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AMY S. ANTHONY, SECRETARY

ANR

PLANS NOT REQUIRING APPROVAL UNDER THE SUBDIVISION CONTROL LAW

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Prepared by

Executive Office of Communities & Development
Office of Local & Regional Planning

Donald J. Schmidt, Principal Planner
Tracy Paiva, Administrative Assistant

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INTRODUCTION

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

In response to such requests, the Executive Office of Communities and Development devoted several issues of the Land Use Manager to reviewing the legislative history and relevant case law dealing with Approval Not Required Plans. Due to the response to the Land Use Manager series, it was decided that a publication focusing on this issue would be beneficial to municipal officials, landowners and other interested parties who deal at the local level with the ANR process.

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

ANR

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HISTORY

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

Subdivision control laws in Massachusetts originated from a concern over the affect of subdivisions and the sale of private land on the planning and development of streets, both public and private, within a community. The first comprehensive subdivision control statute was enacted exclusively for the city of Boston in 1891. It provided that no person open a public way until the layout and specifications were approved by the street commissioners. By 1916, similar powers were conferred on Boards of Survey in many cities and towns throughout the Commonwealth. With the revision of the state statute in 1936 (see St. 1936 c. 211), the subdivision control powers were expanded and conferred on Planning Boards.

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

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

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

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

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

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

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

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

One of the more interesting aspects of the ANR process, if not the Subdivision Control Law, is the vital access standard. The necessity that the Planning Board determine that vital access exists to the lots shown on a plan before endorsing an ANR

plan is not expressly stated in the Subdivision Control Law. The vital access standard has evolved from court decisions. The decisions have been concerned as to whether proposed building lots have practical access and have focused on the following two issues:

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

2. Adequacy of the access from the lot onto the way.

ADEQUACY OF THE WAY

The first case dealing with the question of the adequacy of a way as applied to an approval not required plan was Rettig v. Planning Board of Rowley, 322 Mass. 476 (1955). A plan was presented to the Planning Board showing 15 lots abutting three ways which were created long before the Subdivision Control Law became effective in the Town of Rowley. Two of the roadways shown on the plan were between ten and fourteen feet wide, contained severe ruts and were impassable at times due to heavy rains. The Planning Board determined that the plan constituted a subdivision which required their approval.

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

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

RETTIG V. PLANNING BOARD OF ROWLEY
332 Mass. 476 (1955)

Excerpts

Wilkins, J. . . .

> The plan must be judged as a whole. Irrespective of the meaning of "way" in Section 81L, and for present purposes taking "way" in the sense of a physical way on the ground, as ruled by the judge, it is plain that Orchard Drive on the ground is not a way "adequate for access for vehicular traffic" to ten of the lots shown on the plan. As recently as 1951, when the subdivision control law became effective in Rowley, it could not in any practical sense have been in existence as a way. All that appeared at the view were outlines of a ten foot roadway, once used by a vehicle or vehicles of un-

known character, and ruts and a condition of impassability due to rain. Orchard Drive clearly does not rise even to the dignity of a rough country road, broken and sunken in spots, as is Bowlery Drive off which it leads. Obviously, the plaintiffs propose to make "division of a tract of land into two or more lots in such manner as to require provision for one or more new ways . . . to furnish access for vehicular traffic to one or more of such lots."

The decree is reversed and a decree is to be entered stating that the planning board of Rowley did not exceed its authority, and that no modification of its decision is required.

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

A statutory private way is a way laid out and accepted by a town, for the use of one or more inhabitants, pursuant to Chapter 82, MGL. In Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), it was argued that a statutory private way was a public way for the purposes of determining whether a plan was entitled to be endorsed "approval not required." The court found that such a way was not as a matter of law a public way for the purposes of subdivision control and that development on a statutory private way would require Planning Board approval unless it could be proven that such a way was both maintained and used as a public way. In Spalke v. Board of Appeals of Plymouth, 7 Mass App. Ct. 683 (1979), the court rejected the argument that the Atlantic Ocean was a public way for access purposes. The close reading by the court as to a qualified public way for the purposes of access is important. However, even if a proposed division of land abuts a public way, the Planning Board must consider the adequacy of the way.

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

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

RICHARD V. PLANNING BOARD OF ACUSHNET
10 Mass. App. Ct. 216 (1980)

Excerpts:

Kass, J. . . .

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

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

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

Indeed, the provisions of the fifth paragraph of Section 81U concerning securing of completion of the ways and municipal services of a subdivision plan are mandatory. For all that appears, the Acushnet selectmen, acting as the interim planning board, did not articulate the manner in which the ways were to be constructed, what municipal services were to be furnished or the standards to which that work was to be done. . . . We are of the opinion that exception (b) of the definition of "Subdivision" in Section 81L requires either that the approved ways have been built, or that there exists the assurance required by Section 81U that they will be built. Otherwise, the essential design of the Subdivision Control Law - that ways and municipal

services shall be installed in accordance with specific municipal standards - may be circumvented. . . . In the instant case, where the locus is twenty-five feet below the surrounding land, the municipal concern about the safety of the grades of the roads giving access to the lots and about adequate drainage facilities is particularly compelling.

In Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), the court applied the adequacy of way standard to an existing public way. Perry submitted a two lot ANR plan to the Planning Board. Both lots had the required zoning frontage on Oakland Street which was a way that had appeared on town plans since 1927. The County Commissioners of Nantucket, by an order of taking registered with the Land Court in 1962, took an easement for the purposes of a public highway. Oakland Street, a public way, had never been constructed. The Planning Board decided that the plan constituted a subdivision because the lots did not front on a public way as defined in the Subdivision Control Law. The court agreed.

PERRY V. PLANNING BOARD OF NANTUCKET
15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

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

The Legislature provided, in G.L. c. 82 Sections 1-16, for the layout and establishment of highways within municipalities by county commissioners. . . . When the way is completed, the municipality is required, among other things, to repair and maintain it, and the municipality becomes liable for damages caused by defects. See G.L. c. 84 Sections 1, 15 and 22. . . . .

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

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

. . . In our view, . . . a board can properly deny an 81P endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in Section 81M. . . . We also recognize that Section

> 81M, insofar as it treats the sufficiency of access, is couched primarily in terms of the adequacy of subdivision ways rather than the adequacy of the public ways relied upon by an owner seeking exemption from subdivision control. We do not view these considerations as affecting the soundness of our reasoning. The board's power in these circumstances arises out of the provisions of the subdivision control law itself, read in light of the statutes pertaining to public ways and relevant decisions. The statutory and decisional framework provides for orderly land development through the assurance that proper access to all lots within a subdivision will be reasonably guaranteed. Because no way exists on the ground to serve [the] lots. . . . the board was right to require the plan's antecedent approval under the Subdivision Control Law, and its action should not have been annulled.

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

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

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

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

HUTCHINSON V. PLANNING BOARD OF HINGHAM
23 Mass. App. Ct. 416 (1987)

Excerpts

Dreben, J. . . .

> Citing Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144 (1983), and Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979), the board argues that, even if a way falls within the definition of Section 81L, that is not enough. "[I]t is also necessary that a planning board determine that the way in question . . . satisf[ies] the requirements of G.L. c. 41, Section 81M, which . . . include the requirement that the way be safe for motor vehicle travel."
>
> The board misapprehends the Perry and Hrenchuk decisions. Those cases rest on the reasoning of Gifford v. Planning Bd. of Nantucket, 376 Mass. 801 (1978), which held that as an aid in interpreting the exclusions of Sections 81L and 81P the court may look to Section 81M as elucidating the purposes of those exclusions. . . . Thus, even though a statutory exemption (e.g., frontage on a public way) of Section 81L is technically or formally satisfied, if, in fact, there is no practical access to the lots, Section 81L will not apply. . . . .
>
> In sum, where there is the access that a public way normally provides, that is, where the "street [is] of sufficient width and suitable to accommodate motor vehicle traffic and to provide access for fire-fighting equipment and other emergency vehicles," . . . the goal of access under 81M is satisfied, and an 81P endorsement is required.
>
> We turn now to the findings of the judge. He found that Lazell Street is a paved public way, that, except for a portion which is one-way, it is twenty to twenty-one feet wide, about the same width as the other streets in the area, and that it can "provide adequate access to all the proposed lots for the owners, their guests, police, fire, and other emergency vehicles." The judge also found that the road "is as safe to travel upon as any of the hundreds of comparable rural roads that criss-cross the entire Commonwealth." We do not reach the board's

> arguments on traffic safety as we do not deem them relevant. We note that even if those arguments were to be considered, the judge's findings on traffic safety are not clearly erroneous and are dispositive. The board's contentions to the contrary are without merit. These findings bring Lazell Street within the "specific objective criteria . . . chosen by the Legislature for the quality of access," . . . which entitle a landowner to an 81P endorsement.

The Perry and Hutchinson decisions presently represent the parameters for determining the adequacy of a public way for the purposes of an ANR endorsement. If proposed lots abut an unconstructed way (paper street), the landowner is not entitled to an ANR endorsement. However, if an existing public way is (1) paved, (2) comparable to other ways in the area, and (3) provides adequate access, the court will likely find that the way meets the vital access standard.

ADEQUACY OF THE ACCESS

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

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

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

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

It was not until 1978 that the court would again have the opportunity to consider the adequacy of access to the buildable portion of a lot. Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978), dealt with a most unusual plan which technically complied with the requirements of the Subdivision Control Law so as to be entitled to an ANR endorsement.

The Nantucket zoning bylaw required a minimum lot frontage of 75 feet. An owner of a 49 acre parcel of land submitted a plan to the Planning Board showing 46 lots and requested an ANR endorsement from the Planning Board. Each of the 46 lots abutted a public way for not less than the required 75 feet of frontage. However, the connection of a number of the lots to the public way was by a long, narrow neck turning at acute angles in order to comply with the 75 foot frontage requirement.

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

The Planning Board endorsed the plan ANR, and 15 residents commenced an action in Superior Court to annul the Board's endorsement on the grounds that the plan constituted a subdivision. A judgment was entered in favor of the residents, and the landowner appealed to the Appeals Court. The Massachusetts Supreme Court, on its own initiative, ordered direct appellate review.

In deciding the case, the court looked at the purposes of the Subdivision Control Law as stated in Section 81-M and noted that "a principal object of the law is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." In reviewing the plan, it was found that it would be most difficult, if not impossible,

to use a number of the necks so that there was no practical vehicular access to the main or buildable parts of the lots. The court concluded that the plan was an obvious attempt to circumvent the purpose and intent of the Subdivision Control Law and that the lots shown on the plan did not have sufficient frontage as contemplated by the Subdivision Control Law.

GIFFORD V. PLANNING BOARD OF NANTUCKET
376 Mass. 801 (1978)

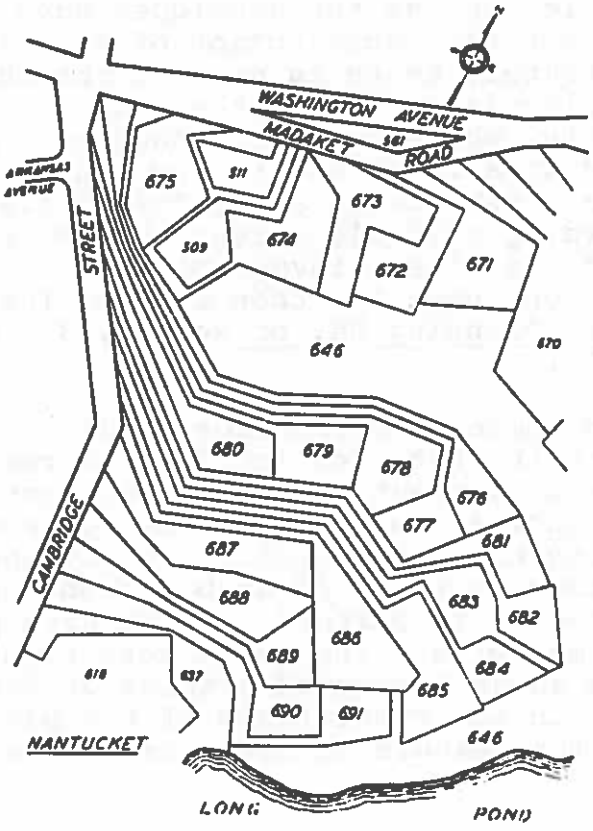
Excerpts

Kaplan, J. . . .

> Where our statute relieves certain divisions of land of regulation and approval by a planning board ("approval . . . not required"), it is because the vital access is reasonably guaranteed in another manner. The guaranty is expressed in Sections 81L and 81P of the statute in terms of a requirement of sufficient frontage for each lot on a public way. In the ordinary case, lots having such a frontage are fully accessible, and as the developer does not contemplate the construction of additional access routes, there is no need for supervision by the planning board on that score. Conversely, where the lots shown on a plan bordered on a road "not in any practical sense . . . in existence as a way," and thus incapable of affording suitable access to the lots, we insisted that the relevant plan was a subdivision under the then current law. Rettig v. Planning Bd. of Rowley, 332 Mass. 476, 481 (1955).
>
> If the purpose of a frontage requirement is to make certain that each lot "may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare" . . ., then in the plan at bar frontage fails conspicuously to perform its intended purpose, and the master and the judge were right to see the plan as an attempted evasion of the duty to comply with the regulations of the planning board. The measure of the case was indicated

by the master (and by counsel at argument before us) in the observation that the developer would ultimately have to join some of the necks to provide ways from lots to the public way: but that is an indication that we have here a subdivision requiring antecedent approval.

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



The Gifford decision was a bellwhether case as it established the necessity for a landowner to show accessibility to the buildable portion of a lot. Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979), was the first case decided after the Gifford decision which dealt with the accessibility issue. Hrenchuk submitted a plan to the Planning Board requesting an ANR endorsement. All the lots shown on the plan abutted Interstate 95, a limited access highway. There was no means of vehicular passage between the highway and any of the lots. The lots could only be reached by use of a 30 foot wide private way which led to another public way upon which one of the nine lots shown on the plan fronted. The court determined that Hrenchuck was not entitled to an ANR endorsement, and his plan required approval under the Subdivision Control Law. The court also noted the following elements must be met before a plan can receive an ANR endorsement from the Planning Board.

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

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

One of the more interesting cases which dealt with the question of whether proposed building lots could actually use the frontage as shown on a plan was McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980). McCarthy submitted a plan to the Planning Board for an ANR endorsement. The lots shown on the plan had at least a hundred feet of frontage on a public way which was the minimum frontage requirement of the Edgartown zoning bylaw. However, the Martha's Vineyard Commission (MVC) had adopted certain road access requirements which affected the town of Edgartown. The pertinent MVC access regulation required that "any additional vehicular access to a public road must be at least 1,000 feet measured on the same side of the road from any other vehicular access." The Planning Board voted to deny the requested endorsement and McCarthy appealed.

McCarthy claimed that the plan did not show a subdivision because every lot had 100 feet of frontage on a public way as required by the Edgartown zoning bylaw. The Planning Board contended that the MVC requirement deprived McCarthy's lots of vehicular access to the public way so the lots did not have frontage for the

purposes of the Subdivision Control Law. Citing the Gifford and Hrenchuck decisions, the court agreed with the Planning Board.

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

Shortly after the McCarthy decision, the Appeals Court had an opportunity to further define the vital access standard in Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980). The Gallitanos submitted a plan to the Planning Board requesting an ANR endorsement. The plan showed four lots, each meeting the requirements of the Waltham zoning ordinance for a buildable lot in the zoning district where the proposed lots were located. In that particular district, the zoning ordinance did not specify any minimum frontage requirement. In such cases where a zoning ordinance does not specify any frontage requirement, Chapter 41, Section 81-L of the Subdivision Control Law requires that proposed lots have a minimum of 20 feet of frontage in order to be entitled to an ANR endorsement. Each of the lots shown on the plan had frontage on Beaver Street, an accepted public way, for a distance of not fewer than 20 feet. One lot had 20 feet of frontage and was no wider (or narrower) than 20 feet for a distance of 76 feet where it widened to permit compliance with the width and yard requirements for a buildable lot. This was the lot that raised the most concern with the Planning Board. The Planning Board denied endorsement of the plan apparently inspired by the analysis in the Gifford case.

The Planning Board sought to establish that despite literal compliance with the lot area and frontage requirements of the zoning ordinance, the lots would be left without access (or without easy access) to utility and municipal services. The Planning Board supported its arguments with affidavits from city officials responsible for fire and police protection, traffic control, and public works. The affidavits claimed that certain lots intersected the public way at so acute an angle as to make entrance by vehicle difficult or impossible. The access was said to be "blind to oncoming traffic" thus creating a traffic hazard. The affidavits asserted that houses built on the lots would most likely be invisible from the way and would jeopardize fire and police protection in cases of emergencies. In deciding against the Planning Board, the court established a general rule to guide Planning Boards in determining whether access exists to the buildable portion of the lot.

GALLITANO V. BOARD OF SURVEY & PLANNING OF WALTHAM
10 Mass. App. Ct 269 (1980)

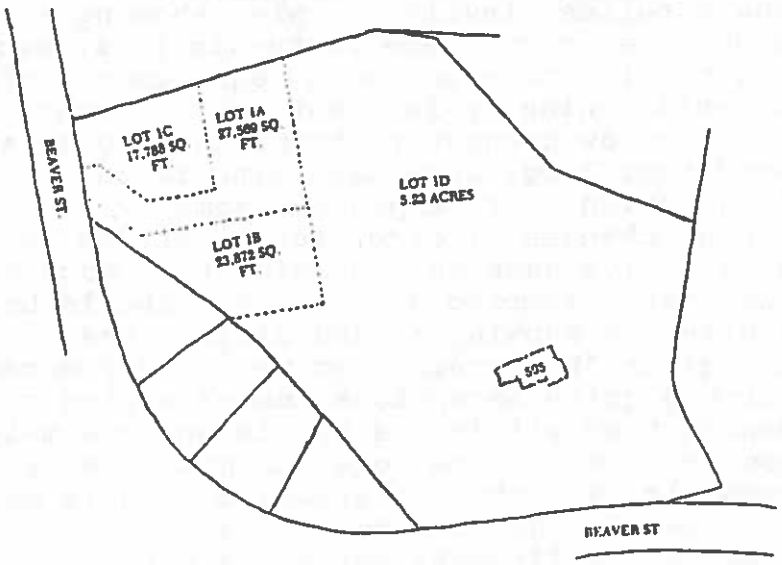
Excerpts:

Armstrong, J. . . .

> It is obvious that all of the difficulties complained of are possible even in municipalities which require minimum frontage but which do not regulate the widths or angles of driveways and do not limit the setbacks of dwellings or require that they be visible from the street. It is equally obvious that a zoning ordinance which, like Waltham's, requires building lots to be one hundred feet wide but allows them to have as little as twenty feet of frontage contemplates that some degree of development will be permissible on back lots exempt from planning board control. Such is the choice made by a municipality which fails to expand the twenty-foot minimum frontage requirement of G. L. c. 41, Section 81L. If not a conscious choice, but merely an ommission, it is probably one beyond the power of a planning board to rectify: for a planning board controls development principally through its regulations, . . . is powerless to pass regulations governing "the size, shape, width, [or] frontage . . . of lots." G. L. c. 41, Section 81Q, as amended through St. 1969, c. 884, Section 3.
>
> Gifford v. Planning Bd. of Nantucket, on which the board relies, involved a plan showing a division of a parcel into forty-six lots, each meeting the frontage and area requirements of Nantucket's zoning by-law, but only by means of long, narrow connector strips, some over a thousand feet long, some narrowing to as little as seven feet in places, some containing changes of direction at angles as sharp as twelve degrees. Holding that such a plan was "an attempted evasion" and should be treated as one showing a subdivision, the court stated: "We stress that we are concerned here with a quite exceptional case: a plan so delineated that within its provisions the main portions of some of the lots are practically inaccessible from their respective borders on a public way." The plan before us is qualitatively different: access is not impossible or particularly difficult for ordinary

vehicles, and such difficulty as there is seems implicit in a zoning scheme which allows frontage as narrow as twenty feet. To permit the board to treat such a plan as subject to their approval would be to confer on the board the power to control, without regulation, the frontage, width, and shape of lots. The Gifford case, if we read it correctly, was not intended thus to broaden the powers of planning boards. The Gifford case does preclude mere technical compliance with frontage requirements in a manner that renders impossible the vehicular access which frontage requirements are intended in part to ensure; it does not create a material issue of fact whenever municipal officials are of the opinion that vehicular access could be better provided for. As a rule of thumb, we would suggest that the Gifford case should not be read as applying to a plan, such as the one before us, in which the buildable portion of each lot is connected to the required frontage by a strip of land not narrower than the required frontage at any point, measured from that point to the nearest point of the opposite sideline.

Gallitano v. Board of Survey & Planning of Waltham.



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

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

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

DICARLO V. PLANNING BOARD OF WAYLAND
19 Mass. App. Ct. 911 (1984)

Excerpts:

> . . . We need not determine, however, whether the judge's finding was warranted, as we hold that in any event the question of access should, in the first instance, be determined by the board. . . . the submissions and the board's 1982 decision show that the question of access to lots 1 and 2 under the easement was never considered by the board.

> While the judge could easily conclude that the board looked at all eight lots in considering the proposed changes in grade, no similar inference can be drawn on the question of access. The 1980 plan did not contain the easements, and, in considering the plan . . ., there was no occasion for the board to look at access to lots 1 and 2. In light of G.L. c. 41, Section 81M, and the evidence, it is not a foregone conclusion that the board will find that the easement provides adequate access to lots 1 and 2. . . . .
>
> The plaintiff argues that a remand to the board is inappropriate as matter of law since lots 1 and 2 front on a public way. He claims that the stipulation that "the proposed grades of Lots 1 and 2 . . . would prevent practical access from Lots 1 and 2 to River Road" is irrelevant under Section 81L. Our cases, however, are to the contrary. "[A] principal object of the law [G. L. c. 41, Section 81M] is to ensure efficient vehicular access to each lot in a subdivision, for safety, convenience, and welfare depend critically on that factor." . . . We hold, therefore, that the plaintiff cannot rely on the River Road frontage to preclude a remand on the question of access.

Since the DiCarlo decision revolved around the submission of a subdivision plan, there was still no court case on point as to what extent a Planning Board could consider topographical issues when reviewing approval not required plans until the Massachusetts Appeals Court decided Corcoran v. Planning Board of Sudbury, 26 Mass. App. Ct. 1000 (1988). In that case, the Appeals Court ruled that a Planning Board could consider the presence of wetlands, which are subject to the Wetlands Protection Act, when reviewing an approval not required plan (See Land Use Manager, Vol. 6, Edition No. 6, August, 1989). The Massachusetts Supreme Court granted further appellate review and reversed the decision of the Appeals Court.

Corcoran had submitted a six lot ANR plan to the Planning Board. Each lot had the required frontage on a public way. The ANR plan showed wetland areas which prevented practical access from the buildable portion of some of the lots to the public way.

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

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

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

CORCORAN V. PLANNING BOARD OF SUDBURY
406 Mass. 248 (1989)

Excerpts:

Lynch, J. . . .

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

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

Right after the Corcoran case, the Massachusetts Supreme Judicial Court decided Long Pond Estates Ltd. v. Planning Board of Sturbridge, 406 Mass. 253 (1989). In Long Pond, the plaintiff had submitted a plan to the Planning Board for ANR endorsement. The plan showed three lots, each of which had adequate frontage on Champeaux Road, a public way. However, a portion of the way between the proposed lots was within a flood easement held by the United States Army Corps of Engineers, and was periodically closed due to flooding. Between 1980 and 1988, the Corps of Engineers closed the affected portion of the public way on an average of 33 1/2 days a year.

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

LONG POND ESTATES LTD V. PLANNING BOARD OF STURBRIDGE
406 Mass. 253 (1989)

Excerpts:

Lynch, J. . . .

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

> neighboring town. For these reasons, we find that the planning board exceeded its authority . . . in refusing to endorse the plaintiff's plan "approval under the subdivision control law not required."

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

The Long Pond decision added a variation to the practical access theory in that the principal access to a lot can be temporarily unavailable provided that adequate access for emergency vehicles exists on another way. The interesting aspect of the Long Pond case is that, except for the temporary closure of the way due to flooding, the way provided adequate access. Therefore, in order to be eligible for this variation, the landowner must show that the principal access meets the vital access standard and that the second means of access is also adequate for the purposes of the Subdivision Control Law.

An issue not addressed in the Corcoran decision was the existence of a common driveway. A Planning Board should review Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987), for guidance in this area. The Fox decision provides valuable insight concerning common driveways and the vital access standard. For the purposes of an ANR endorsement, if it can be determined that each lot can comply with the vital access standard, then the existence of a common driveway is of no concern to the Planning Board. However, common driveways must comply with local zoning regulations. If problems exist relative to the use of common driveways, communities should consider zoning regulations to deal with the issue.

At a minimum, a zoning bylaw should require that access to a lot be over the required frontage or across the front lot line. Absent a common driveway regulation, such a provision would clarify zoning enforcement. For a further discussion on this issue see Chapter 8 of the this report.

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).

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). Long Pond Estates Ltd v. Planning Board of Sturbridge, 406 Mass. 253 (1989) (a 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 rat-tail lot 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).

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." 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.

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 lann 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, <u>as to use</u>, 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 plans, 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.

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 the 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.

Finally, 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.

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, 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 by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two-family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five

> hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three 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 paragragh 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 81-L, 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).

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. See Land Use Manager, Vol. 2, Edition No. 9, November, 1985. The first call as to whether a proposed common driveway will conform to local zoning rests with the zoning enforcement officer. If the 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. The answer to this question would be on a case-by-case basis. To eliminate confusion in this area, we would suggest that communities

adopt zoning provisions either authorizing or prohibiting common driveways. Specifically addressing the issue will be of great assistance to the zoning enforcement officer. 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.

81-L 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 81-L, 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 81-L 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 several buildings. Clean Harbors leased eleven acres of the parcel for a hazardous waste terminal but reached an agreement with Citgo to buy the property. Citgo prepared a plan dividing the parcel into two lots. Citgo's contention was that the buildings existed before the Subdivsion Control Law went into effect in Braintree and thus the plan was not a subdivision because of the 81-L exemption. The Planning Board denied the

ANR endorsement because the lot to be sold to Clean Harbors lacked adequate frontage and argued that a literal reading of the term "building" would be contradictory to the purposes of the Subdivision Control Law.

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 81-L exemption. The most interesting aspect of the Citgo case is the notation by the court that the 81-L exemption does not relieve a property owncr from complying with local zoning requirements. This exemption is only for the purposes of the Subdivision Control Law.

PERIMETER PLANS

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

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

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

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

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

The first paragraph of Section 81-X states:

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

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

In Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.), a landowner obtained an ANR endorsement to protect his property from a zoning change. The Planning Board had endorsed the plan which depicted one lot with the exact dimensions and bounds shown on an earlier plan registered with the land court. In finding that the Planning Board had mistakenly endorsed the plan, the court noted:

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

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

> . . ., it should be clear that the purpose of section 81P is to relieve certain divisions of land of regulation and approval by a planning board when a proposed plan indicates that newly created lots will be guaranteed access

> to the outside world by preexisting ways or roads. In sum, section 81P facilitates the recording process, and was "not intended to enlarge the substantive powers of a (planning) board." Thus, when section 81P states that "an endorsement shall not be withheld unless such plan shows a subdivision," it is clear from the above discussion that the Legislature intended to expedite the recording of 'non-subdivision plans, and not to encourage the filing under section 81P of plans showing no subdivision of lots whatsoever. . .
>
> Plaintiff's plan shows no division of land and hence there is no need for the verification process of section 81P. Moreover, Plaintiff's plan may have easily been filed under section 81X. It is clear that plaintiff instead sought section 81P endorsement to achieve the advantage of the zoning protection provided under G.L. c. 40A, section 6 to those plans endorsed ANR under section 81P. Withholding comment on this tactic, the Court simply states that plaintiff's perimeter plan is properly filed under section 81X, not section 81P. Consequently, the Defendant was never under an obligation to endorse plaintiff's plan under section 81P.

The Massachusetts Appeals Court, in Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), noted the need to show a division of land when submitting an ANR plan. In Perry, the landowner submitted a perimeter plan showing a triangular shaped lot abutted on all three sides by existing ways. The main issue in the case dealt with the adequacy of the ways, but it was also argued whether there was a need to show a division of land in order to be entitled to an ANR endorsement.

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

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

PERRY V. PLANNING BOARD OF NANTUCKET
15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

> In Bloom, the petitioner's plan disclosed the residual lot's inadequacy for building purposes. It was thus clear that the parcel with inadequate frontage was not a section 81L "lot." In the present case, the plan of lot 750 contains no information at all concerning the dimensions or boundaries of the tract from which lot 750 is proposed to be severed. The remaining land may or may not be "available for use . . .as the site of one or more buildings." Unlike the situation in Bloom, Perry's plan is not one "which disavows any claim of existing right to use [the remaining land] as a zoning by-law lot."
>
> . . . Although an 81P endorsement carries no implication that the subject lots comply with zoning ordinances in all respects, it is expected to address "the fact of adequate frontage of the newly created lots." Where the plan shows on its face that the endorsement was occasioned by the fact that inadequate frontage brought a parcel outside the definition of a section 81L "lot," the danger that the public might be misled into believing the plan showed only buildable lots is dissipated. The Bloom opinion suggests that such noncompliance could be shown by de-

> picting the inadequate frontage on the plan or by an endorsement that the subject lot could not be used for building, but preferably by both methods. Were an 81P endorsement to be granted . . . on the plan as submitted, the public would have no way of ascertaining the basis of the decision from the recorded plan and could be misled as to the adequacy of frontage on a public way. On remand, Perry may amend the plan of lot 750 to show the boundaries and dimensions of the tract from which it is to be severed, and the board need not grant an 81P endorsement unless he does so. If appropriate, assuming the requirements for an 81P endorsement are otherwise met, the board may require a further endorsement of noncompliance with the zoning code on the plan as a condition of approval.

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

Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.) and Malden Trust Company v. Timothy Twomey, Middlesex Superior Court C.A. No. 87-6574, September 27, 1989 (McDaniel J.) support the position that as a matter of law, perimeter plans are not entitled to an ANR endorsement. Although Perry states the need to show a division of land in order to obtain an ANR endorsement, under the Bloom rationale, an arbitrary line could be drawn but not necessarily show two lots.

PERIMETER PLANS
YOU BE THE JUDGE

The following article was submitted to the Executive Office of Communities and Development responding to the perimeter plan issue. The Executive Office of Communities and Development reproduced this article so that local officials would be aware of arguments in support of the position that perimeter plans must be endorsed by the planning board.

In Volume 7, Edition No. 4 (May, 1990), of the Land Use Manager, we reviewed recent lower court decisions dealing with the issue of perimeter plans. The cases we reviewed supported the position that perimeter plans are not entitled to an "approval not required" (ANR) endorsement from the planning board.

Bart J. Gordon, Esq., of Bulkley, Richardson and Gelinas, and Paul L. Feldman, Esq. of Davis, Malm and D'Agostine, are of the opinion that a Planning Board has no choice and must endorse a perimeter plan. They have written an article supporting their contention which we have reproduced. We feel their analysis will be useful to local officials as it presents arguments that might be raised by a landowner seeking an ANR endorsement for a perimeter plan.

If it were not for the fact that ANR plans are entitled to a zoning protection pursuant to the provisions of the Zoning Act, there probably would be little interest as to whether a perimeter plan should receive an ANR endorsement. In their article, Mr. Gordon and Mr. Feldman note that perimeter plans are entitled to zoning protection, citing Cape Ann Development Corp., Wolk, and Samson (where Planning Boards had endorsed or failed to seasonably act on perimeter plans). These cases, however, did not decide that perimeter plans must be endorsed by the Planning Board.

The focus of our article was not on zoning protection but whether a perimeter plan is entitled to an ANR endorsement under the provision of the Subdivision Control Law. As noted in the following article, Section 81-P states that an endorsement shall not be withheld unless the plan shows a subdivision. Section 81-P deals with the process for endorsement. Whether a plan requires approval or not is determined under Section 81-L, the definition of subdivision, which defines when a division of a tract of land will not constitute a subdivision.

We agree that there is an obligation on our part to point out both sides of disputed issues. Again, it is our belief that Twomey, Horne and Perry support the position that unless a plan shows a division of land it is not entitled to an ANR endorsement and we are unaware of any cases which have reached a different conclusion.

We wish to thank Mr. Gordon and Mr. Feldman, who are notable land use attorneys, for taking the time to express their views. We would now suggest that you read the following article and Vol. 7, Edition No. 4 of the Land Use Manager.

Are perimeter plans entitled to an ANR endorsement?
You be the judge.

Perimeter Plans Are Entitled to ANR Endorsement

By Bart J. Gordon and Paul L. Feldman

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

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

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

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

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

> "In December, 1972, Cape Ann submitted a 'perimeter plan' of the locus to the Gloucester Planning Board, requesting that the plan be endorsed subdivision approval not required. See G.L. c. 41, §81P. A city clerk's certificate concerning the failure of the planning board to act seasonably, equivalent in effect to such an endorsement (G.L. 451, §81P), was obtained and recorded with the 'perimeter plan' in the registry of deeds."

See Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976): "the planning board's endorsement under G.L. 451, §81P, on his 'perimeter plan' ... " Samson v. San Land Development Corp., 17 Mass. App. Ct. 977, 978 (1984): "On January 26, 1972, An-Land filed a perimeter plan with the planning board and obtained its stamp indicating that subdivision approval was not required. See G.L. c. 41, §81P." Each of these cases makes clear that the zoning freeze protections of G.L. c. 40A, §6, apply to perimeter plans. We have found no reported appellate case in which a planning board was upheld in refusing to endorse a perimeter plan, although the Malden Trust Company v. Twomey, Middlesex Sup. Ct. 6574 (Sept. 28, 1989), decision does reach this result.

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

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

There is an obligation on the part of Land Use Manager to point out both sides of disputed issues. As is indirectly suggested, by reference to the cases of Bloom v. Planning Board of Brookline, 346 Mass. 270 (1983), and Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1903), a landowner may avoid a planning board's refusal to endorse a perimeter plan by filing a plan with a division into lots but adding a notation that the lots may not conform to the zoning by-laws or that one of the lots is not a buildable lot. The Bloom and Perry cases suggest that a freeze may be obtained by filing a perimeter plan with an arbitrary line of division, requiring an ANR endorsement. There is no policy reason to require such a tactic, particularly where the language of §81P is unequivocal. Further, a planning board's failure to give an §81P endorsement should - if the plan does not show a subdivision - lead to a clerk's certificate and the same result.

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

APPENDIX A

SECTION 81-K. Designation of Law

Sections eighty-one K to eighty-one GG, inclusive, shall be designated and may be known as "the subdivision control law". This designation shall, when apt, include corresponding provisions of earlier laws.

Added by St. 1953, c. 674, s. 7.

SECTION 81-L. Definitions

In construing the subdivision control law, the following words shall have the following meaning, unless a contrary intention clearly appears:

Applicant "Applicant" shall include an owner or his agent or representative, or his assigns.

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

Drainage "Drainage" shall mean the control of surface water within the tract of land to be subdivided.

Lot "Lot" shall mean an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings.

Municipal Service "Municipal service" shall mean public utilities furnished by the city or town in which a subdivision is located, such as water, sewerage, gas and electricity.

Planning Board "Planning board" shall mean a planning board established under section eighty-one A, or a board of selectmen acting as a planning board under said section, or a board of survey in a city or town which has accepted the provisions of the

subdivision control law as provided in section eighty-one N or corresponding provisions of earlier laws, or has been established by special law with powers of subdivision control.

Preliminary Plan

Planning Board cannot require an applicant to submit more information than is contained in the definition of a Preliminary Plan.

"Preliminary plan" shall mean a plan of a proposed subdivision or resubdivision of land drawn on tracing paper, or a print thereof, showing (a) the subdivision name, boundaries, north point, date, scale, legend and title "Preliminary Plan"; (b) the names of the record owner and the applicant and the name of the designer, engineer or surveyor; (c) the names of all abutters, as determined from the most recent local tax list; (d) the existing and proposed lines of streets, ways, easements and any public areas within the subdivision in a general manner; (e) the proposed system of drainage, including adjacent existing natural waterways, in a general manner; (f) the approximate boundary lines of proposed lots, with approximate areas and dimensions; (g) the names, approximate location and widths of adjacent streets; (h) and the topography of the land in a general manner.

Recorded

"Recorded" shall mean recorded in the registry of deeds of the county or district in which the land in question is situated, except that, as affecting registered land, it shall mean filed with the recorder of the land court.

Register of Deeds

"Register of deeds" shall mean the register of deeds of the county or district in which the land in question, or the city or town in question, is situated, and, when appropriate, shall include the recorder of the land court.

Registered Mail

"Registered mail" shall mean registered or certified mail.

Registry of Deeds

"Registry of deeds" shall mean the registry of deeds of the county or district in which the land in question is situated, and, when appropriate, shall include the land court.

Subdivision

"Subdivision" shall mean the division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is

made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth, or the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

Subdivision Control

"Subdivision control" shall mean the power of regulating the subdivision of land granted by the subdivision control law.

Added by St. 1953, c. 674, s. 7; Amended by St. 1955, c. 411, s. 2; St. 1956, c. 282; St. 1957, c. 138, s. 1; St. 1957, c. 163; St. 1958, c. 206, s. 1; St. 1961, c. 331; St. 1963, c. 580; St. 1965, c. 61; St. 1979, c. 534.

APPENDIX B

SECTION 81-P. Endorsement of Plans Not Requiring Approval Under Subdivision Control Law

Procedure

Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed in section eighty-one T, and, if

Endorsement Within 21 Days

the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words "approval under the subdivision control law not required" or words of similar import with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such

If Approval Required, Notice to Clerk and Applicant Within 21 Days

plan shows a subdivision. If the board shall determine that in its opinion the plan requires approval, it shall within twenty-one days of such submittal, give written notice of its determination to the clerk of the city or town and the person submitting the plan, and such person may submit his plan for approval as provided by law and the rules and regulations of the board, or he may appeal from the determination of the board in the manner provided in section eighty-one BB. If the board fails to act upon a plan submitted under this section or fails to notify the clerk of the city or town and the person submitting the plan of its action within twenty-one days after

Failure to Act Deemed Approval

its submission, it shall be deemed to have determined that approval under the subdivision control law is not required, and it shall forthwith make such endorsement on said plan, and on its failure to do so forthwith the city or town clerk shall issue a certificate to the same effect. The plan bearing such endorsement or the plan and such certificate, as the case may be, shall be delivered by the planning board, or in case of the certificate, by the city or town clerk to the person submitting such plan. The planning

Signature of Other Than Majority of Board

board of a city or town which has authorized any person, other than a majority of the board, to endorse on a plan the approval of the board or to make any other certificate under the subdivision control law, shall transmit a written statement to

Statement to Register of Deeds and Recorder of Land Court

the register of deeds and the recorder of the land court, signed by a majority of the board, giving the name of the person so authorized.

The endorsement under this section may include a statement of the reason approval is not required.

Added by St. 1953, c. 674, s. 7; Amended by St. 1955, c. 326, s. 1 and 2; St. 1957, c. 293, s. 1 and 2; St. 1960, c. 197; St. 1961, c. 332; St. 1963, c. 363, s. 1; St. 1987, c. 122.

APPENDIX C

SECTION 81-X. Requirements for Registration of Plan

No register of deeds shall record any plan showing a division of a tract of land into two or more lots, and ways, whether existing or proposed, providing access thereto, in a city or town in which the subdivision control law is in force unless (1) such plan bears an endorsement of the planning board of such city or town that such plan has been approved by such planning board, and a certificate by the clerk of such city or town, is endorsed on the plan, or is separately recorded and referred to on said plan, that no notice of appeal was received during the twenty days next after receipt and recording of notice from the planning board of the approval of the plan, or, if an appeal was taken, that a final decree has been entered by the court sustaining the approval of the plan, or (2) such plan bears an endorsement of the planning board that approval of such plan is not required, as provided in section eighty-one P, or (3) the plan is accompanied by a certificate of the clerk of such city or town that it is a plan which has been approved by reason of the failure of the planning board to act thereon within the time prescribed, as provided in sections eighty-one U and eighty-one V, or that it is a plan submitted pursuant to section eighty-one P and that it has been determined by failure of the planning board to act thereon within the prescribed time that approval is not required, and a reference to the book and page where such certificate is recorded is made on said plan; and, unless, in case of plans approved, the endorsement or certificate is dated within six months of the date of the recording, or there is also endorsed thereon or recorded therewith and referred to thereon a certificate of the planning board or city or town clerk, dated within thirty days of the recording, that the approval has not been modified, amended or rescinded, nor the plan changed. Such certificate shall upon application be made by the board or by the clerk unless the records of the board or clerk receiving the application show that there has been such modification, amendment, rescission or change. The planning board of a city or town which has authorized any person, other than a majority of the board, to endorse on a plan the approval of the board or to make any other certificate under the subdivision control law, shall transmit a written statement to the register of deeds and the

Approval by Planning Board

Approval Not Required

Approval by Failure of Planning Board to Act

Reference to Certificate

Time Limit of Date of Endorsement

Certification that Plan Not Changed

Authorized Endorsement

Notice to Register and Recorder

recorder of the land court, signed by a majority of the board, giving the name of the person so authorized.

The contents of any such endorsement of the planning board or certificate by the clerk of the city or town shall be final and conclusive on all parties, subject to the provisions of section eighty-one W.

Public Record by Register and Recorder

Such register and recorder shall each keep in a place open for public inspection a book which shall be a public record in which the name of each city or town in which, according to notices sent him by the board having powers of subdivision control in such city or town the subdivision control law is or may be in effect, shall be separately indexed and in which shall be entered all notices from such board or the board of appeal of such city or town relating to subdivision control, including copies of the rules and regulations of such boards. Such register and recorder may each accept for record any plan of land, otherwise appropriate for record, in a city or town of which the board having powers of subdivision control has not sent him notice that the subdivision control law is in effect in such city or town, without requiring the approval of the planning board of such city or town, or a certificate that no approval is necessary.

Any Plan Accepted if Register and Recorder Not Notified that Subdivision Control is in Effect

Register and Recorder Shall Accept Plans Where No New Lots or Ways are Shown

Notwithstanding the foregoing provisions of this section, the register of deeds shall accept for recording and the land court shall accept with a petition for registration or confirmation of title any plan bearing a certificate by a registered land surveyor that the property lines shown are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownership or for new ways are shown. The recording of any such plan shall not relieve any owner from compliance with the provisions of the subdivision control law or of any other applicable provision of law.

Statement to be Contained in Notice of Modification, Amendment or Rescission of Approved Plan

No register of deeds or recorder of the land court shall accept for record a notice of modification, amendment or rescission of approval of a plan of a subdivision unless such notice contains a statement by the planning board that such modification, amendment or rescission does not affect any lot or rights appurtenant thereto in

such subdivision which lot was conveyed or mortgaged in good faith and for valuable consideration subsequent to the approval of the subdivision plan.

Added by St. 1953, c. 674, s. 7; Amended by St. 1958, c. 207; St. 1960, c. 189; St. 1962, c. 313, St. 1966, c. 380; St. 1967, c. 248.