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.

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

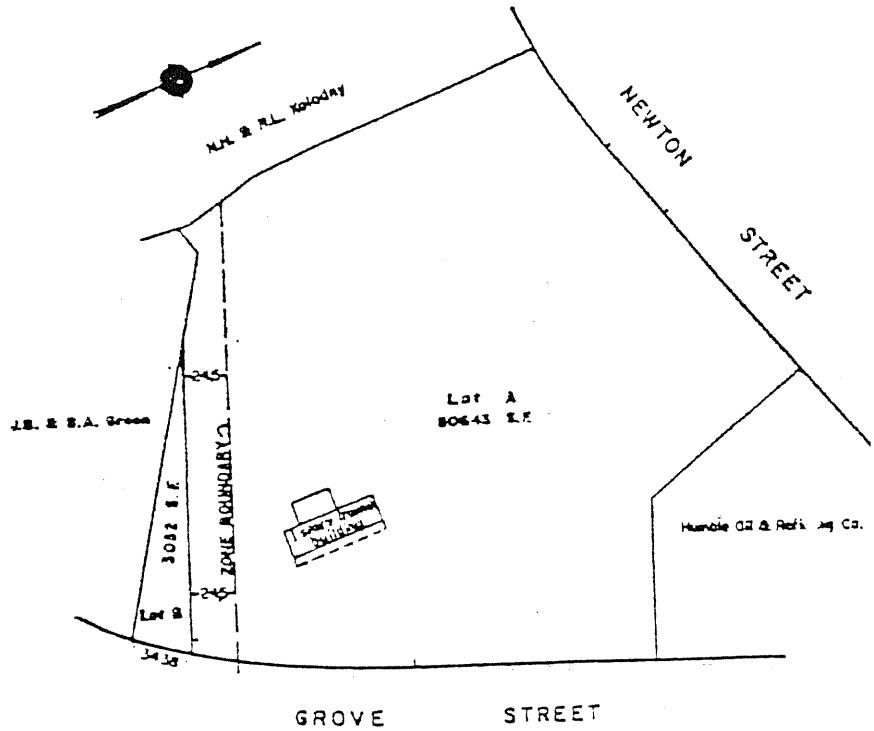
In Bloom, owners of a parcel of land were refused a variance to allow them to build an apartment complex. Their parcel extended more that 25 feet into a single-family zoning district. The zoning bylaw of the town of Brookline contained the following requirement:

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

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

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

Bloom v. Planning Board of Brookline



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

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

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

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

In Cricones v. Planning Board of Dracut, 39 Mass. App. Ct. 264 (1995), a 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:

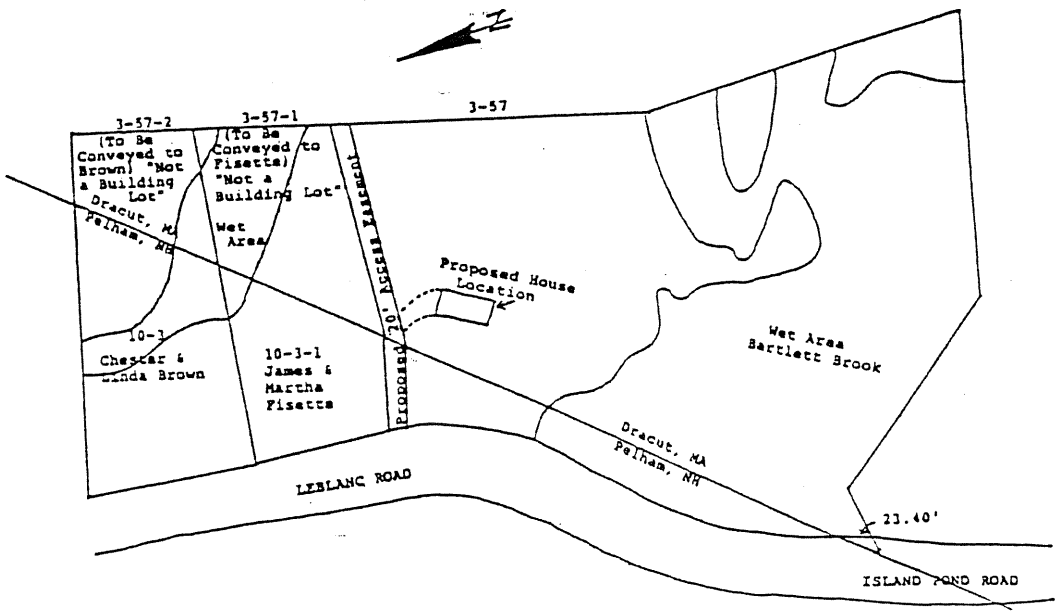
1. In determining whether to endorse a plan "approval not required," a Planning Board's judgment is confined to determining whether a plan shows a subdivision.

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, 16 Mass. App. Ct. 901 (1983), the Massachusetts Appeals Court determined that the separate lot protection provisions protect a lot if it: 1) has at least 5,000 square feet and fifty feet of frontage; 2) is in an area zoned for single or two-family use; 3) conformed to existing zoning when legally created, if any; and 4) is in separate ownership prior to the town meeting vote which made the lot nonconforming. At a later date, the Massachusetts Supreme Court reached the same conclusion in Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985).

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

> Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or 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 (1985), that the grandfather provision for common ownership lots is not limited to lots which were created by a plan and recorded or endorsed by January 1, 1976. The court's interpretation of the common lot provision provides a unique opportunity to landowners and developers.

In Baldiga, the plaintiff had purchased three lots in the town of Uxbridge. The lots were shown on a plan, dated February 20, 1979, which contained the Planning Board's endorsement "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 13, 1980, the Town amended its zoning bylaw requiring that single-family building lots have a minimum frontage of 300 feet and a minimum lot area of two acres. In October, 1983, the plaintiff filed building permit applications for the three lots. The Building Inspector denied the applications. The plaintiff appealed to the Zoning Board of Appeals, and the Board denied the plaintiff's appeal because the lots did not meet the 300 foot frontage requirement that had been adopted by the town meeting in 1980.

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

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

Excerpts:

Abrams, J. ...

> We agree with the plaintiff. ... the first part of the second sentence of section 6 entitles an owner of property to an exemption from any increase in minimum lot size required by a zoning ordinance or bylaw for a period of five years from its effective date or for five years after January 1, 1976, "whichever is later." ...We conclude ... that "the statute looks to the most recent instrument of record prior to the effective date of the zoning change." If we were to interpret the "as of January 1, 1976," clause as qualifying the "plan recorded or endorsed" condition, it would negate the effect of the words "whichever is later." As we read the statute, the phrase "as of January 1, 1976," only modifies the condition immediately preceding, that requiring conformity with zoning laws.

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

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

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

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 1, 1976.

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

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."

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.

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.

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).