plan to the Planning Board. During the 18 year period, the locus shown on the ANR plan had been the site of gravel excavation so that it was now 25 feet below the grade of surrounding land. The Planning Board refused to endorse the plan. The central issue before the court was whether the lots shown on the ANR plan had sufficient frontage on ways that had been previously approved in accordance with the Subdivision Control Law. The court found that to be entitled to the ANR endorsement, when a plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards. Since there was no performance guarantee, Richard's plan was not entitled to ANR endorsement.

A Planning Board, when approving a subdivision plan, has the authority to impose reasonable conditions. A Planning Board may impose a condition which can result in the automatic rescission of a subdivision plan. A Planning Board may also impose a condition which can limit the ability of a developer/landowner to further subdivide the land shown on the plan without modifying or rescinding the limiting condition through the § 81W process. Therefore, in reviewing an ANR plan where the proposed lots abut a previously approved subdivision way, a Planning Board should check for the following:

1. Has the previously approved subdivision plan expired for failure to meet a specific condition?

2. Does the previously approved subdivision plan contain a condition which prevents the land shown on the plan from being further subdivided?

The issue of an automatic rescission of a previously approved subdivision plan was discussed in Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971). In that case, the Planning Board approved a subdivision plan on the condition that the developer

complete all roads and municipal services within a specified period of time or else the Planning Board's approval would automatically be rescinded. The Board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant which contained the following language:

> The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two years from date. Failure to so complete shall automatically rescind approval of the plan.

After the expiration of the two-year time period, the landowner submitted a plan to the Planning Board requesting an "approval not required" endorsement. The plan showed a portion of the lots that were shown on the previously approved definitive plan which abutted a way which was also shown on the plan. The landowner's position was that he was entitled to an ANR endorsement since the lots shown on this new plan abutted a way that had been previously approved by the Planning Board pursuant to the Subdivision Control Law. The Planning Board denied endorsement. The court found that the automatic rescission condition was consistent with the purposes of the Subdivision Control Law and that the Planning Board could rely on that condition when considering whether to endorse a plan "approval not required". Since the ways and installation of municipal services had not been completed in accordance with the terms of the conditional approval, the court held that the plan before the Board constituted a "subdivision" and was not entitled to the ANR endorsement. A similar result was also reached in Campanelli, Inc. v. Planning Board of Ipswich, 358 Mass. 798 (1970).

In SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), the Planning Board approved a definitive subdivision plan with the notation stating that "All building units will be detached as covenanted" and a covenant to that effect was executed. At a later date, the landowner submitted a plan for ANR endorsement showing building lots abutting ways that were shown on the previously approved subdivision plan. The lots shown on the ANR plan were of such a size to accommodate a multi-family housing development. The Planning Board denied ANR endorsement.

SMI INVESTORS (DELAWARE), INC. V. PLANNING BOARD OF TISBURY
18 Mass. App. Ct. 408 (1984)

Excerpts:

Armstrong, J. ...

> ... the 1973 [definitive] plan was approved subject to a condition that all dwellings erected on the lots shown thereon be detached. The imposition of that condition was not appealed, and its propriety is not now before us. ...The 1981 [ANR] plan showed the same roads but altered lot lines. The plan also showed that the lots are designed to serve multi-family dwellings. The plaintiff asked the planning board to disregard the proposed use, but this it could not demand as of right.
>
> ... The application for the § 81P endorsement was necessarily predicated on the approval of the 1973 plan, which remained contingent on acceptance of the condition. As the 1981 plan does not contemplate compliance with the condition, it is, in effect, a new plan, necessitating independent approval. We need not consider whether the plaintiff might have been entitled to a § 81P endorsement if each lot shown on the plan had been expressly made subject to the condition on the 1973 plan ... The record in the case before us makes clear that the plaintiff did not seek such a qualified endorsement ... .
>
> It follows that the judge did not err in ruling that the planning board was correct in refusing the § 81P endorsement.

In Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993), the court held that the Planning Board did not modify or waive a condition imposed on a previously approved subdivision plan by endorsing a subsequent plan "approval not required." In Hamilton, the Beverly Planning Board approved a five lot definitive plan on the stated condition that "This subdivision is limited to five (5) lots unless a new plan is submitted to the Beverly Planning Board which meets their full standards and approval." Seven years later, Hamilton, an owner of one of the lots shown on the 1982 definitive plan, submitted an ANR plan to the Planning Board. He wished to divide his lot into two lots which would meet the current lot area and lot frontage requirements of the Beverly Zoning Ordinance. The Planning Board endorsed the plan. Thereafter, Hamilton applied for a building permit to erect a single-family residence on one of the newly created lots. The Building Inspector was made aware of the condition noted on the 1982 definitive plan that had limited the subdivision to five lots. On the strength of that limitation, the Building Inspector declined to issue the building permit. On appeal, Hamilton argued that the "approval not required" endorsement superseded the limiting condition imposed on the 1982 definitive plan.

HAMILTON V. PLANNING BOARD OF BEVERLY

35 Mass. App. Ct. 386 (1993)

Excerpts:

Kass, J. ...

> Approval of a subdivision plan involves procedures, including a public hearing (G. L. c. 41, § 81T) as well as open sessions of the planning board at which the proposed division of a tract of land into smaller lots is carefully reviewed so as to meet design criteria and certain policy objectives relating to streets (with emphasis on maximizing traffic convenience and minimizing traffic congestion), drainage, waste disposal, catch basins, curbs, access to surrounding streets, accommodation to fire protection and policing needs, utility services, street lighting, and protecting access to sunlight for solar energy. ...
>
> The number of lots in a subdivision has a bearing on those considerations. What might be an adequate access road or waste disposal system for five lots is not necessarily adequate for seven or ten. For that reason a planning board may limit the number of lots in a subdivision. ... If it does so, the board must, as here, note the lot number limitation on the approved plan, which becomes a matter of record. Otherwise, under G.L. c. 41, § 81O, the number, shape and size of the lots shown on a plan may be changed as a matter of right, provided every lot still has frontage that meets the minimum requirements of the city or town in which the land is located.
>
> Under G.L. c. 41, § 81W, a person having a cognizable interest may petition the planning board for modification of an approved subdivision plan. Action by a planning board on such a petition for modification incorporates all the procedures attendant on original approval, including, therefore, a public hearing. Section 81W also provides that no modification may affect the lots in the original subdivision which have been sold or mortgaged.
>
> The provisions built into §§ 81T and 81W, which are designed to protect purchasers of lots in a subdivision and the larger public, would be altogether - and easily - subverted if an approved plan could be altered by the simple expedient of procuring a § 81P "approval not required" endorsement. All that is required to obtain such an endorsement is presentation to a planning board of a plan that shows lots fronting on a public street or its functional equivalent, see G.L. c. 41, § 81L, with area and frontage that meet local municipal requirements. The endorsement of such plan is a routine act, ministerial in character, and constitutes an attestation of compliance neither with zoning requirements nor subdivision conditions. ... Restrictions in an approved subdivision plan are binding on a building inspector. ... .

> The limited meaning which may be ascribed to a § 81P endorsement and the ministerial nature of the endorsement defeat the argument of the plaintiffs that the endorsement constituted a waiver of the five-lots limitation - prescinding from the question whether the board, for reasons we have discussed, could waive the limitation, thus altering the plan, without a public hearing. ...

As Judge Kass noted in Hamilton, restrictions in an approved subdivision plan are binding on a building official. Specifically, MGL, Chapter 41, § 81Y provides that a building inspector cannot issue a building permit until satisfied that:

> "... the lot on which the building is to be erected is not within a subdivision, or that a way furnishing the access to such lot as required by the subdivision control law is shown on a plan recorded or entitled to be recorded ... and that any condition endorsed thereon limiting the right to erect or maintain buildings on such lot have been satisfied, or waived by the planning board, ...

MGL, Chapter 41, § 81P further provides that a statement may be placed on an ANR plan indicating the reason why approval is not required under the Subdivision Control Law. As was noted by the court in SMI Investors, if a Planning Board believes its endorsement may tend to mislead buyers of lots shown on a plan, they may exercise their powers in a way that protects persons who will rely on the endorsement. Before endorsing a plan "approval not required" where the proposed lots abut a way shown on a previously approved and endorsed subdivision plan, the Planning Board should review the subdivision plan to see if there is any limiting condition which would prevent the land shown on the subdivision plan from being further subdivided. If no such condition exists but there were other conditions imposed, it may be prudent to place a notation on the ANR plan indicating that the lots shown on the plan abut a way which has been conditionally approved by the Planning Board pursuant to the Subdivision Control Law. Hopefully, this notation will alert a building official to review the previously approved subdivision plan to determine if there is any condition which would prevent the issuance of a building permit. If the subdivision way shown on the ANR plan has not been constructed, the Planning Board should check to make sure that there exists a performance guarantee as required by the Subdivision Control Law. If the construction of such way is secured by a covenant, the Planning Board may want to consider placing a statement on the ANR plan which will alert a future buyer of any lot shown on the plan to the existence of such a covenant.

A Planning Board should check with municipal counsel if there is any question concerning the applicability of the covenant to the lots shown on the ANR plan.

APPROVING ANR LOTS ON EXISTING ADEQUATE WAYS

In determining whether a proposed building lot has adequate frontage for the purposes of the Subdivision Control Law, MGL, Chapter 41, § 81L provides that the proposed building lots must front on one of three types of ways:

> (a) a public way or a way which the municipal clerk certifies is maintained and used as a public way,
>
> (b) a way shown on a plan approved and endorsed in accordance with the Subdivision Control Law, or
>
> (c) a way in existence when the Subdivision Control Law took effect in the municipality having, in the opinion of the Planning Board, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use and for the installation of municipal services to serve such use.

In determining whether a lot has adequate frontage for zoning purposes, many zoning bylaws contain a definition of "street" or "way" which includes the types of ways defined in the Subdivision Control Law. The fact that a lot may abut a way which is defined in the Subdivision Control Law does not mean the lot complies with the frontage requirement of the local zoning bylaw.

Where a zoning bylaw allows lot frontage to be measured along a way which in the opinion of the Planning Board has sufficient width, suitable grades, and adequate construction for vehicular traffic, there must be a specific determination by the Planning Board that the way meets such criteria. In Corrigan v. Board of Appeals of Brewster, 35 Mass. App. Ct. 514 (1993), the court determined that a lot abutting such a way does not have zoning frontage unless the Planning Board has specifically made that determination.

In Corrigan, the Planning Board had given an ANR endorsement to a plan of land showing the lot in question. At the direction of the Land Court, the Planning Board noted on the ANR plan that "No determination of compliance with zoning requirements has been made or is intended." At a later date, the Building Inspector denied a building permit because the lot lacked frontage on a "street" as defined in the Brewster Zoning Bylaw. The Brewster Zoning Bylaw defined a "street" in the following way:

> (i) a way over twenty-four feet in width which is dedicated to public use by any lawful procedure;
>
> (ii) a way which the town clerk certifies is maintained as a public way;
>
> (iii) a way shown on an approved subdivision plan; and

> (iv) a way having in the opinion of the Brewster Planning Board sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed uses of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.

The Building Inspector denied the building permit because the lot did not abut a public way which is over twenty-four feet in width as noted in (i) above. The Building Inspector's decision did not discuss whether the definition of street as defined in (iv) above was applicable to the lot in question.

On appeal to the court, Corrigan argued that the previous ANR endorsement by the Planning Board constituted a zoning determination by the Planning Board that the way shown on the plan had sufficient width, suitable grades, and adequate construction as required by the Brewster Zoning Bylaw. Corrigan's argument was that the Planning Board could not have given its ANR endorsement unless the Board determined that the lots shown on the plan fronted on one of the three types of ways specified in the Subdivision Control Law. Since the way shown on the ANR plan was not (a) a public way or, (b) a way shown on a plan approved and endorsed by the Planning Board in accordance with the Subdivision Control Law, Corrigan concluded that the Planning Board must have determined that the way was in existence prior to the Subdivision Control Law and had suitable width and grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land and that determination also constituted the favorable determination by the Planning Board required by the Brewster Zoning Bylaw.

CORRIGAN V. BOARD OF APPEALS OF BREWSTER

35 Mass. App. Ct. 514 (1993)

Excerpts:

Gillerman, J. ...

> The argument is appealing. If the Planning Board has in fact decided that a lot has adequate frontage on a "street" under § 81L of the Subdivision Control Law because it is adequate in all material respects for vehicular traffic, then it is wasteful, if not silly, not to extend that decision to the resolution of the same issue by the same board applying the same criteria under the Brewster zoning by-law.

Previous decisions of this court, nevertheless, have repeatedly pointed out that a § 81P endorsement does not give a lot any standing under the zoning by-law. See Smalley v. Planning Bd. of Harwich, 10 Mass. App. Ct. 599, 603 (1980). There we said, "In acting under § 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision."... Smalley, however, involved a lot with less than the minimum area requirements, ... and we rightly rejected the argument that a § 81P endorsement would constitute a decision that the unrelated requirements of the Harwich zoning code had been met. ...

Another decision of major importance is Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802 (1981). There we held that § 81L is not merely definitional, but imposes a substantive requirement that each lot have frontage on a "street" for the distance specified in the zoning by-law, or absent such specification, twenty feet, and that § 81R gives the planning board the power to waive strict compliance with the frontage requirements of § 81L, whether that requirement is twenty feet or the distance specified in the zoning by-law . We also held in that case that the waiver by the planning board under § 81R was valid only for the purposes of the Subdivision Control Law and did not operate as a variance by the zoning board of appeals under the different and highly restrictive criteria of G.L. c. 40A, § 10. ... . Arrigo, too, is different from the present case: there the criteria for the grant of the § 81R waiver by the planning board were different from the criteria for the granting of a § 10 variance, ... In Arrigo, there was no reason whatsoever to make the action of one agency binding upon the other.

Here, unlike Smalley and Arrigo, the subject to be regulated is the same for both the Subdivision Control Law and the Brewster zoning by-law (the requirement that the lot have frontage on a "street"), the criteria for a "street" are the same for both (a determination of the adequacy of the way for vehicular traffic), and the agency empowered to make that determination is the same (the Brewster planning board). The difficulty, however, is that the judge found - and we find nothing to the contrary in the record before us - that the Brewster planning board never in fact determined that the way relied upon by the plaintiffs was a "street" within the meaning of § 81L; the record is simply silent as to the route followed by the board in reaching its decision to issue a § 81P endorsement. Given the variety of possible explanations, we should not infer what the planning board did - as the plaintiffs would have us do - and certainly we will not guess as to the board's reasoning.

The last sentence of MGL, Chapter 41, § 81P provides that a statement may be placed on an ANR plan indicating the reason why approval under the Subdivision Control Law is not required. Placing a

statement on an ANR plan stating the reason for endorsement takes on added importance where a local zoning bylaw authorizes frontage to be measured on a "street" or "way" which in the opinion of the Planning Board provides suitable access. As was noted in Corrigan, in such situations a record must exist that clearly indicates that the Planning Board has made such a determination. Before endorsing such a plan, we would suggest that a Planning Board make a determination that the way shown on the plan provides suitable access and then place a statement on the ANR plan indicating that they have made such a determination.

DETERMINING ANR ENDORSEMENT

In determining whether a plan is entitled to be endorsed "approval under the Subdivision Control Law not required," a Planning Board should ask the following questions:

1. Do the proposed lots shown on the plan front on one of the following types of ways?
   A. A public way or a way which the municipal clerk certifies is maintained and used as a public way.

   Case Notes: Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979) (way must be used and maintained as a public way, not just maintained). Spalke v. Board of Appeals of Plymouth, 7 Mass. App. Ct. 683 (1979) (Atlantic Ocean is not a public way for purposes of the Subdivision Control Law).

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

   Case Notes: Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980) (paper street shown on plan approved by selectmen before subdivision control in community, is not a way previously approved and endorsed under the Subdivision Control Law). Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971) (where condition of approved definitive plan required that construction of ways shown on such plan be completed in two years or definitive plan is automatically rescinded, such ways are not ways approved in accordance with the Subdivision Control Law if two year condition is not met). SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984) (condition of original subdivision plan prevented subsequent plan showing a division of land from obtaining ANR endorsement). Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993) (landowner not entitled to building permit for ANR lot where lot was created in violation of a condition imposed on a subdivision plan which prevented the land shown on subdivision plan from being further subdivided to create additional lots).

   C. A way in existence when the Subdivision Control Law took effect in the municipality, which in the opinion of the Planning Board is suitable for the proposed use of the lots.

   Case Notes: Rettig v. Planning Board of Rowley, 332 Mass. 476 (1955) (ways which were impassable were not adequate for access and subdivision approval was required).

2. Do the proposed lots shown on the plan meet the minimum frontage requirements of the local zoning ordinance or bylaw?

   Case Notes: Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980) (if the local zoning ordinance or bylaw does not specify any minimum frontage requirement, then the proposed lots must have a minimum of 20 feet of frontage in order to be entitled to the ANR endorsement).

3. Can each lot access onto the way from the frontage shown on the plan?
   Case Notes: Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979) (limited access highway does not provide frontage and access for purposes of ANR endorsement). McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980) (driveway requirement deprived lots shown on plan of vehicular access to the public way so the lots did not have frontage for the purposes of ANR endorsement).

4. Does the way on which the proposed lots front provide adequate access?
   Case Notes: Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983) (a paper street, even though a public way, does not provide adequate access as the Subdivision Control Law requires that a public way be constructed on the ground). Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987) (a public way provides adequate access if it is paved, comparable to other ways in the area, and is suitable to accommodate motor vehicles and public safety equipment). Sturdy v. Planning Board of Hingham, 32 Mass. App. Ct. 72 (1992) (deficiencies in a public way are insufficient ground to deny ANR endorsement). Long Pond Estates Ltd v. Planning Board of Sturbridge, 406 Mass. 253 (1989) (a public way provided adequate access though temporarily closed due to flooding where adequate access for emergency vehicles existed on another way).

5. Does each lot have practical access from the way to the buildable portion of the lot?
   Case Notes: Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978) (a plan showing lots connected to a public way with long necks narrowing to such a width so as not to provide adequate access was not entitled to an ANR endorsement). Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980) (as a rule of thumb, practical access exists where 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). Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989) (where no physical impediments affect access from the road to the buildable portion of a lot, practical access exists even though several lots would require regulatory approval for alteration of a wetland). Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992) (existence of a guardrail

and downward slope constituted physical impediments so that practical access did not exist to permit ANR endorsement).

ENDORSING ANR PLANS SHOWING ZONING VIOLATIONS

Frequently, Planning Boards are presented with a plan to be endorsed "approval under the Subdivision Control Law not required" where the plan shows a division of land into proposed lots in which:

a. all the proposed lots have the required zoning frontage either on public ways, previously approved ways or existing ways that are adequate in the board's opinion, but

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

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

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

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

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

The zoning bylaw required a minimum lot area of 20,000 square feet; thus, the smaller lot containing the residence did not conform to the minimum lot area requirement. The plan also indicated violations as to the minimum sideline requirements of the zoning bylaw. The Planning Board refused to endorse the plan and Smalley appealed to the Superior Court. The judge in Superior Court annulled the Planning

Board's decision to refuse endorsement, and the Planning Board appealed to the Massachusetts Appeals Court.

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

SMALLEY V. PLANNING BOARD OF HARWICH

10 Mass. App. Ct. 599 (1980)

Excerpts:

Goodman, J. . . .

> In view of the legislative history and judicial interpretation of Section 81P, we do not read that section to place the same duties and responsibilities on the board as it has when it is called upon to approve a subdivision. .... Provision for an endorsement that approval was not required first appeared in 1953, when Section 81P was enacted. Theretofore plans not requiring approval by a planning board could be lawfully recorded without reference to the planning board. The purpose of Section 81P, as explained by Mr. Philip Nichols on behalf of the sponsors of the 1953 legislation, was to alleviate the "difficulty ... encountered by registers of deeds in deciding whether a plan showing ways and lots could lawfully be recorded." ... This purpose is manifested in the insertion by St. 1953, c. 674, Section 7, of G.L. c. 41, Section 81X, which provided - as it now provides -- that; "No register of deeds shall record any plan showing a division of a tract of land into two or more lots, and ways, ... unless (1) such plan bears an endorsement of the Planning Board of such city or town that such plan has been approved by such planning board, ... or (2) such plan bears an endorsement ... as provided in [Section 81P,]," ....
>
> Thus, Section 81P was not intended to enlarge the substantive powers of the board but rather to provide a simple method to inform the register that the board was not concerned with the plan -- to "relieve certain divisions of land of regulation and approval by a planning board ('approval ... not required') ... because the vital access is reasonably guaranteed ...." .... Further, were we to accept the defendant's contention that a planning board has a responsibility with reference to zoning when making a

> Section 81P endorsement, it would imply a similar responsibility with reference to other considerations in Section 81M ..., not only "for insuring compliance with the applicable zoning [laws]" but "for securing adequate provision for water, sewerage, drainage, underground utility services," etc. A Section 81P endorsement is obviously not a declaration that these matters are in any way satisfactory to the planning board. In acting under Section 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision.
>
> Nor can we say that the recording of a plan showing a zoning violation, as this one does, can serve no legitimate purpose. The recording of a plan such as the plaintiff's may be preliminary to an attempt to obtain a variance, or to buy abutting land which would bring the lot into compliance, or even to sell the non-conforming lot to an abutter and in that way bring it into compliance. In any event, nothing that we say here in any way precludes the enforcement of the zoning by-law should the recording of her plan eventuate in a violation.
>
> We therefore affirm the judgment. In this connection we note that the lower court has retained jurisdiction though so far as appears nothing remains to be done but to place a Section 81P endorsement on the plan in accordance with the judgment...

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

Chapter 41, Section 81P, MGL, states, "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. See Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983). In Bloom v. Planning Board of Brookline, 346 Mass. 278, (1963), the court was presented with plan showing a division of a tract of land into two lots which should have been treated as a subdivision because one of the lots lacked the requisite frontage on a public way. However, it was determined that the Planning Board had properly given an ANR endorsement because a statement had been placed on the plan indicating that the deficient lot did not conform with the zoning bylaw.

If an applicant is unwilling to note on the plan those lots which are in noncompliance with the zoning bylaw, or are otherwise not available as building lots, we suggest that the Planning Board may properly add on the plan under its endorsement an explanation to the effect that the Planning Board has made no determination regarding zoning compliance. Since a Planning Board has no jurisdiction to pass on zoning matters, we would suggest that Planning Boards consider the following type of statement:

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

2. "No determination of compliance with zoning requirements has been made or intended."

3. "Planning Board endorsement under the Subdivision Control Law should not be construed as either an endorsement or an approval of Zoning Lot Area Requirements."

Hopefully, one of the above statements would have the affect of leading a purchaser to seek further advice. Of course, the Building Inspector should also be alerted.

ANR STATEMENTS AND ONE LOT PLANS

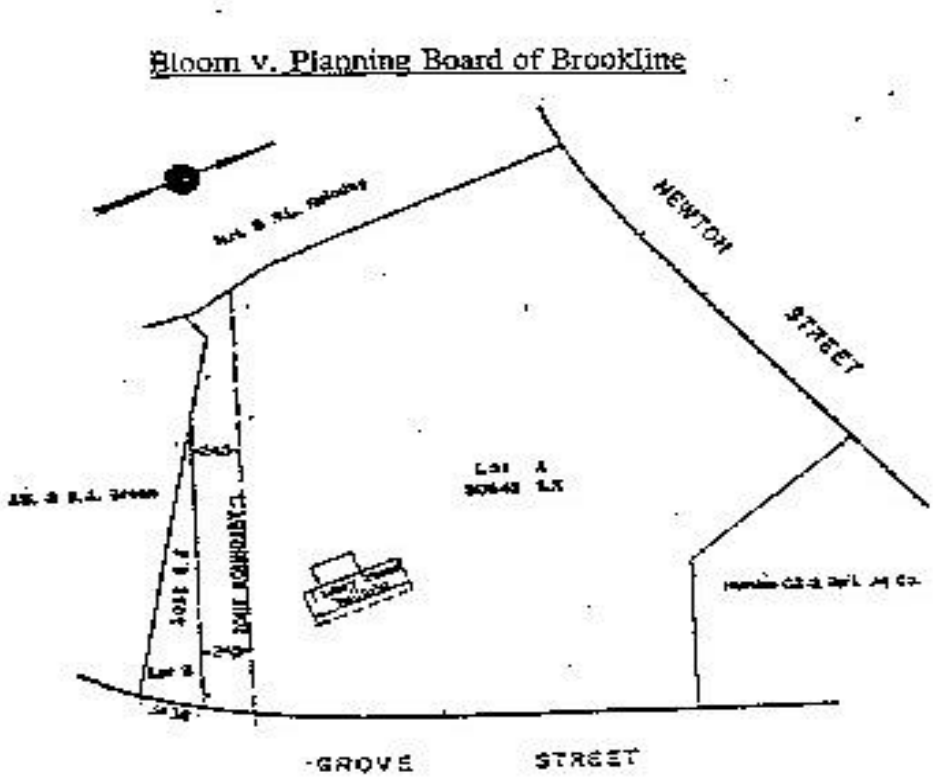
In Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963), the court reached the conclusion that a plan showing the division of a tract of land into two parcels where one parcel was clearly not available for building was not a division of land into two lots which would require Planning Board approval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



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 landowner 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:

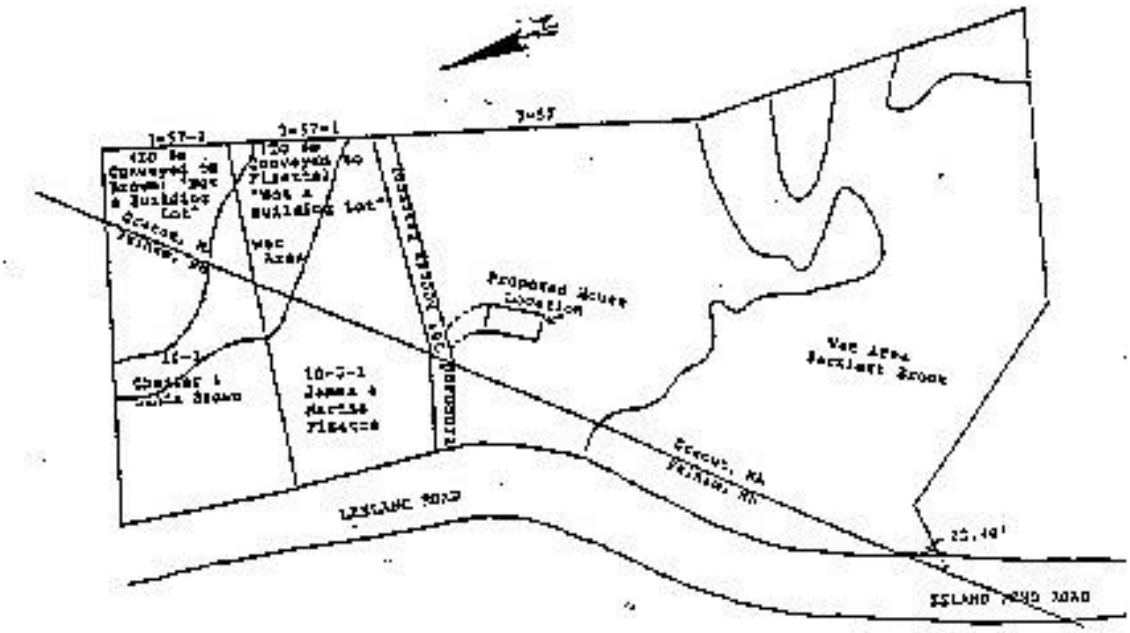
1. In determining whether to endorse a plan "approval not required," a Planning Board's judgment is confined to determining whether a plan shows a subdivision.

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



ZONING PROTECTIONS FOR ANR PLANS

The submission of a definitive plan or approval not required plan protects the land shown on such plans from future zoning changes for a specified period of time. A definitive plan is afforded an eight year zoning freeze, while an approval not required plan obtains a three year zoning protection period. A definitive plan protects the land shown on such plan from all changes to the zoning bylaw. An approval not required plan protects the land shown on such plan from future zoning changes related to use.

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

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

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

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

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

On March 5, 1970, Bellows Farms submitted a plan to the Planning Board requesting the Board's endorsement that "approval under the Subdivision Control Law is not required." Since the plan did not show a subdivision, the Planning Board made the requested endorsement. Under the zoning bylaw in effect when Bellows Farms submitted the plan, apartments were permitted as a matter of right. Also,

based upon the "Intensity Regulation Schedule" in effect at the time of submission, a maximum of 435 apartment units could be constructed on the land shown on such plan.

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

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

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

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

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

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

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

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

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

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

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

Excerpts:

Quirico, J. .. .

> ... when a plan requiring planning board approval under the subdivision control law is submitted to the board for such approval, "the land shown ... [on such plan] shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of submission of the plan first submitted while such plan or plans are being processed ... [and] said provisions ... shall govern the land shown on such approved definitive plan, for a period of seven [now eight] years from the date of endorsement of such approval ... ." This language giving the land shown on a plan involving a subdivision protection against all subsequent zoning amendments for a seven [now eight] year period is obviously much more broad than the language of ... [the Zoning Act] covering land shown on a plan not involving a subdivision. We have already noted that the ... [Zoning Act] gives protection for a period of three years against zoning amendments relating to "the use of the land," and that this means protection only against the elimination of, or reduction in, the kinds of uses which were permitted when the plan was submitted to the planning board. ...
>
> The 1970 amendment to the zoning by-law did not eliminate the erection of apartment units from the list of permitted uses in a general business district, nor did it change the

> classification of the locus from that type of district to any other. It changed the off street parking and loading requirements and the "Intensity Regulation Schedule" applicable to all new multiple dwelling units in a manner which, when applied to the locus, had the effect of reducing the maximum number of units which could be built on the locus from the previous 345 to 203, but that did not constitute or otherwise amount to a total or virtual prohibition of the use of the locus for apartment units. ...
>
> The 1971 amendment to the zoning by-law making the 1970 site plan approval provision applicable to the erection of multiple dwelling units makes no change in the kind of uses which the plaintiffs are permitted to make of the locus. It does not delegate to the board of selectmen any authority to withhold approval of those plans showing a proposed use of the locus for a purpose permitted by the by-law and other applicable legal provisions. Furthermore, the plaintiffs have submitted no site plan to the board of selectmen and we cannot be required to assume that the board will unreasonably or unlawfully withhold approval of such a plan when submitted. ...

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

The court further stressed this "practical prohibition" theory in Cape Ann Land Development Corp v. City of Gloucester, 371 Mass. 19 (1976), where the city amended its zoning ordinance so that no shopping center could be constructed unless a special permit was obtained from the City Council. When Cape Ann had submitted its approval not required plan, a shopping center was permitted as a matter of right. The issue before the court was whether Cape Ann was required to obtain a special permit, and if so required, whether the City Council had the discretionary right to deny the special permit. The court held that Cape Ann was required to obtain a special permit, and the City Council could deny the special permit if Cape Ann failed to comply with the zoning ordinance except for those provisions of the ordinance that practically prohibited the shopping center use. The court warned the City Council that they could not decline to grant a special permit on the basis that the land will be used for a shopping center. However, the City Council could impose reasonable conditions which would not amount to a practical prohibition of the use. 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 a rather muddled decision, the Massachusetts Appeals Court held in Perry v. Building Inspector of Nantucket, 4 Mass. App. Ct. 467 (1976), that a proposed single family condominium development was not entitled to a three year grandfather protection from increased dimensional and intensity requirements. However, the court found that in applying the principle
of the Bellows Farms case, relative to protection afforded by an approval not required plan for a use of land which is no longer authorized in the zoning district, a reasonable accommodation must be made by either applying the intensity regulation applicable to a related use within the zone or, alternatively, applying the intensity regulations which would apply to the protected use in a zoning district where that use is permitted. The court further noted that no hard and fast rule can be laid down, and reasonableness of the accommodation will depend on the facts of each case.

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

Although it is possible that the Legislature intended to afford freeze protection only to ANR plans which have been recorded, the court, in Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232 (1992) held that nothing in the Zoning Act requires recording of a plan as a prerequisite for a zoning freeze. A landowner applied for a special permit to use a portion of his property for a dental office. The zoning bylaw would have allowed such use, subject to certain restrictions, with a special permit. The special permit application was accompanied by a plan showing the locus with proposed alterations to an existing structure, parking spaces, and other related features. While the Zoning Board of Appeals was reviewing the special permit application, the Planning Board published notice of a public hearing to consider an amendment to the zoning bylaw which would have made the locus ineligible for the special permit. Solely for the purpose of obtaining a zoning freeze, the landowner submitted a plan to the Planning Board seeking ANR endorsement. The plan, which was not the same plan submitted with the special permit application, showed two lots. The plan did not show a subdivision and the Planning Board gave the plan an ANR endorsement. The plan was never recorded.

LONG V. BOARD OF APPEALS OF FALMOUTH

32 Mass. App. Ct. 232 (1992)

Excerpts:

Fine, J. ...

> ... Although it is possible that the Legislature intended to afford freeze protection only to ANR-endorsed plans which are recorded in due course, nothing in G.L. C. 40A § 6, sixth par., requires recording of the plan as a prerequisite for a freeze. Only submission to the planning board and endorsement are referred to in the statute as prerequisites. ... The only proper basis under the statute for withholding an endorsement is that the plan shows a subdivision as defined in G.L. c. 41, § 81L, and Price's plan clearly did not show a subdivision. Application of a subjective test of intent to determine whether to endorse a plan would be inconsistent with the purpose of § 81P and the provision included within that no hearing be held. The test is, therefore, an objective one, and objectively the plan submitted, which showed two adjacent lots with adequate frontage, met the requirement for endorsement.
>
> Second, the abutters claim that, because the plan submitted for ANR endorsement is different from the plan submitted with the application for a special permit, the endorsement did not entitle Price to a zoning freeze. It is true that the lot with respect to which Price sought the special permit is different from the lot with the proposed new boundary line shown on the endorsed plan. All the land with respect to which the special permit was sought, however, was included within the proposed new lot shown on the endorsed plan, and G.L. c. 40A, § 6, sixth par., provides a zoning freeze for "the use of the land shown on [the endorsed] plan" [emphasis added]. The difference in the plans, therefore, did not disqualify Price from benefiting from the freeze.
>
> Third, the abutters argue that the freeze did not apply to the locus because much earlier, in accordance with a 1949 subdivision plan, the lot had been fully developed with a residential structure. Because G.L. c. 40A, § 6, sixth par., refers to freezes of the use of land, they argue, it does not apply to developed land. ... The purpose of the freeze provision is to protect a developer during the planning stage of a building project. ... One may wish to invest in the development of property in accordance with the applicable current zoning regulations whether or not some structure already exist on the property. Price certainly incurred expenses, for example, for the purchase of the property and the preparation of his special permit application, in reliance on the zoning regulations existing at the time he applied for the special permit. The presence of a

> structure on the property at the time of that application should not deprive him of the protection the freeze provision was designed to provide.
>
> ... The fact that Price's effort to obtain a special permit had almost reached fruition before the zoning by-law was changed makes us comfortable with the result we reach. We recognize, however, in general, the right to obtain a three- year zoning freeze by submitting a plan for ANR endorsement is very broad. As we interpret the statute, it has the potential for permitting a developer, or at least a sophisticated one, to frustrate municipal legislative intent by submitting a plan not for any purpose related to subdivision control and not as a preliminary to a conveyance or recording, but solely for the purpose of obtaining a freeze. Any overbreadth in the protection afforded by the statute, however, will have to be cured by the Legislature.

In Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976), the court found no basis in the language or history of the old section 7A zoning freezes of the Zoning Enabling Act, which are now found in section 6 of the Zoning Act, permitting the freeze provisions to be combined in a "piggy-back" fashion. Wolk had an ANR plan endorsed by the Planning Board prior to a zoning change being adopted which would have applied to his property. Wolk argued unsuccessfully that the ANR zoning freeze protected his land in such a manner so as to allow him to submit, within the ANR freeze period, a preliminary or subdivision plan which would be governed by the provisions of the old zoning bylaw.

Judge Marilyn Sullivan, in one of her more interesting interpretations of the Zoning Act, opined that where a landowner files an ANR plan identical to one previously endorsed, a Planning Board does not have to endorse the new ANR plan while the three year freeze period remains in effect. In Kelly v. Uhlir, (Middlesex) Misc. Case No. 162655, 1993 (Sullivan, J.), Judge Sullivan also noted that any subsequent submission and endorsement of an identical ANR plan does not extend the three year use protection.

ANR AND THE COMMON LOT PROTECTION

The fourth paragraph of Chapter 40A, Section 6, MGL, protects certain residential lots from increased dimensional requirements to a zoning bylaw or ordinance. The first sentence protects separate ownership lots and the second sentence affords protection for lots held in common ownership.

In Sieber v. Zoning Board of Appeals of Wellfleet, l6 Mass. App. Ct. 90l (l983), the Massachusetts Appeals Court determined that the separate lot protection provisions protect a lot if it: l) has at least 5,000 square feet and fifty feet of frontage; 2) is in an area zoned for single or two-family use; 3) conformed to existing zoning when legally created, if any; and 4) is in separate ownership prior to the town meeting vote which made the lot nonconforming. At a later date, the Massachusetts Supreme Court reached the same conclusion in Adamowicz v. Town of Ipswich, 395 Mass. 757 (l985).

The second sentence of the fourth paragraph of Section 6 which provides protection for common ownership lots was inserted into the Zoning Act in l979 (see St. l979, c. l06). As enacted, the "grandfather" protection for common ownership lots provides as follows:

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

The Massachusetts Supreme Judicial Court found in Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829 (l985), that the grandfather provision for common ownership lots is not limited to lots which were created by a plan and recorded or endorsed by January l, l976. The court's interpretation of the common lot provision provides a unique opportunity to landowners and developers.

In Baldiga, the plaintiff had purchased three lots in the town of Uxbridge. The lots were shown on a plan, dated February 20, l979, which contained the Planning Board's endorsement "Approval Under the

Subdivision Control Law Not Required." At the time of the Planning Board's endorsement, the three lots conformed with the requirements of the zoning bylaw that single-family building lots have a minimum frontage of 200 feet, and a minimum lot area of one acre.

On May l3, l980, the Town amended its zoning bylaw requiring that single-family building lots have a minimum frontage of 300 feet and a minimum lot area of two acres. In October, l983, the plaintiff filed building permit applications for the three lots. The Building Inspector denied the applications. The plaintiff appealed to the Zoning Board of Appeals, and the Board denied the plaintiff's appeal because the lots did not meet the 300 foot frontage requirement that had been adopted by the town meeting in l980.

Both the town and the plaintiff agreed that, at all relevant times, the three lots were held in common ownership, and that the lots complied with the zoning in effect at the time of the Planning Board's endorsement, as well as to the zoning requirements in existence as of January l, l976. However, the town contended that the plaintiff's lots were not entitled to "grandfather rights" since the plan for such lots was not "recorded or endorsed" as of January l, l976. The plaintiff argued that the lots were entitled to zoning protection since the phrase "as of January l, l976," only qualifies the condition that the lots conform with zoning requirements as of that date, and that lots shown on a plan "recorded or endorsed" after January l, l976 are entitled to a zoning freeze.

BALDIGA V. BOARD OF APPEALS OF UXBRIDGE

395 Mass. 829 (l985)

Excerpts:

Abrams, J. ...

> We agree with the plaintiff. ... the first part of the second sentence of section 6 entitles an owner of property to an exemption from any increase in minimum lot size required by a zoning ordinance or bylaw for a period of five years from its effective date or for five years after January l, l976, "whichever is later." ...We conclude ... that "the statute looks to the most recent instrument of record prior to the effective date of the zoning change." If we were to interpret the "as of January l, l976," clause as qualifying the "plan recorded or endorsed" condition, it would negate the effect of the words "whichever is later." As we read the statute, the phrase "as of January l, l976," only modifies the condition immediately preceding, that requiring conformity with zoning laws.
>
> We reject the town's contention that the statute's use of the word "conformed," rather than "conforms," to precede the phrase "to the existing zoning requirements as of January l, l976," suggests that the plan and the lot must not only conform at some later

date to the zoning requirements in effect on January l, l976, but also must have been in existence in l976 and conformed to the zoning requirements at that time. The town's argument ignores the fact that the statutory language consistently uses the past tense to describe all of the conditions needed for a lot to qualify for "grandfather" protection. The word "conformed" is thus appropriate in the context of the statutory provision as a whole and does not specifically signify that the lot or plan must have existed before l976. ...

The town also argues that the interpretation proposed by the plaintiff would permit the practice of "checkerboarding" as a means of avoiding compliance with local zoning requirements. This result, the town asserts, would contravene the recognition by the new G.L. c. 40A, ... of local autonomy in dealing with land use and zoning issues. However, the specific purpose of the disputed sentence ... was to grant "grandfather rights" to owners of certain lots of land. If we accept the town's interpretation, the ability to checkerboard two or three parcels would be eliminated as of January l, l976. But there also would be a substantial reduction in "grandfather rights," a result which is inconsistent with the general purposes of the fourth paragraph of section 6, which is "concerned with protecting a once valid lot from being rendered unbuildable for residential purposes, assuming the lot meets modest minimum area ... and frontage ... requirements... .

We thus conclude that the second sentence of the fourth paragraph of G.L. C. 40A, s. 6, does not require that the plan of the lot in question be recorded or endorsed before January l, l976. We also conclude that for lots to be entitled to a five-year exemption from the requirements of a zoning amendment, pursuant to the second sentence of the fourth paragraph of G.L. C. 40A, s.6, the plan showing the lots must have been endorsed or recorded before the effective date of the amendment.

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

The interpretation of the common ownership grandfather protection by the Massachusetts Appeals Court opens doors which would otherwise not be available to landowners. Since the freeze period does not commence until the effective date of the zoning amendment, having a plan recorded or

endorsed guarantees a landowner a future five-year zoning exemption from increased dimensional requirements to single or two-family use.

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

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

1. The lot must be shown on a plan which is either recorded or endorsed before the effective date of the increased zoning requirements.

2. The lot must have at least 7,500 square feet of area and at least 75 feet of frontage.

3. The lot must comply with applicable zoning requirements when recorded or endorsed and conform to the zoning requirements in effect as of January l, l976.

4. The lot must have been held in common ownership with any adjoining land before the effective date of the increased zoning requirements.

ANR AND COMMON DRIVEWAYS

Case law has established the principle that each lot shown on an ANR plan must be able to access onto the way from the designated frontage. For example, in McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980), the Massachusetts Supreme Court upheld the denial of an ANR plan because the landowner could not access his proposed lots to the public road shown on the plan. The Martha's Vineyard Commission had adopted a regulation which was in force in the town of Edgartown. The regulation required that any additional vehicular access (driveways) to a public road had to be at least 1,000 feet apart. McCarthy had submitted an ANR plan to the Planning Board. The Edgartown Zoning Bylaw required a minimum lot frontage of 100 feet. Each lot shown on McCarthy's plan had the required frontage on a public road. However, the Planning Board denied the requested ANR endorsement. The Planning Board contended that the Martha's Vineyard Commission's vehicular access regulation deprived the lots practical access as driveways could not be constructed to the public way. Therefore, the proposed lots did not have the type of frontage required by the Subdivision Control Law for the purposes of an ANR endorsement. The Massachusetts Supreme Court agreed with the Planning Board. See also Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979), where the Massachusetts Appeals Court held that lots abutting a limited access highway did not have the required frontage on a way for the purpose of an ANR endorsement.

All lots shown on an ANR plan must be able to provide vehicular access to a way from the designated frontage. However, what happens when a landowner proposes to construct a common driveway rather than individual driveways to a way?

1. Is a proposed common driveway a relevant factor in determining whether a plan is entitled to an ANR endorsement?

2. In reviewing an ANR plan, does the Planning Board have the authority to make a determination that a proposed common driveway provides the necessary vital access to each lot?

The Massachusetts Appeals Court took a look at both questions in Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987). Robert Fox owned a parcel of land which abutted the Neponset Valley Parkway. Fox submitted a plan to the Planning Board for an ANR endorsement. The plan showed the division of his parcel into four lots. Each lot abutted parkway land for a distance of 150 feet which was the minimum frontage requirement of the Milton Zoning Bylaw. The proposed lots were separated from the paved portion of the parkway by a greenbelt which was approximately 175 feet wide. However,

Fox had obtained an access permit from the Metropolitan District Commission for a "T" shaped common driveway connecting, at the base, to the paved road and, at the top, to the four lots where they abutted the greenbelt. The proposed common driveway was shown on the ANR plan. The Planning Board denied endorsement ruling that the plan showed a subdivision. Fox appealed.

The Planning Board, in denying its endorsement, relied on a line of previous court cases which have held that the frontage on a public way required by the Subdivision Control Law must be frontage that offers serviceable access from the buildable portion of the lot to the public way on which the lot fronts. In the Board's view, Fox's parcel was effectively blocked from the paved roadway by the greenbelt so that his proposal was essentially for the development of back land. Therefore, the Planning Board contended that the proposed common access driveway should be subject to their regulations governing the construction of roads in subdivisions.

The two issues before the court were:

1. whether the parcel in question had a right of access over the greenbelt to the parkway; and

2. whether the proposed common driveway would prevent Fox from obtaining an ANR endorsement from the Planning Board.

As to the question of access, the court found that Fox had rights of access to the Neponset Valley Parkway. Chapter 288 of the Acts of 1894 authorized the Metropolitan Park Commissioners to take land for the construction of parkways and boulevards. Pursuant to this authority, the Metropolitan Park Commissioners took land in 1904 to construct the Neponset Valley Parkway. In Anzalone v. Metropolitan District Commission, 257 Mass. 32 (1926), the court ruled that in contrast to roadways constructed within public parks, roadways constructed under the 1894 statute were public ways to which abutting owners had a common-law right of access. Anzalone also noted that if land, adjacent to roadways which were constructed under the authority of the 1894 statute, was divided into separate ownership lots, then each lot owner would have a right of access from his lot to the roadway. The court concluded that Fox's right of access to the parkway was not impaired or limited by the substantial intervening greenbelt. Since each of the proposed lots shown on the plan had a guaranteed right of access to the parkway, Fox argued that the construction of a common driveway rather than four individual driveways should be of no concern to the Planning Board when reviewing an ANR plan. The court agreed.

FOX V. PLANNING BOARD OF MILTON

24 Mass. App. Ct. 572 (1987)

Excerpts:

Armstrong, J. . . .

> The proposed common driveway is not relevant to determining whether Fox's plan shows a subdivision. If all the lots have the requisite frontage on a public way, and the availability of access implied by that frontage is not shown to be illusory in fact, it is of no concern to a planning board that the developer may propose a common driveway, rather than individual driveways, perhaps for aesthetic reasons or reasons of cost. The Subdivision Control Law is concerned with access to the lot, not to the house; there is nothing in it that prevents owners from choosing, if they are so inclined, to build their houses far from the road, with no provision for vehicular access, so long as their lots have the frontage that makes such access possible. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. at 272-273. Here, each of the proposed lots has the frontage called for by the Milton by-law. Under the Anzalone case each has a guaranteed right of access to the road itself. These facts satisfy the requirements of Section 81L.

The Fox decision provides valuable insight concerning common driveways and vital access. Ask the following questions when reviewing ANR plans and proposed common driveways.

1. Do all the proposed building lots have the frontage on an acceptable way as defined in Chapter 41, Section 81L, MGL?

2. Is access to any of the lots from such frontage illusory in nature? The lot frontage must provide practical access to the way or public way. A lot condition which would prevent practical access over the front lot line such as a steep slope is an appropriate matter for a Planning Board to consider before endorsing an ANR plan. See DiCarlo v. Planning Board of Wayland, 19 Mass. App. Ct. 911 (1984); Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989); Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992).

3. Does the proposed common driveway access over the frontage shown on the ANR plan to the acceptable way or public way? Access obtained by way of easement over a side or rear lot line is not authorized unless approved by the Planning Board. See DiCarlo v. Planning Board of Wayland, supra.

An issue that the Fox decision did not address was the question of zoning. Just because a proposed division of land may be entitled to an ANR endorsement for the purposes of the Subdivision Control Law does not mean that the lots or a proposed common driveway are buildable under the provisions of the local zoning bylaw. An ANR endorsement gives the lots no standing under the zoning bylaw. See Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980).

Access roadways are a use of land which must conform to the provisions of the local zoning bylaw. This issue first came to light when, in 1954, the town of Braintree amended its zoning map by changing a large parcel of land from a residential district to an industrial district. The rezoning resulted in creating an industrial district which was entirely surrounded by residential zoning districts. Textron Industries purchased a tract of land in which the major portion was located in the industrial district and constructed a factory. Textron also constructed roadways for access to the factory built in the industrial zone. However, the access roadways passed through residential zoning districts. Tredwell Harrison, an abutter, sought enforcement action as to the construction of the access roadways and requested their relocation. Textron argued that the access over the residential land was necessarily implicit in a zoning scheme which completely surrounds industrial areas with residentially zoned land and pointed out that without access across the residentially zoned land, the industrially zoned land could not be used for the purposes intended in an industrial district. In Harrison v. Building Inspector of Braintree, 350 Mass. 559 (1966), the court found that since the residential zone did not expressly authorize industrial use, then the use of land in the residential zone as an access roadway for an industrial use violated the requirements of a residential zone. The court did not rule on Textron's claim that the 1954 amendment was an unreasonable classification of the industrial land without the necessary access as there was no statutory basis for modifying the requirements of the residential zone to make reasonable the classification in the industrial zone. The court noted that if the 1954 amendment was invalid because of unreasonable classification it would appear that the residential land, as well as the industrial land, would remain residential. In deciding against Textron, the court delayed any order for compliance with the zoning bylaw to allow the town of Braintree an opportunity to determine whether to provide legal access to the land in the industrial zone.

The issue of the Textron access roadways would be considered in two more court cases. Eventually, however, the problem would be solved when the town accepted the access ways as town ways. See Harrison v. Braintree, 355 Mass. 651 (1969); Harrison v. Textron, Inc., 367 Mass. 540 (1975).

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

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

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

In Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967), the court faced the situation where a tract of land consisting of a strip from 14-23 feet wide was located in an area of the city of Brockton which was zoned residential, and the remainder of the parcel was located in the town of Abington and zoned for business. The only access to the business portion of the land was through the residentially zoned strip located in Brockton. Lapenas sought a variance under the Brockton ordinance for access to a gasoline station for which the Building Inspector in Abington had issued a building permit. The variance was denied by the zoning Board of Appeals. The court held that the Zoning Board of Appeals' interpretation of the Brockton ordinance was in error and could not be construed as prohibiting access to the land located in Abington. Even though a variance was not considered necessary, the court found that since the land in the residential zone was too narrow to be useable for any permitted purpose, and the commercially zoned land in Abington was without access, Lapenas was entitled to relief from the literal operation of the Brockton zoning ordinance.

If a local zoning bylaw remains silent relative to the use of land for a common driveway, then the zoning enforcement officer will have to determine whether a proposed common driveway would be an

allowable accessory use. In order to make this interpretation we believe, as a minimum, each lot would have to access over its own frontage. In its report to the General Court relative to restricting the zoning power to city and town governments, (see 1968 Senate No. 1133, at 107) the Legislative Research Council noted that one of the primary purposes of zoning frontage requirements for residential lots is to "assure adequate access of these lots to the street which faces them ... ."

The Land Court has not looked favorably towards the use of land for a common driveway where the zoning bylaw has not expressly authorized common driveways. In Litchfield Company, Inc. v. Board of Appeals of the City of Woburn, Misc. Case No. 199971 (August 5, 1997), the court held that if the intent of the City's zoning ordinance was to permit residential driveways to access streets from lot lines other than the front lot line, the ordinance should have been so written. In the absence of a zoning provision authorizing a common driveway, the prohibition stated in the zoning ordinance that "no use of land not specified in this zoning ordinance shall be permitted" must be enforced. In RHB Development, Inc. v. Duxbury Zoning Board of Appeals, Misc. Case No. 237281 (September 19, 1997), the court concluded that "it strains credulity past the breaking point to suggest that common driveways are permitted as an accessory use to a residential use, as a matter of right and without limitations, where (i) such a common driveway is not expressly authorized anywhere in the by-law, (ii) accessory uses to a residential use are required to be 'on the same lot,' (iii) common driveways for 'cluster' developments require a special permit and are limited to serving no more than two dwellings, and (iv) driveways serving as part of mandated parking facilities are required to be on the same lot."

To assist the zoning enforcement officer in interpreting your local zoning ordinance or bylaw we would suggest that communities adopt zoning provisions either authorizing or prohibiting common driveways. If you choose to permit common driveways, consider the following regulations.

1. Authorize common driveways through the issuance of a special permit.

2. Limit the number of lots that may be accessed by a common driveway.

3. Specify that common driveways may never be used to satisfy zoning frontage requirements.

4. Establish construction standards for common driveways.

5. Require that common driveways access over approved frontage.

6. Designate a maximum length for common driveways.

81L EXEMPTION

Whether a plan is entitled to be endorsed as "approval under the Subdivision Control Law not required" is determined by the definition of "subdivision" found in Chapter 41, Section 81L, MGL. 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 original versions of the Subdivision Control Law, as appearing in St. 1936, c. 211, and St. 1947, c. 340, did not contain this exemption. It was added in a 1953 general revision of the law by St. 1953, c. 674, s.7. The purpose of the exemption is not clear but the Report of the Special Commission on Planning and Zoning, 1953 House Doc. No. 2249, at 54, shows that the drafters were aware of what they were doing, although it does not explain their reasons.

The main issue dealing with the 81L exemption has been the interpretation of the term "buildings." The legislation is unclear as to what types of structures had to be in existence prior to the Subdivision Control Law taking effect in a community in order to qualify for the exemption. There were no reported cases dealing with this exclusion until Citgo Petroleum Corporation v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987).

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.

CITGO PETROLEUM CORP. V. PLANNING BOARD OF BRAINTREE
24 Mass. App. Ct. 425 (1987)

Excerpts:

Armstrong, J. . . .

> The defendants argue that a literal reading of this exception would completely undercut the purposes of the Subdivision Control Law, as set out in G.L. c. 41, section 81M, by allowing a homeowner to use any detached garage, shed, or other outbuilding as a basis for unrestricted backland development. There are several replies. First, this language in section 81L is not the result of legislative oversight. . . . Second, just because a lot can be divided under this exception does not mean that the resulting lots will be buildable under the zoning ordinance. Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599, 603 (1980). Third, the lots in this case are being used for distinct, independent business operations, and the preexisting buildings relied upon the main office, the underwriter's pump house/machine shop, the wax plant building, the earth burner building, and the new yard office - are substantial buildings. A claim that a detached garage or a chicken house or woodshed qualifies under this exception might present a different case. Finally, a building, to qualify under this provision, must have been in existence when the Subdivision Control Law went into effect in the town. It is too late for speculators to buy tracts of back land, cover them with shacks, and divide them into lots accordingly. In short, we see no sufficient reason to refuse application of the plain language of the exclusion in this case.

What constitutes a "substantial building" is still unclear. However, a landowner may have a problem arguing that a garage, woodshed or chicken house are buildings that would qualify under the 81L exemption. Since the Citgo decision, there has been one Land Court case which has taken a look at the "substantial building" issue. 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 a building is no way controlling on the issue. An 88.6 foot by 30.8 foot cement block building with its own cesspool and electricity that had been used to store automobiles and as a turkey farm was found to be a substantial building.

The most interesting 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. This exemption is only for the purposes of the Subdivision Control Law. In reviewing the Citgo case, Judge Kilborn of the Land

Court noted in Mignosa v. Parks, 6 LCR 279 (1998) (Misc. Case No. 215750), that the division of land under the 81L exemption creates a zoning violation.

"The 81L exception applies in a subdivision context and is unrelated to zoning. Lots created by the exception must stand or fall on their own for zoning purposes. This is recognized by the Appeals Court:

> '… just because a lot can be divided under this exception does not mean that the resulting lots will be buildable under the zoning ordinance. *Smalley v. Planning Board of Harwich*, 10 Mass. App. Ct. 599, 603 (1980).' *Citgo*, at 427."

PERIMETER PLANS

A perimeter plan is a plan of land showing existing property lines, with no new lines drawn indicating a division of land. Such plans are usually filed so that the property owner can obtain a three year zoning protection for the land shown on such plan. There has been case law that has looked at the question as to whether a perimeter plan is entitled to an ANR endorsement from the Planning Board.

The Subdivision Control Law is a comprehensive scheme for regulating the creation of new lots and for the recording of plans showing such new lots. There are three sections of the Subdivision Control Law which are relevant to the perimeter plan issue.

1. Section 81L which defines the term "subdivision" as well as divisions of land that will not be considered a subdivision.

2. Section 81P which sets out the procedure for endorsement of plans not requiring subdivision approval.

3. Section 81X which provides a procedure for recording plans which show no new lot lines.

The first paragraph of Section 81X states:

> Notwithstanding the foregoing provisions of this section, the register of deeds shall accept for recording and the land court shall accept with a petition for registration or confirmation of title any plan bearing a certificate by a registered land surveyor that the property lines shown are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownerships or for new ways are shown.

Should a perimeter plan be recorded only with a certificate of a registered land surveyor under Section 81X or is a perimeter plan entitled to an ANR endorsement from the Planning Board pursuant to Section 81L and 81P?

In Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.), a landowner obtained an ANR endorsement to protect his property from a zoning change. The Planning Board had endorsed the plan which depicted one lot with the exact

dimensions and bounds shown on an earlier plan registered with the land court. In finding that the Planning Board had mistakenly endorsed the plan, the court noted:

> As a matter of law, the plaintiffs cannot file their April, 1985, plan in the Land Court. The plan is not a subdivision nor is it a division of land with "approval not required". Lot No. 91 was created in 1960 and registered as noted. As far as the Land Court would be concerned, its status has not changed since 1960. As a matter of law, the Planning Board should not have endorsed the April, 1985, plan. Nevertheless, the action of the Planning Board was not appealed and the legality of its action is not before this Court for review. Once a plan has been endorsed 'approval not required', the Court cannot go behind that endorsement unless the action of the board is before the Court for review. As a matter of law, the plaintiffs are entitled to the three-year protection despite the method by which same was derived. In an exercise of judicial constraint, I make no comment on the methods utilized and with judicial reluctance enter this judgment.

In Horne, the landowner succeeded in protecting his property from the zoning change because the Court could not revoke the Planning Board's endorsement since the issue was not properly before the Court. However, in Malden Trust Company v. Twomey, Middlesex Superior Court C.A No. 6574, September 28, 1989 (McDaniel J.), the Planning Commission declined to endorse a plan "ANR" which showed no new property lines. In upholding the Commission's decision not to endorse the plan, the court noted:

> . . ., it should be clear that the purpose of section 81P is to relieve certain divisions of land of regulation and approval by a planning board when a proposed plan indicates that newly created lots will be guaranteed access to the outside world by preexisting ways or roads. In sum, section 81P facilitates the recording process, and was "not intended to enlarge the substantive powers of a [planning] board." Thus, when section 81P states that "an endorsement shall not be withheld unless such plan shows a subdivision," it is clear from the above discussion that the Legislature intended to expedite the recording of 'non-subdivision' plans, and not to encourage the filing under section 81P of plans showing no subdivision of lots whatsoever. . . . .
>
> Plaintiff's plan shows no division of land and hence there is no need for the verification process of section 81P. Moreover, plaintiff's plan may have easily been filed under section 81X. It is clear that plaintiff instead sought section 81P endorsement to achieve the advantage of the zoning protection provided under G.L. c. 40A, section 6 to those plans endorsed ANR under section 81P. Withholding comment on this tactic, the Court simply states that plaintiff's perimeter plan is properly filed under section 81X, not

> section 81P. Consequently, the defendant was never under an obligation to endorse plaintiff's plan under section 81P.

However, in Costello v. Planning Board of Westport, (Bristol) Misc. Case No. 152765, 1991 (Sullivan, J.), a Land Court Judge decided that perimeter plans are entitled to an ANR endorsement. In her opinion, Judge Sullivan determined that Section 81P of the Subdivision Control Law, provides for such an endorsement. Judge Sullivan summarized that:

> Nothing in the statute requires the conclusion that only divisions of land which are deemed by virtue of the provisions of G.L. c. 41, § 81L not to constitute a subdivision were entitled to such an endorsement. The plain language says otherwise, and as it presently reads, a perimeter plan must be endorsed by the Board.

It should be noted that neither the Costello, Twomey, or Horne cases are controlling on the issue as a higher court is not required to follow an opinion written by a lower court. The perimeter plan issue still remains unsolved.

The Massachusetts Appeals Court, in Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), although not specifically addressing the perimeter plan issue, noted the need to show a division of land when submitting an ANR plan. In Perry, the landowner submitted a perimeter plan showing a triangular shaped lot abutted on all three sides by existing ways. The main issue in the case dealt with the adequacy of the ways, but it was also argued whether there was a need to show a division of land in order to be entitled to an ANR endorsement.

Perry argued that his plan was entitled to an ANR endorsement based upon the rationale found in Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963). The Bloom decision involved the division of a tract of land into two parcels. One parcel did not meet the minimum frontage requirement of the zoning bylaw for a building lot. However, the landowner placed a notation on the plan that the parcel didn't conform to the zoning bylaw.

The Supreme Judicial Court held that since the plan showed that the lot with inadequate frontage would be unusable for building, it was not a plan subject to subdivision control. The court observed that by the definition in the Subdivision Control Law, a "lot" is "an area of land... used, or available for use, as the site of one or more buildings," and a "subdivision" is "the division of a tract of land into two or more lots . . . ." The court reasoned that a division of land into two parcels, one of which clearly could not be used for building under the zoning law, was therefore not a division into two "lots" and, therefore, not a subdivision.

PERRY V. PLANNING BOARD OF NANTUCKET

15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

> In Bloom, the petitioner's plan disclosed the residual lot's inadequacy for building purposes. It was thus clear that the parcel with inadequate frontage was not a section 81L "lot." In the present case, the plan of lot 750 contains no information at all concerning the dimensions or boundaries of the tract from which lot 750 is proposed to be severed. The remaining land may or may not be "available for use. . . as the site of one or more buildings." Unlike the situation in Bloom, Perry's plan is not one "which disavows any claim of existing right to use [the remaining land] as a zoning by-law lot."
>
> . . . Although an 81P endorsement carries no implication that the subject lots comply with zoning ordinances in all respects, it is expected to address "the fact of adequate frontage of the newly created lots." Where the plan shows on its face that the endorsement was occasioned by the fact that inadequate frontage brought a parcel outside the definition of a section 81L "lot," the danger that the public might be misled into believing the plan showed only buildable lots is dissipated. The Bloom opinion suggests that such noncompliance could be shown by depicting the inadequate frontage on the plan or by an endorsement that the subject lot could not be used for building, but preferably by both methods. Were an 81P endorsement to be granted . . . on the plan as submitted, the public would have no way of ascertaining the basis of the decision from the recorded plan and could be misled as to the adequacy of frontage on a public way. On remand, Perry may amend the plan of lot 750 to show the boundaries and dimensions of the tract from which it is to be severed, and the board need not grant an 81P endorsement unless he does so. If appropriate, assuming the requirements for an 81P endorsement are otherwise met, the board may require a further endorsement of noncompliance with the zoning code on the plan as a condition of approval.

Perimeter plans can be recorded pursuant to Chapter 41, Section 81X, MGL. Such plans, however, are not entitled to the three year zoning protection found in Chapter 40A, Section 6, MGL. Chapter 41 is only concerned with the recordation of plans and what plans require Planning Board approval or endorsement. Chapter 41 does not deal with zoning protection.

If it were not for the fact that ANR plans are entitled to a zoning protection pursuant to the provisions of the Zoning Act, there probably would be little interest whether a perimeter plan should receive an ANR endorsement.

Horne and Twomey, support the position that as a matter of law, perimeter plans are not entitled to an ANR endorsement. Although Perry states the need to show a division of land in order to obtain an ANR endorsement, under the Bloom rationale, an arbitrary line could be drawn but not necessarily show two lots.

The Costello decision supports the position that as a matter of law, perimeter plans are entitled to an ANR endorsement. Bart J. Gordon, Esq., of Bulkley, Richardson and Gelinas, and Paul L. Feldman, Esq., of Davis, Malm and D'Agostine, noted land use attorneys, are of the opinion that a Planning Board has no choice and must endorse a perimeter plan. They wrote an article in response to a Land Use Manager which reviewed lower court decisions that had supported the position that perimeter plans were not entitled to an ANR endorsement. They submitted their article to the Executive Office of Communities and Development. Their analysis is important as it identifies arguments in support of ANR endorsement for perimeter plans. Mr. Gordon and Mr. Feldman note that perimeter plans are entitled to zoning protection, citing Cape Ann Development Corp., Wolk, and Sampson (where Planning Boards had endorsed or failed to seasonably act on perimeter plans). These cases, however, did not decide that perimeter plans must be endorsed by a Planning Board. The statute defines both "subdivisions" and non-subdivisions 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 neither constitutes a subdivision or non-subdivision under MGL, c.41, § 81L. Are perimeter plans entitled to an ANR endorsement? You be the judge.

Perimeter Plans Are Entitled to ANR Endorsement

By Bart J. Gordon and Paul L. Feldman

> In Land Use Manager, Vol. 7, Edition 4, May, 1990, on Perimeter Plans, Donald Schmidt suggests that a perimeter plan -- a plan showing the circumference of property and not dividing the property into two lots -- is not entitled to an endorsement under G.L. c. 41, § 81P. Mr. Schmidt relies on two Superior Court decisions that suggest that a planning board need not endorse a perimeter plan as "approval not required" ("ANR") under the Subdivision Control Law. The absence of such endorsement may be intended to deprive the plan of any zoning freeze protection under G.L. c. 40A, § 6, sixth paragraph. Planning boards who wish to prevent such freezes may rely on the Land Use Manager to justify refusal to give an ANR endorsement. Such reliance, however, is misplaced and may result in significant litigation.

The sole inquiries for a Planning Board when reviewing a request to endorse an ANR plan is whether the plan shows a subdivision of land and whether vital access is assured. A perimeter plan does not show a subdivision of land. It is a plan of existing ownership, and no new boundaries are created. Nonetheless, despite questions raised by the Superior Court decisions, they are plans which the Planning Board must endorse under G.L c. 41, § 81P. The statute is clear:

> "Any person wishing to cause to be recorded a plan of land situated in a ... town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such ... town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words 'Approval under the subdivision control law not required' or words of similar impact with the appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision" (emphasis added).

The language of the statute says that if the plan does not show a subdivision, a planning board must endorse it. The fact that a plan under G.L. c. 41, § 81X, could be recorded with a surveyor's certificate (of no new lines of division of existing ownership) does not provide a board with a basis for failure to endorse a perimeter plan. If the planning board fails to act on endorsing the plan, an applicant is entitled to a certificate from the town clerk and the failure to act has the effect of an endorsement.

There are several appellate decisions acknowledging planning board endorsement of perimeter plans and the effect of a failure to endorse. See Cape Ann Development Corp. v. Gloucester, 371 Mass. 19 (1976).

In December, 1972, Cape Ann submitted a "perimeter plan" of the locus to the Gloucester Planning Board, requesting that the plan be endorsed subdivision approval not required. See G.L. c. 41, § 81P. A city clerk's certificate concerning the failure of the planning board to act seasonably, equivalent in effect to such an endorsement (G.L. c. 41, § 81P), was obtained and recorded with the 'perimeter plan' in the registry of deeds."

See Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976): "the planning board's endorsement under G.L. c. 41, § 81P, on his 'perimeter plan' ..." Sampson v. San Land Development Corp., 17 Mass. App. Ct. 977, 978 (1984): "On January 26, 1972, San-Land filed a perimeter plan with the planning board and obtained its stamp indicating that subdivision approval was not required. See G.L. c.41, § 81P." Each of these cases make clear that the zoning freeze protections of G.L. c. 40A, § 6, apply to perimeter plans. We have found no reported appellate case in which a planning board was upheld in refusing to endorse a perimeter plan, although the Malden Trust Company v. Twomey, Middlesex Sup. Ct. 6574 (Sept, 28, 1989), decision does reach this result.

Section 81P twice uses the word "shall" to describe the planning board's obligation to endorse a plan if it does not show a subdivision. "The word 'shall' in a statute is commonly a word of imperative obligation and is inconsistent with the idea of discretion." Johnson v. District Attorney for the Northern District, 342 Mass. 212, 215, (1961). The Superior Court cases turn the mandatory "shall" into a discretionary "need not."

To reach this result, a court must disregard the language of G.L. c. 41, § 81P, and existing appellate decisions construing it. The Superior Court decisions pointedly avoid the policy issue of whether perimeter plans should receive zoning freeze status. Indeed, despite language in Horne v. Board of Appeals of Chatham, Barnstable Sup. Ct. 46345 (Nov. 4, 1986), that the planning board "should not have endorsed" the perimeter plan, the Court held that the endorsement (even if erroneous) conferred a zoning freeze. A large body of law exists construing zoning freezes. See B.J. Gordon and R.C. Davis, Zoning Freezes, Chapter 7, Massachusetts Zoning Manual, (MCLE, 1989). While planning boards may be frustrated by a landowner's attempt to secure some protection from a rezoning which might have catastrophic economic impact, the Legislature in G.L. c. 40A, § 6, has struck a balance to afford landowners some protection against changes while a project is under development. One may disagree with the statute, but, until it is amended, it is the law.

There is an obligation on the part of Land Use Manager to point out both sides of disputed issues. As is indirectly suggested, by reference to the cases of Bloom v. Planning Board of Brookline, 346 Mass. 270 (1963), and Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. (1983), a landowner may avoid a planning board's refusal to endorse a perimeter plan by filing a plan with a division into lots but adding a notation that the lots may not conform to the zoning by-laws or that one of the lots is not a buildable lot. The Bloom and Perry cases suggest that a freeze may be obtained by filing a perimeter plan with an arbitrary line of division, requiring an ANR endorsement.

There is no policy reason to require such a tactic, particularly where the language of § 81P is unequivocal. Further, a planning board's failure to give an § 81P endorsement should - if the plan does not show a subdivision - lead to a clerk's certificate and the same result.

For these reasons, Land Use Manager and the Twomey case may be incorrect in suggesting that a perimeter plan is not entitled to ANR endorsement. The statutory language, appellate case precedent, and the policy underlying zoning freezes support a contrary interpretation. Until G.L. c. 41, § 81P, or c. 40A, § 6, sixth paragraph, are changed, our position is that a planning board has no choice regarding endorsement of perimeter plans. Under the statute, if no subdivision is shown, the board must provide the statutory endorsement. If it fails to act, the town clerk must so certify and the effect of endorsement is achieved.

PROCESS FOR APPROVING BUILDING LOTS LACKING ADEQUATE FRONTAGE

Frequently a landowner wishes to create a building lot which would not meet the minimum frontage requirement of the local zoning bylaw. As a Building Inspector, or member of a Planning Board or Zoning Board of Appeals, you have probably been asked by a local property owner what he or she must do to get approval for a building lot which does not meet the frontage requirement specified in the local zoning bylaw.

In Seguin v. Planning Board of Upton, 33 Mass. App. Ct. 374 (1992), the Massachusetts Appeals Court reviewed the process for approving building lots lacking the necessary frontage.

The Seguins wished to divide their property into two lots for single family use. One lot had the required frontage on a paved public way. The other lot had 98.44 feet of frontage on the same public way. The Seguins applied for and were granted a variance from the 100 foot frontage requirement of the Upton Zoning Bylaw. Upon obtaining the variance, the Seguins submitted a plan to the Planning Board seeking the Board's endorsement that approval under the Subdivision Control Law was not required. The Planning Board denied endorsement on the ground that one of the lots shown on the plan lacked the frontage required by the Upton Zoning Bylaw. Rather than resubmitting the plan as a subdivision plan for approval by the Planning Board pursuant to Section 81U of the Subdivision Control Law, the Seguins appealed the Planning Board's denial of the ANR endorsement.

Whether a plan requires approval or not rests with the definition of "subdivision" as found in MGL, Chapter 41, Section 81L. A "subdivision" is defined in Section 81L as the "division of a tract of land into two or more lots," but there is an exception to this definition. A division of land will not constitute a "subdivision" if, at the time it is made, every lot within the tract so divided has the required frontage on a certain type of way. MGL, Chapter 41, Section 81L states that a subdivision is:

> "the division of a tract of land into two or more lots...[except where] every lot within the tract so divided has frontage...of at least such distance as is then required by zoning...ordinance or by-law if any...and if no distance is so required, such frontage shall be of at least twenty feet."

The only pertinent zoning requirement for determining whether a plan depicts a subdivision is frontage. The Seguins argued that the words "frontage...of at least such distance as is then required by zoning...by-law" should be read as referring to the 98.44 foot frontage allowed by the Zoning Board's variance, with the result that each lot shown on the plan had the required frontage. In making their argument that their plan was entitled to an ANR endorsement, the Seguins relied on previous court cases which had held that the required frontage requirement of the Subdivision Control Law is met when a special permit is granted approving a reduction in lot frontage from what is normally required in the zoning district.

In Haynes v. Grasso, 353 Mass. 731 (1968), the court reviewed a zoning bylaw provision which had been adopted by the town of Needham. The bylaw empowered the Board of Appeals to grant special permits authorizing a reduction from the minimum lot area and frontage requirements of the bylaw. Before granting such special permits, the Board of Appeals had to make one of the following findings:

> a. Adjoining areas have been previously developed by the construction of buildings or structures on lots generally smaller than is prescribed by (the bylaw) and the standard of the neighborhood so established does not reasonably require a subdivision of the applicant's land into lots as large as (required by the bylaw).
>
> b. Lots as large as (required by the bylaw) would not be readily saleable and could not be economically or advantageously used for building purposes because of the proximity of the land to through ways bearing heavy traffic, or to a railroad, or because of other physical conditions or characteristics affecting it but not affecting generally the zoning district.

The Board of Appeals granted a special permit which authorized the creation of two lots having less lot area and frontage than normally required by the zoning bylaw. On appeal, it was argued that the creation of the two lots was a matter within the jurisdiction of the Planning Board because the division of land creating lots lacking the necessary frontage was governed by the Subdivision Control Law. The court ruled that the Planning Board did not have jurisdiction as there was no subdivision of land requiring approval under the Subdivision Control Law. The court found that the requirement that each lot has frontage of at least such distance as required by the zoning bylaw was met by the granting of the special permit. The court further noted that this was not a variance from the zoning law but a special application of its terms.

The court reached the same conclusion in Adams v. Board of Appeals of Concord, 356 Mass. 709 (1970), where the Concord Zoning Bylaw authorized the Board of Appeals to approve garden

apartment developments having less than the minimum frontage requirement of the bylaw. The court found that a lot, having less frontage than normally required by the zoning bylaw but which has been authorized by special permit, met the frontage requirement of the zoning bylaw and the Subdivision Control Law. Since the reduced frontage for the garden apartment plan had been approved by special permit, the Planning Board was authorized to endorse the plan approval not required.

The distinction in the Seguin case was that the Seguins received a variance to create a lot lacking the frontage normally required by the zoning bylaw. The court found that a plan showing a lot having less than the required frontage, even if the Zoning Board of Appeals had granted a frontage variance for the lot, was a subdivision plan which required approval under the Subdivision Control Law. In holding that the Seguins' plan was not entitled to an approval not required endorsement from the Planning Board, the court noted its previous decision in Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981). In that case, the court analyzed the authority of a Planning Board to waive strict compliance with the frontage requirement specified in the Subdivision Control Law.

Landowners, in Arrigo, wished to create a building lot which would not meet the minimum lot frontage requirement of the zoning bylaw. The minimum lot frontage requirement was 200 feet, and the minimum lot area requirement was 40,000 square feet. They petitioned the Zoning Board of Appeals for a variance and presented the Board with a plan showing two lots, one with 5.3 acres and 200 feet of frontage, and the other lot with 4.7 acres and 186.71 feet of frontage. The Board of Appeals granted a dimensional variance for the lot which had the deficient frontage. Upon obtaining the variance, the landowners applied to the Planning Board for approval of a plan showing the two lot subdivision.

The Planning Board waived the 200 foot frontage requirement for the substandard lot pursuant to the Subdivision Control Law and approved the two lot subdivision. MGL, Chapter 41, Section 81R, authorizes a Planning Board to waive the minimum frontage requirement of the Subdivision Control Law provided the Planning Board determines that such waiver is in the public interest and not inconsistent with the intent and purpose of the Subdivision Control Law.

As stated earlier, the minimum frontage requirement of the Subdivision Control Law is found in MGL, Chapter 41, Section 81L, which states that the lot frontage is the same as is specified in the local zoning bylaw, or 20 feet in those cases where the local zoning bylaw does not specify a minimum lot frontage.

In deciding the Arrigo case, the Massachusetts Appeals Court had the opportunity to comment on the fact that the Planning Board and the Zoning Board of Appeals are faced with different statutory responsibilities when considering the question of creating a building lot lacking minimum lot frontage. Although MGL, Chapter 41, Section 81R gives the Planning Board the authority to waive the frontage requirement for the purposes of the Subdivision Control Law, the court stressed that the authority of the Planning Board to waive frontage requirements pursuant to 81R should not be construed as authorizing the Planning Board to grant zoning variances. The court noted that there is indeed a significance

between the granting of a variance for the purposes of the Zoning Act and approval of a subdivision plan pursuant to the Subdivision Control Law. On this point, the court summarized the necessary approvals in order to create a building lot lacking minimum lot frontage.

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

Absent a zoning bylaw provision authorizing a reduction in lot frontage by way of the special permit process, an owner of land wishing to create a building lot which will have less than the required lot frontage needs to obtain approval from both the Zoning Board of Appeals and the Planning Board. A zoning variance from the Zoning Board of Appeals varying the lot frontage requirement is necessary in order that the lot may be built upon for zoning purposes. It is also necessary that the lot owner obtain a frontage waiver from the Planning Board for the purposes of the Subdivision Control Law.

In the Arrigo case, the landowners had submitted a subdivision plan to the Planning Board. The court noted that without obtaining the frontage waiver the plan was not entitled to approval as a matter of law because, although it may have complied with the Planning Board's rules and regulations, it did not comply with the frontage requirements of the Subdivision Control Law. After the Arrigo decision, it was debatable as to the process a landowner had to follow in obtaining a frontage waiver from the Planning Board. Rather than submitting a subdivision plan, another view was that a landowner could submit a plan seeking an approval not required endorsement from the Planning Board and at the same time petition the Board for a frontage waiver pursuant to 81R. If the Planning Board granted the frontage waiver and noted such waiver on the plan, then the Board could endorse the plan approval not required. The Seguin case leaves no doubt as to the process that must be followed when a landowner seeks a frontage waiver from the Planning Board. If a lot shown on a plan lacks the frontage required by the zoning bylaw, then the plan shows a subdivision and must be reviewed under the approval procedure specified in Section 81U of the Subdivision Control Law. The Planning Board must hold a public hearing before determining whether a frontage waiver is in the public interest and not inconsistent with the Subdivision Control Law. A notation that a frontage waiver has been granted by the Planning Board should either be shown on the plan or on a separate instrument attached to the plan with reference to

such instrument shown on the plan. It is unclear whether a Planning Board must allow the Board of Health 45 days to comment on the plan when the only issue before the Planning Board is the frontage waiver. We would recommend that Planning Boards consider amending their rules and regulations providing for a shorter review period when a landowner is only seeking a frontage waiver from the Planning Board. A Planning Board may also want to specify a fee and any relevant information that should be submitted with the plan.

In determining whether to grant a frontage waiver, a Planning Board should consider if the frontage is too narrow to permit easy access or if the access from the frontage to the buildable portion of the lot is by a strip of land too narrow or winding to permit easy access. In the Seguin case, the court noted that the lot appeared to present no problem and indicated that the Planning Board would be acting unreasonably if the Seguins submitted a subdivision plan and the Board did not approve the plan.

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 immediately, without a public hearing, endorse the plan "approval under the Subdivision Control Law not required" or words of similar import. 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).

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.

ANR PROCESS

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.

The Subdivision Control Law does not specify the manner in which an application for endorsement of an ANR plan is to be submitted to the Planning Board. Section 81P states that a plan is submitted to the planning board in the manner prescribed in 81T. Section 81T does not specify procedures for the submission of a plan to the Planning Board but simply requires that notice of such submission be given to the Town Clerk. Section 81O specifies the process for submission of definitive plans which allows the submission of plans at a meeting of the Planning Board or by mailing such plans by registered mail to the Planning Board.

In Maini v. Whitney, 7 LCR 263 (1999) (Misc. Case No. 250542), Judge Green of the Land Court held that the Halifax Planning Board could require that all ANR plans be submitted at a meeting of the Planning Board. Pursuant to Section 81Q of the Subdivision Control Law, the Halifax Planning Board adopted a regulation requiring that ANR plans be submitted at a regular or special meeting of the Planning Board. Judge Green concluded that the Halifax regulation was not inconsistent with the Subdivision Control Law because the Subdivision Control Law does not clearly determine the date on which an ANR plan is considered submitted to the Planning Board.

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.

Section 81P specifies that if the Planning Board determines that a plan does not require approval under the Subdivision Control Law, "it shall *forthwith*, without a public hearing, endorse ... [the plan] 'approval under the Subdivision Control Law not required' or words of similar import... . Such endorsement *shall not be withheld* unless such plan shows a subdivision." In Bisson v. Planning Board of Dover, 43 Mass. App. Ct. 504 (1997), a landowner submitted a plan to the Planning Board which did not show a subdivision. The Planning Board deferred endorsing the plan until town meeting amended the zoning bylaw increasing the minimum lot frontage requirement. After town meeting vote, the Planning Board denied ANR endorsement because the plan did not meet the new frontage requirement. The court determined that the term "forthwith" in Section 81P compels immediate action

after a Planning Board determines that a plan does not show a subdivision and that the Planning Board did not have the authority to delay its determination when the plan clearly did 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.

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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.

MISCELLANEOUS COURT DECISIONS

Goldman v. Planning Board of Burlington, 347 Mass. 320 (1964) (an anr endorsement of a plan which was given in error does not obligate a planning board to endorse a later plan showing the same lots and the same frontage).

Devine v. Town Clerk of Plymouth, 3 Mass. App. Ct. 700 (1975) (where clerk of the planning board, who clearly had authority to accept anr plan for the board, for some unexplained reason, returned the anr plan to the petitioner which resulted in a constructive grant).

Lynch v. Planning Board of Groton, 4 Mass. App. Ct. 781 (1976) (planning board failure to act on an anr plan within 14 [now 21] days entitled petitioner to such endorsement and board's determination thereafter that the plan did require approval was without legal effect).

Landgraf v. Building Commissioner of Springfield, 4 Mass. App. Ct. 840 (1976) (lots shown on a definitive plan which had frontage on a public way were entitled to the zoning protection afforded subdivision plan lots).

Kelly v. Planning Board of Dennis, 6 Mass. App. Ct. 24 (1978) (where planning board failed to meet notice requirement of open meeting law when voting to deny anr plan).

J & R Investment, Inc. v. City Clerk of New Bedford, 28 Mass. App. Ct. 1 (1989) (mandamus is the appropriate remedy and owner's delay of 25 days between clerk's refusal to issue certificate endorsing owner's plan of land and owner's commencement of suit seeking mandamus relief was not unreasonable delay, and thus mandamus was available).

J. & R. Investment, Inc. v. City Clerk of New Bedford, 28 Mass. App. Ct. 1 (1989) (whether a board acted within the allowable time period will depend on whether reasonable persons examining the formal record could ascertain that a particular action was taken).