THE ANR HANDBOOK

Approval Not Required Plans

COMMONWEALTH OF MASSACHUSETTS
Jane Swift, Governor

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
Jane Wallis Gumble, Director

January, 1997
revised May, 2000

Commonwealth of Massachusetts
DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT
Jane Swift, Governor ◆ Jane Wallis Gumble, Director

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 all 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

One Congress Street
Boston, Massachusetts 02114-2010

www.state.ma.us/dhcd
617.727.7765

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

Donald J. Schmidt, Principal Planner

TABLE OF CONTENTS

Chapter	Page
Introduction	1
History	2
Adequacy of a Way	4
Adequacy of a Public Way	9
Adequacy of Access	16
Approving ANR Lots on Subdivision Ways	31
Approving ANR Lots on Existing Adequate Ways	38
Determining ANR Endorsement	42
Endorsing ANR Plans Showing Zoning Violations	45
ANR Statement and One Lot Plans	49
Zoning Protections for ANR Plans	52
ANR and Common Lot Protection	59
ANR and Common Driveways	63
81L Exemption	69
Perimeter Plans	72
Process for Approving Building Lots Lacking Adequate Frontage	80
ANR Process	86
Miscellaneous Court Decision	88

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.

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 lots had the required zoning frontage on Oakland Street, which was a way that had appeared on town plans since 1927. The County Commissioners of Nantucket, by an order of taking registered with the Land Court in 1962, took an easement for the purposes of a public highway. Oakland Street, a public way, had never been constructed. The Planning Board decided that the plan constituted a subdivision because the lots did not front on a public way as defined in the Subdivision Control Law. The court agreed.

PERRY V. PLANNING BOARD OF NANTUCKET

15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

> A "subdivision" for purposes of the Subdivision Control Law, is defined as "the division of a tract of land into two or more lots . . ." A division is excluded from the definition of a subdivision . . . if "at the time when [the division] is made, every lot within the tract so divided has frontage on . . . a public way . . . ." The question for decision is what is intended by the term "public way" in this exclusion.

The Legislature provided, in G.L. c. 82 Sections 1-16, for the layout and establishment of highways within municipalities by county commissioners . . . .

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

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

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

. . . In our view, . . . a board can properly deny an 81P endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in Section 81M. . . . We also recognize that Section 81M, insofar as it treats the sufficiency of access, is couched primarily in terms of the adequacy of subdivision ways rather than the adequacy of the public ways relied upon by an owner seeking exemption from subdivision control. We do not

view these considerations as affecting the soundness of our reasoning. The board's power in these circumstances arises out of the provisions of the subdivision control law itself, read in light of the statutes pertaining to public ways and relevant decisions. The statutory and decisional framework provides for orderly land development through the assurance that proper access to all lots within a subdivision will be reasonably guaranteed. Because no way exists on the ground to serve [the] lots. . . . the board was right to require the plan's antecedent approval under the Subdivision Control Law, and its action should not have been annulled.

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

Hutchinson proposed to divide a 17.74 acre parcel on Lazell Street in Hingham into 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.

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.

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

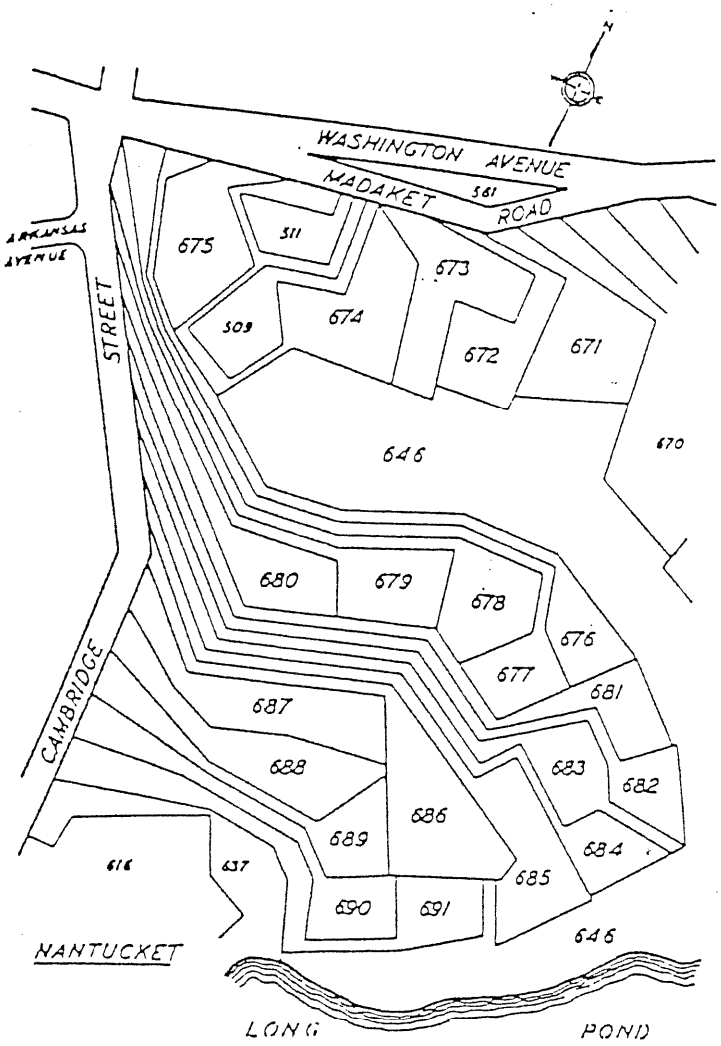
Kaplan, J. . . .

> 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.



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

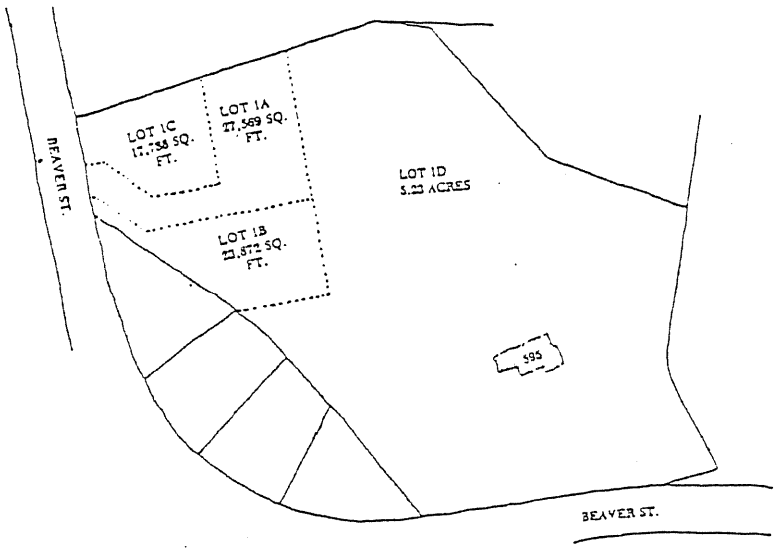
10 Mass. App. Ct. 269 (1980)

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.



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.

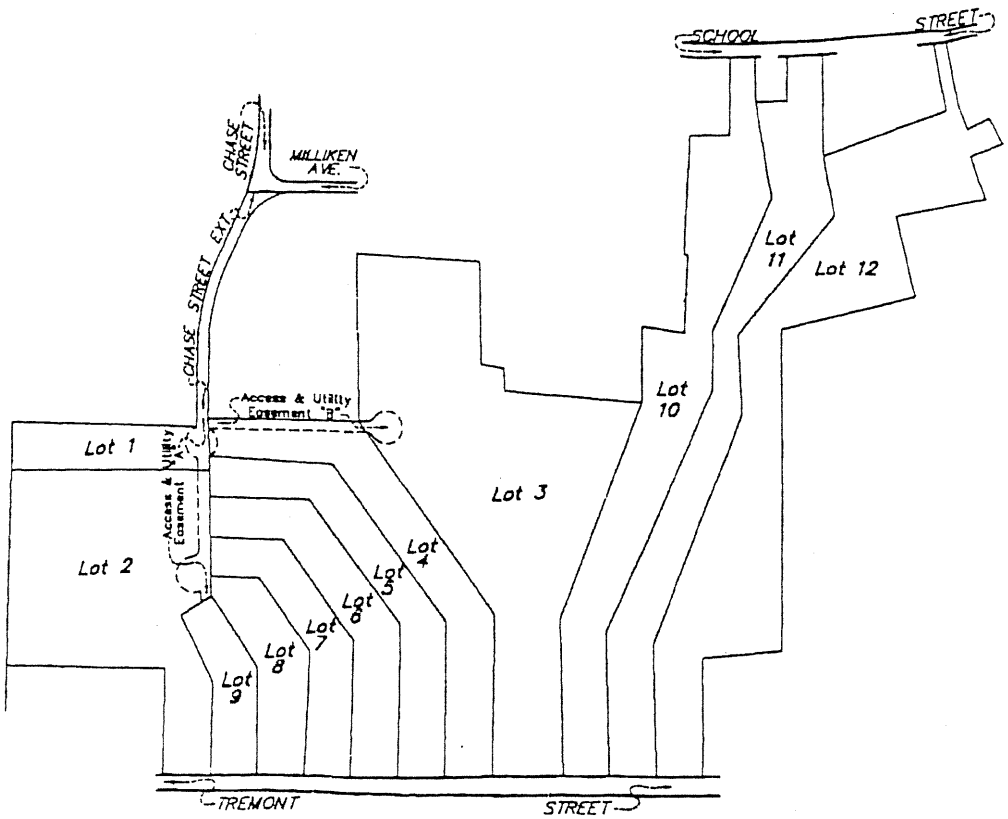
As to the eleven lots on Tremont Street, the front land was wetlands and unsuitable for residential construction. Leaving aside practicality and the necessity of other public approvals, the developer's engineer said access from Tremont Street was theoretically possible. To reach the portions of the lots 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 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

---

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